RESPONSE TO THE CALL FOR EVIDENCE: REGULATION OF INSOLVENCY PRACTITIONERS REVIEW OF CURRENT REGULATORY LANDSCAPE

BY MICHELLE BUTLER

Overview

This response reflects my personal experience and views as an unlicensed insolvency practitioner. I am drawing on my experience as a consultant to insolvency practitioners ("IPs"), assisting them to comply with insolvency legislation and the requirements of their licensing bodies, and previously from 2005 to 2012 working in the IPA's regulation department. I have little experience of the functioning of ICAS and CAI and, in light of the news that ACCA will stop licensing IPs are the end of the year, my responses reflect only my experiences and views of the ICAEW and IPA.

I am conscious that I describe several negative aspects of the RPBs' activities. Notwithstanding this, I strongly believe that the existing RPBs are better placed to deliver the regulatory objectives than any Single Regulator would be. While I believe that the current climate – not least the threat of a Single Regulator – has not helped the RPBs to focus on sensible strategies to deliver good regulation, if the RPBs are given time and useful support and supervision of a well-resourced Insolvency Service, the existing flaws in the regulatory processes can be reduced, if not eliminated. Dramatic changes to the current regulatory landscape are not necessary and are only likely to disrupt the running of current regulatory processes at great cost and to the detriment of all parties.

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Consultation Questions

Q1	**Do you think the RPBs investigate complaints about insolvency practitioners in a way that is fair, and delivers consistent outcomes for all parties? Please share examples of good and bad practice.**

No.

My personal experience of RPBs' complaint-handling is limited. I have observed clients pass through the complaints process on only two or three occasions, but I have spoken to several others who have experienced the RPBs' complaints processes.

The time it takes RPBs sometimes to reach a conclusion on a complaint is unfair to all parties, including IPs who are finally determined to have been subjected to an unfounded complaint. Communication from regulation staff can often be sporadic and seem disorganised. IPs can receive no communication for several months and then receive a letter posing a number of complex questions with a request for a response within a short period. Sometimes, this requires the IP to recall files from archive and revisit vast amounts of documentation in order to respond to the queries.

Sometimes, IPs are asked questions that appear to have no bearing on the original complaint and that often require further in-depth examination and evidence-gathering. From the Insolvency Service's Report on the ICAEW's Complaints Handling Process (September 2019)[1], it seems that the Insolvency Service is driving the RPBs to explore "potential additional allegations as part of any investigation or assessment of the complaint", apparently in particular seeking explanations and justifications for fees and expenses, and the Service is "encouraged" by progress in this direction. This is a retrograde strep and is unfair to all parties: it unnecessarily delays consideration of the complainant's specific issues and puts unnecessary burdens on the IPs and RPB staff to deal with other matters that are most likely better suited for exploration at a monitoring[2] visit. The Insolvency Service seems to believe that an assessment of fees can be achieved by a simple desk-top process, but I cannot see that the RPBs have the staff resources to conduct such investigations effectively and fairly. In any event, is it fair that in effect an IP is subjected to an impromptu desk-top examination triggered only by the receipt of an expression of dissatisfaction that may well be found as groundless?

Such unfair treatment causes the IPs much distress. Even though the IPs may be confident that they had acted appropriately, investigations weigh over them constantly and the inordinate length of time some investigations take, together with the surprising turns in the RPB staff's questions, are unfair on the IPs.

I also have reason to believe that the outcome of complaints is unfair and inconsistent, as I suspect that the process suffers the same issues as that for consideration of the IPA's

[1] https://www.gov.uk/government/publications/report-on-the-institute-of-chartered-accountants-in-england-wales-complaints-handling-process

[2] In general, the IPA refers to "inspection visits" and "inspectors", whereas the ICAEW and the Insolvency Service refer to "monitoring visits" and "monitors". I have used the latter terms throughout irrespective of which RPB I am writing about.

monitoring visit outcomes, which I have witnessed. In a similar way to complaints investigations, RPB monitoring staff gather information on the IP's conduct and then provide a report to a committee of lay persons, IPs and other insolvency professionals. I have seen two IPA monitoring reports contain findings of exactly the same issue, but the outcome for one IP was a referral for further investigation and then receipt of an informal warning, but the other IP received a "satisfactory" outcome. Personally, I cannot understand how this inconsistency was allowed to happen: surely, the committee is guided by a precedents book, is it not? I have seen other monitoring outcomes that seem disproportionate and inconsistent.

These instances lead me to believe that committee members are not impartial. Although committee members are expected to distance themselves from their personal and commercial interests, they are only human and so cannot, even if they try hard to do so. Of course, committee members would excuse themselves from clear cases in which they had a conflict of interests, but insolvency is an incredibly small sphere and, unless investigation reports and monitoring visit reports are anonymised, I believe that fair outcomes will never be achieved.

I am also concerned that monitors are now attending IPA committee meetings. I do not believe that it is fair for the committee to receive information that has not been presented in the report, as this does not give the IP an opportunity to respond and leaves the IP in the dark as regards the process of considering the findings of their monitoring visit. If committee members receive a well-written report, there should be no need for them to require any further information from the monitors.

I recently learned that the IPA has taken into its complaints department a secondee who is an associate director of a Top 10 firm, which I suspect is the IPA's largest customer. I find this shocking. Not only does this obviously cast doubt on whether the IPA's complaints investigations could remain fair and consistent – even if the person is kept away from his own firm's complaints, he will have access to highly sensitive information about his firm's competitors and his closeness to the regulation team may influence their investigations – but I think it provides an appalling example to the IPA's members and licensed IPs. It is also likely to damage the public perception of the IPA's ability to be a fair and consistent regulator. The fact that the IPA's management felt that it was appropriate to take into its regulation department a secondee from a firm for whom it licenses 32 IPs has knocked my confidence in this RPB.

Q2 What level of confidence do you have that RPBs will deal with insolvency practitioner misconduct swiftly and impartially, using the full range of available sanctions set out in the Common Sanctions Guidance?

I have little confidence that the RPBs deal swiftly or always impartially with IP misconduct, although I am confident that they use the full range of sanctions… eventually.

Firstly, the RPB can be slow to identify misconduct. In the past, monitoring visits have been carried out once every 3 years (with some clearly explained exceptions) and both the IPA and the ICAEW operate IP self- or independent-review processes in the interim. I set out in my answer to Q5 my thoughts on these interim processes. I believe that such processes have

been sufficient to help most honest IPs to monitor and improve their levels of compliance (although I have found that it is often ineffective for IPs or their case-administration/ management staff to review their own work). However, it is not difficult for an IP intent on misconduct to avoid detection for several years. I have serious doubts that the IPA's new regime[3] will improve on this speed, as it seems to me that it will be a relatively simple endeavour for an IP to work under the radar for six years until a full monitoring visit is carried out. Although I support a reduction in monitoring for the IPs who are capable of maintaining good standards of compliance without RPB intervention, of course the difficulty is in identifying these IP and in spotting issues quickly when an IP starts to fail – intentionally or accidentally – in this effort.

RPBs can also be slow to decide the consequences of a monitoring visit report. In my experience, the IPA has been very slow to report outcomes to its IPs and their record appears to have deteriorated. Having reviewed one IP's IPA-monitoring history, I noted that they waited 4.5 months to hear the outcome of their monitoring visit in 2015, but they waited 7.5 months to hear the outcome of their 2018 visit. I am not encouraged by the IPA's intention to permit its monitors to issue on-the-spot warnings to IPs[4], as this will do nothing to stop misconduct and is hardly impartial as it lacks any due process.

There also seems to be some odd decisions made as regards fines. For example, in January 2017, an IPA-licensed IP was fined £2,500 for omitting two extremely minor items from a SIP16 statement[5], but in July 2018, another IPA-licensed IP was fined only £1,500 for having failed to provide fees estimates on three cases and for having over-drawn fees of c.£7,000[6].

I believe that the publicity given to sanctions is by far more painful to IPs than the monetary penalties, but inevitably readers will perceive that an IP who has been fined £2,500 has engaged in more serious conduct than the one fined £1,500. Therefore, it is important that the punishment fits the seriousness of the misconduct.

I have also seen occasions when the IPA has failed to take action that I believed was necessary to deal with IPs whose conduct fell far short of acceptable standards. It would be indiscreet of me to explain further, but I would recommend that the Insolvency Service explores the complaints and monitoring histories of IPs whose licences have been restricted, withdrawn or not renewed (except where such IPs clearly have retired) and asks itself whether the RPB's actions in the years before were appropriate to the knowledge of misconduct at the time.

I also consider that the practices around publication of sanctions on the .gov.uk website are unfair and not impartial. A quick scan on the web-page[7] demonstrates that the period between the issuing of the sanction and the date of publication differs wildly. This period ranges from less than 2 months to over 18 months (see the sanction dated 30 March 2017, which was published on 10 October 2018). It is not clear to me how long sanctions remain on the website: are they removed after a set period from the date of the issuing of the sanction or the date of publication? Either way, this is unfair to IPs: if they are removed, say, 2 years

[3] "Notice to licence-holders: new IPA risk-based monitoring system" at https://www.insolvency-practitioners.org.uk/press-publications/recent-news
[4] "IPA makes improvements following Insolvency Service monitoring" at https://www.insolvency-practitioners.org.uk/press-publications/recent-news
[5] Notice of this sanction is no longer available from www.gov.uk
[6] https://www.gov.uk/government/publications/insolvency-practitioner-sanctions-ashok-bhardwaj-3-july-2018
[7] https://www.gov.uk/government/collections/current-insolvency-practitioner-sanctions

after publication, then late publication is unfair as an old sanction will relate to an IP's action in the further distant past, perhaps even when they long ago worked at a previous firm, than sanctions that are published much more promptly on issuing; on the other hand, if sanctions are removed, say, 2 years after they are *issued*, then it could incentivise IPs to appeal decisions, as this may postpone publication and may mean that the sanction eventually remains on the website for only a few months.

In fact, a comparison of the sanctions listed in the Insolvency Service's 2018 annual review on IP regulation[8] reveals a few sanctions that were *never* published on .gov.uk, seemingly because they had become too old for publication. As mentioned above, the greatest deterrent effect of a sanction is its publicity, so to fail to publicise sanctions of equal seriousness in the same way is grossly unfair.

Q3 Do you believe the sanctions that the RPBs can currently apply are adequate and sufficient to provide fair and reasonable redress when a complaint is upheld? If not, what sanctions do you believe an RPB should be able to apply?

The purpose of sanctions is not to provide redress, but primarily to discourage bad behaviour. The Common Sanctions Guidance lists four factors that the RPB is required to consider when deciding on sanctions and only the last is: "correcting and deterring breaches of those standards"[9]. The nature of complaints means that an IP's past actions are reviewed with the result that the majority of findings *in relation to that case* cannot be corrected – for example, it is too late if a report is issued late or a SIP16 statement fails to have provided all the required information – but of course on the rare occasions when a party loses out financially because of the IP's actions, I would expect the IP to make restoration, as I have seen IPs be required to do in cases of misconduct or mistake identified in monitoring visits.

Having said that, I believe the sanctions arising from complaints do not achieve the purposes stated in the Common Sanctions Guidance, as there seems to be no effort to ensure that such breaches of the standards are corrected and deterred in relation to the IP's case portfolio *as a whole*. Other than maintaining the sanction on the IP's file for the monitor's consideration at the next scheduled visit to the IP, I am not aware of any considerations given to whether the misconduct was systemic and therefore merits additional steps to be taken by the IP or by the RPB, for example in scheduling an early monitoring visit. I do not believe the RPBs provide any directions or even expectations to the IP in relation to explaining *why* the error occurred and how to correct other cases and the firm's systems to avoid recurrence of the issue.

For example, in relation to the fee-related sanction mentioned in my answer to Q2, there is no reference to whether the IP repaid the c.£7,000 nor whether any other cases suffered the same

[8] https://www.gov.uk/government/publications/insolvency-practitioner-regulation-process-review-2018

[9] "it should consider the following factors: protecting and promoting the public interest; maintaining the reputation of the profession; upholding the proper standards of conduct in the profession; and correcting and deterring breaches of those standards" https://www.gov.uk/government/publications/disciplinary-sanctions-against-insolvency-practitioners/common-sanctions-guidance

issues. I also wonder whether the IP was asked to explain how the errors occurred and how he had changed his systems and procedures to avoid recurrence of the issue. Although the Common Sanctions Guidance Table lists such matters in its mitigating factors, in my experience, IPs are not asked to explain such matters in their responses to complaints. I have seen no references to such mitigating factors in a sample of the published consent orders, but surely most, if not all, of the IPs sanctioned will have taken steps to avoid the issue recurring.

Q4 What evidence is there to demonstrate that RPBs collaborate to ensure there is consistency in monitoring and enforcement outcomes?

Consistency in monitoring and enforcement outcomes begins with consistency in the understanding of the standards against which IPs are measured.

It might be expected that, in view of the JIC's work on SIPs and the Ethics Code, the JIC would be at the forefront of assisting RPBs to collaborate to ensure consistency. However, disappointingly few fruits have emerged from the JIC's work over the past few years. The RPBs were late in issuing the revised SIP9 to work alongside the new fees regime: the new rules came into force on 1 October 2015, but the revised SIP9 was effective only from 1 December 2015. Although the issuing of SIP6 was slightly more successful, as it was released just in time for the new 2016 Rules, the JIC's second version of SIP6, which was preceded by a consultation to understand the difficulties encountered by IPs in applying the new rules, was only very slightly different and in my view did nothing to alleviate IPs' difficulties.

In addition, the JIC issued a consultation on a draft revised Ethics Code. That consultation closed on 25 July 2017, but a revised Code has yet to be released. Although the Insolvency Service has explained that the revised Code was put on hold because the accountancy profession's Code was also being revised, it would seem to me from the Insolvency Service's own annual regulatory reports that there have been several ethical concerns over the past few years, which are in urgent need of addressing.

Another means by which the RPBs collaborate is via the AML Supervisors' Forum. From this forum has developed work on industry-specific guidance and, in collaboration with the RPBs, the CCAB has been working on draft insolvency-specific guidance for several years now. The new Money Laundering Regulations, which came into force in June 2017, interrupted this work but it is frustrating to see that 2 years' later IPs still have no RPB-common insolvency-specific AML guidance that addresses the 2017 Regulations, let alone guidance that has HM Treasury approval.

There are some informal meetings regularly arranged by technical and compliance managers and directors to which certain RPB monitoring staff are invited. Although, understandably, the individual RPB staff members show some reluctance at these meetings to express their personal views on specific items, any guidance that these RPB staff feed back to the groups is extremely welcome and I believe these efforts demonstrate some collaboration between the RPBs to develop consistent approaches.

On occasions, RPB monitoring staff have spoken at R3 events, such as R3's SPG Forum, on topics such as fees and SIP9. These events demonstrate that RPB monitoring staff largely take consistent approaches and presumably they collaborated in order to deliver the information.

These methods of disclosing RPB monitoring approaches are extremely valuable to us all in the profession, but they are rare and, unless they are accompanied by publicised guidance, they only benefit the attendees and experience has shown that some approaches can no longer be relied upon once the RPB staff have changed. There have been some publicised guidance notes, e.g. the RPBs' guidance on fees and SIP9[10] and the GDPR FAQs[11]. I believe that far more could be done to disseminate to all IPs and their staff how the RPBs measure compliance with the regulatory standards and how they view certain matters where the legislation or standards are unclear. This would help ensure consistency in approach between the RPBs.

In my experience, however, it is also important to ensure that the RPB committees, as well as their regulation staff, observe the RPB-transmitted guidance and that "mission creep" is avoided. On several occasions, I have seen monitors make statements on visits and in their reports about what they view as non-compliances, but these are not supported by the statute, SIPs or other written regulatory standards. In some cases, it seems that one month's "recommendation" becomes next month's "requirement". I have also seen a monitor explain the application of a statutory provision to an IP in one visit only to have this contradicted by their colleague in the next visit. I have also seen the IPA committee direct an IP to take certain action that is not provided for in statute etc. and in one case the committee expressed a view on a statutory provision that was contrary to the IP's counsel even though counsel's opinion had been provided to the committee. I also refer back to the example I gave in Q1 of IPA monitoring outcomes that differed despite the IPs' reports presenting the same finding. These instances demonstrate insufficient collaboration to ensure consistency *within* an RPB, let alone across the RPBs.

An analysis of the monitoring outcomes reported in the Insolvency Service's annual reviews on IP regulation suggests that there is little consistency between the tools used by the RPBs as a consequence of monitoring visits. For example, the 2018 report disclosed that the majority of negative outcomes from the IPA's monitoring visits were penalties or referrals for disciplinary or investigative action, whereas the ICAEW's negative outcomes were more varied, including also directions regarding ICRs, undertakings and confirmations. Of course, these outcomes may be varied because different IPs had been monitored, but it does not appear to suggest that the RPBs collaborate to achieve consistency in monitoring outcomes.

Q5 **Are RPBs doing enough to promote an independent and competitive insolvency practitioner profession that considers the interests of all creditors? Please share examples of good and bad practice.**

[10] "Q&A notes SPG Forum" at http://www.insolvency-practitioners.org.uk/regulation-and-guidance/other-regulation-guidance and https://www.icaew.com/en/technical/insolvency/support-for-insolvency-practitioners/insolvency-sector-news/sip-9-fee-estimates-and-other-reporting-requirements

[11] https://ion.icaew.com/insolvency/b/weblog/posts/the-gdpr---faqs-for-insolvency-practitioners

Conflicting public policy?

I find it surprising that the Insolvency Service is so interested in whether the profession "considers the interest of all creditors", in light of the fact that the government has recently issued draft legislation to elevate many of HMRC's claims over almost all other creditors. The RPBs reacted commendably by responding – particularly robustly, in the ICAEW's case – to the consultation, pointing out the damaging effects this would have on other creditors.

Promoting independence through self-regulation

One way that RPBs promote an independent IP profession is by emphasising the need for *self*-regulation, so that IPs do not wait for the RPB monitor to tell them what they have got wrong once every three years or so when they visit. In this regard, I think that the ICAEW's model of Insolvency Compliance Reviews ("ICRs") is far better than the IPA's model of self certifications. Although both models involve IPs (or their assigned staff or external reviewer) reviewing samples of case-work to identify non-compliances and to establish a plan to remedy issues on a system-wide basis, the ICAEW's model is far more sophisticated in requiring the IP to decide the scope of each review, including some focus on the systems that control and govern relevant case-administration processes. The disadvantage of the IPA's process of self certifications is that these rely on IPA staff selecting cases for the IP to review. In my experience, these selections can be nonsensical, requiring the IP to review long-ago closed cases and work carried out a decade or more ago when the IP knows full well that their systems and processes (as well as the relevant statute and SIPs) have long since changed. Thus, the IPA's approach is far too scatter-gun, whereas the ICAEW's process is logical and progressive, exploring all aspects of the IP's work over a number of years.

Of course, this process of self-regulation only works if there are consequences for the IP for failing either to carry out the required annual reviews or to address the findings of such reviews. In my experience, the ICAEW appears to approach this more successfully: the ICAEW has sanctioned IPs for failing to conduct annual reviews and, where a monitoring visit has demonstrated material issues, the ICAEW seems more consistent and stronger in instructing IPs to make required changes, to review the steps taken, and to report back to it.

Although it may be more difficult for an IPA-licensed IP to fail to submit self certifications, I am not persuaded that IPA-licensed IPs receive appropriate directions if they fail either to carry out thorough reviews or to remedy identified issues on a system-wide basis. Over the years, the IPA has made some attempts to provide useful feedback on self certifications shortly after their submission, but these have been haphazard and inconsistent. I am concerned that the IPA's new monitoring regime puts greater weight on self certifications: if the IPA is to rely more heavily on self certifications, they must have full confidence that the self certification reviews have been thorough and they need to take swift action when they see serious issues disclosed – it seems to me that a mini inspection at the 3-year point is inadequate to promote independent self-regulation.

Promoting competition through guidance

As explained earlier, RPB guidance is extremely valuable to IPs. In addition to the guidance described above, traditionally RPBs have helped their IPs by providing helpsheets on regulatory compliance. Soon after the 2016 rules came into force on 6 April 2017, the ICAEW provided updated helpsheets to its members. However, despite listing a "full library of

technical help sheets" as a member benefit on its website[12], the IPA provides no such help sheets and, to my knowledge, has not provided any since the 2016 rules came into force.

The Insolvency Service's Technical Manual always used to be another valuable resource to IPs and their staff. In the past, the Manual used to be made available via the .gov.uk (and its predecessor) website. However, I understand that a year or so ago the Insolvency Service decided no longer to make the Manual accessible outside its staff. I find this decision baffling and contrary to the regulatory objectives. The RPBs could do more to promote competition by repeatedly asking the Insolvency Service to reverse this decision.

Promoting competition through legislation

To promote a competitive profession, I believe it is important to assist IPs working in smaller practices, as they are unable to benefit from the economies of scale of their larger competitors. Regulatory compliance is an extremely costly task for all IPs and of course is proportionately more costly for smaller practices. Despite the past Red Tape Challenge and the consequent new insolvency rules being advertised as a simplification, the costs of regulatory compliance for IPs has continued to mushroom, not least as non-insolvency regulation such as Anti-Money Laundering, GDPR, and the dual regulation of the FCA in advising debtors in financial difficulty has added to IPs' burdens.

The new fees regime introduced in October 2015 also has made it particularly hard for smaller practice IPs. In general, creditors tend to be less engaged on smaller, low profile, insolvencies, particularly where their prospects of any recovery are low. There are a great deal of routine tasks required in every insolvency: for example, the new insolvency rules have burdened IPs with additional notice requirements and cumbersome decision processes, and they have not relieved the IPs of any reporting duties; IPs must also carry out investigations and submit reports to the Insolvency Service in all CVLs. However, the new fees regime prohibits an IP from drawing any fees on any insolvency case unless and until they have obtained creditors' approval, the seeking of which itself brings not insignificant costs to the IP.

This contrasts unacceptably with the process for Official Receivers, who have seen their reporting duties reduce to zero in many cases and who are entitled by statute to draw £6,000 per case immediately, without any creditor notification or approval. If the case remains with the Official Receiver, they are also entitled to 15% of all asset realisations again with no need to notify creditors or seek their approval, and if the case is immediately transferred to an IP, the Official Receiver still draws their £6,000. Official Receivers also do not have an RPB to serve, thus saving on the costs of licence fees, self certifications, ICRs and monitoring visits.

Many IPs have been left with the burden of cases with funds of less than £6,000 (many times, much less), having incurred necessary time costs exceeding the funds in hand, but with no creditors willing to spend their own time reading the copious fee-related information (required by the rules and SIP9) and filling out the necessary forms. These IPs are left with the unpalatable options of applying to court (at further cost) to get approval for their fees or by administering the case for free, as they are unable to resign from office or decide no longer to carry out their statutory duties in order to bring the case to a conclusion. As explained above, this problem is felt far more by IPs working in smaller practices.

[12] https://www.insolvency-practitioners.org.uk/news/newsjun1914

Thus, the RPBs could do more to promote a competitive profession if they were to plead with the Insolvency Service to change the rules to allow office holders to be paid a basic fee to carry out the necessary work on each case without the need to seek creditors' approval, just as Official Receivers do. This would also be considerate of all creditors' interests, because it would enable the IP to avoid incurring the costs of seeking creditors' (or the court's) approval to the basic fee, which in some cases may allow a dividend to be paid to creditors where otherwise there would be none.

Q6 In what ways have the RPBs used the introduction of regulatory objectives to improve professional standards within the insolvency profession?

I do not believe that the RPBs have used the introduction of regulatory objectives to improve standards. The RPBs have always known what misconduct should be most strongly dealt with and they have always had the powers to take appropriate action. The issues that existed before the regulatory objectives, e.g. the time taken to process complaints and the inconsistency in outcomes from complaints and monitoring visits, still exist. It does not take statutory objectives for people to understand what misconduct looks like or how an RPB should act efficiently and effectively.

Q7 When dealing with insolvency practitioner conduct, how transparent are RPBs in their decision making?

The RPBs are more transparent now than they used to be. The published sanctions provide more information, although as explained earlier, I believe that they still do not present the whole picture and some outcomes appear odd in light of the described misconduct.

I have heard from some IPs who struggle to comprehend the decisions reached in relation to complaints and monitoring visits, which suggests that the RPB has not been sufficiently transparent. Sadly, most of those IPs are reluctant to raise such issues with the RPB for fear that they will be branded a trouble-maker, so these occasions are not fed back to the RPB.

Q8 Does the current system of regulation provide for the effective scrutiny of insolvency practitioner fees? If not, what improvements would you suggest

The legislation provides sufficient means of scrutinising IP fees. If there is a disagreement on fees, interested parties have the right to take the matter to the court. I accept that the court process is too costly to encourage many who are disgruntled with the level of fees, but this does not mean that the court process is not fit for purpose: it is fair and effective, when it is engaged.

At the end of the day, IPs are service providers, so if parties feel that they are not getting the service they are paying for, they can seek a voluntary change from the IP in direct communication, via the Complaints Gateway, by public expressions of dissatisfaction on social media, or ultimately by exercising their statutory rights via the court or by requisitioning a decision procedure to enforce a change, where this is possible.

The RPBs are not sufficiently resourced (and it would be prohibitively expensive to resource them adequately) to undertake a thorough scrutiny of fees and the past suggestions that RPBs can take some kind of vague high-level view of the reasonableness of fees that can result in a binding decision on the IP irresponsibly simplifies the situation.

The number of appointment-taking IPs has fallen year-on-year since 2015. I believe this is mainly due to the ever-increasing costs of practising as an IP as well as the ever-decreasing confidence that creditors will approve, and the regulators will not challenge, fair and reasonable fees. Inevitably, these pressures squeeze out IPs working alone and/or in isolated parts of the country. The longer this trend continues, the more fragmented the geographical coverage of IP services becomes; local businesses lose a value source of advice and assistance to deal with their financial difficulties and they are forced to seek the services of fewer larger insolvency practices, who are less able and less inclined to assist them in their local setting. The concerted efforts over the last decade or so to decrease the fees involved in IVAs has demonstrated that this produces an undesirable concentration of cases in a few large firms, which are not well-equipped to deal with individuals with unusual circumstances and which appear to attract more than their fair share of complaints and regulatory attention.

In light of the trends in IP numbers and practice mergers, as well as the regulators' concerns over how the IVA market has evolved, I would urge that the Insolvency Service take some care in pressing the RPBs to demonstrate that they are concentrating on challenging fees. It is about time that the Insolvency Service acknowledged that improving on IPs' compliance with regulatory standards is highly likely to increase costs, not decrease them.

Q9 What are RPBs doing to promote the maximisation and promptness of returns to creditors? Please share examples of good and bad practice.

The RPBs have always been keenly interested in the effectiveness with which IPs achieve realisations and pay dividends. Case progression has always been high on the agenda of monitoring visits and has often been the feature of negative monitoring visit outcomes and directions for improvement. Where case progression has seen to be poor, the RPBs have used a number of strategies to enforce improvements, including targeted visits, demanding regular case progression schedules and restricting licences so that IPs cannot take new cases for a time.

In my view, the expectations on RPBs to tackle what is seen as poor compliance standards in some other areas has over-shadowed this important objective. For example, the Insolvency Service's obsession with compliance with the SIP16 disclosure points has over-shadowed the need for RPBs to consider the fundamental justification behind business and asset sales and in particular sales that do not fall within SIP16, such as pre-liquidation sales. It can seem that there is a greater regulatory risk to an IP for failing to make a minor required disclosure in

their SIP16 statement than it would be to condone or complete a sale having made little effort to elicit any improved offers. On occasion, some individual monitors can also seem more concerned with minor statutory defaults than with failures to efficiently and effectively realise assets and pay dividends and this misdirection sometimes is reflected in committee decisions on monitoring reports.

Q10 Is there confidence that people who are in financial difficulty and wish to enter a statutory solution are routinely offered the best option for their circumstances?

If an individual (based in England or Wales) approaches an IP for a statutory solution, that IP can usually only "offer" them an IVA. The individual must make their own application online, if they want to enter bankruptcy, and they must approach a DRO intermediary if they want a DRO. Thus, IPs are not there to "offer" individuals the best option, but rather to provide them with information about their options to assist them in making the right decision. I am confident that, far more often than not, IPs achieve this where they are able to advise individuals. Where I have seen failures in this area, it is often because the individual's mind has already been made up because they have first spoken to non-IP advisers.

Under the Financial Services and Markets Act 2000 (Exemption) Order 2001, an IP who is not authorised by the FCA can only advise consumers if they are doing so "in reasonable contemplation" of an appointment and therefore, if the IP decides that an IVA is not appropriate, they are prohibited from offering to help the individual access any other option (statutory or non-statutory).

For IPs who do not specialise in IVAs, FCA authorisation is prohibitively burdensome (although it may be possible for some IPs to have limited recognition by their RPB). Therefore, this restriction on IPs as well as the ongoing downward pressure on IVA fees has led to many IPs refusing to consider taking IVA appointments and thus also closing their doors to providing advice to individuals.

Twenty years' ago, most IPs and their senior staff working in offices across the UK were happy to talk with individuals in financial difficulties, giving of their time free of charge, to help them explore their options. Of course, in light of the explosion of consumer debt in more recent times, the providing of advice and debt solutions to consumers has become a mass-production exercise. Thus, the old model would not work today in any event, but I do believe that good-quality advice would be more available at least for individuals with more complicated circumstances than the average consumer (i.e. those that are less suited to the boiler-plate approach to insolvency advice), if it were not for the FCA restriction.

Q11 Are RPBs doing enough to promote the public interest and protect the public from harm? Please share examples of good and bad practice.

It is not at all clear to me what RPBs are expected to do "to promote the public interest". It is a vague and subjective term that is open to many interpretations.

I believe that the primary way in which the RPBs might protect the public from harm is to deal swiftly and impartially with IPs engaging in serious misconduct. As explained in my answer to Q2, I do not believe that this is being achieved.

For questions 12-15 only
On a scale of 1 to 5, to what extent do you agree with the following statements?
(1 being strongly agree, 5 being strongly disagree.)
Please provide an explanation for your score and supporting evidence if possible.

Q12 "The regulatory objectives are fit for purpose"

3

The regulatory objectives are generally appropriate, but, as some explained in their responses to the consultation that led to the 2015 Act, the objectives fail miserably to identify the need for fair treatment of IPs. They only identify the need for "fair treatment for persons affected by [IPs'] actions and omissions".

Q13 "The RPBs function in a way that delivers the regulatory objectives and this has increased confidence in the system"

3

I do not feel that the RPBs' core work has changed materially since 2015, when the regulatory objectives were introduced: in some areas, there have been improvements, but other areas have become more troublesome.

I believe that the Insolvency Service has done little to improve the position overall. From my perspective, the Service seems to have over-reacted to public or other departments' criticisms of IPs, which seems to have resulted in the RPBs concentrating monitoring and sanctioning efforts on the month's/ year's hot topic, e.g. SIP16 non-compliance and the needs for IPs to chase down a company's books and records and diligently to scrutinise employee claims. Although, of course, it is important to improve regulatory standards, this reactionary approach risks RPBs taking their eye off more important target areas and, particularly as regards the IPA, has led to rapid changes in regulatory approaches and processes that have impaired my own confidence in their system.

Q14 "There are matters of significant concern, which are currently affecting confidence in the regime, which are not addressed adequately by the regulatory objectives"

1

As mentioned above, the regulatory objectives do not address fairness to IPs, which is a matter of significant concern to me at present. I also wonder whether the objective to "consider the interests of all creditors in any particular case" inappropriately marginalises other parties, e.g. the debtors and shareholders, in cases where these ones have legitimate interests.

Q15 "There is confidence that government oversight sufficiently holds the RPBs to account to deliver the regulatory objectives"

2

In my view, it is a common misconception that the RPBs are intent on "protecting their own". On the contrary, partly because of this public misconception, RPBs are usually very zealous at ensuring that IPs are brought to account for any mistakes or misconduct. Therefore, I do not believe that much government oversight is necessary to ensure that the RPBs uphold regulatory standards and in fact if government oversight is administered in a heavy-handed way, it can hinder RPBs from carrying out their work effectively.

It is evident that the Insolvency Service engages with the RPBs to effect change. However, it seems to me that often their efforts are misguided. I do wonder whether their staff have the skills and vision to ensure that the regulatory system performs practically. It seems to me that the Insolvency Service is too far removed from IPs working in practice to be able to instruct RPBs in such a top-down manner. I do wonder if the RPBs, who have a greater working understanding of IPs in practice, are helping the Service enough to understand the IP perspective. Working together in a collaborative way, the Service and the RPBs can deliver the regulatory objectives.

Q16 Does the reserve power provide sufficient flexibility in the options for a single regulator? If so, which option would most effectively deliver the regulatory objectives?

Yes. I believe that the most effective way to deliver the regulatory objectives is the current system and that a single regulator should not be created.

In my response, I have raised a number of areas in which I think the Insolvency Service and RPBs should improve. These concerns do not arise because of the lack of a single regulator. Issues such as inconsistency in complaints and monitoring outcomes and delays in taking

appropriate action would likely be present in a single regulator. Greater consistency may be possible with a single regulator or with a unified group of monitors, complaints investigators and committees, but there will always be some inconsistency and partiality.

The multiple regulator system incentivises RPBs to improve and to innovate. All but the rare dishonest IPs are pleased to see their RPB take action to address misconduct; we all want to work in a profession that takes pride in high standards. It does not serve an RPB well to fail to take action against misconduct and pressure from its licence-holders can incentivise the RPB to make greater efforts to address misconduct as well as work effectively to support IPs who are determined to work to high standards. Such incentives would not exist for a single regulator.

IPs have had to absorb a vast amount of change over recent years, such as the new insolvency rules. These changes have been expensive and stressful and maintaining compliance continues to be a costly endeavour. There are only c.1,300 appointment-taking IPs in the UK. This is far too few to support the expense of a substantial regulatory change such as moving to a single regulator and the small improvements that a single regulator may aspire to, over and above those already in the RPBs' fields of vision, are insufficient pay-back for the expense and disruption in regulatory activity that will result from such a move.

Q17 Should government look to create a different type of regulatory framework that better suits the current insolvency system (for example firm regulation in certain sectors)? If so, what type of framework would best deliver improvements to public confidence?

There is some merit in considering corporate licensing. The call for evidence notes the fact that some IPs are only employees in the firms in which they work. This is not unique to the Volume IVA field, but it is clear from the call for evidence that this field raises most causes for concern.

IPs hold insolvency offices as individuals and I believe that this should not change; to do so would require wholesale changes to primary legislation and many related statutory instruments and it would effectively wipe the slate clean as regards valuable legal precedents and principles. Consequently, it is correct that licensing should apply at the IP level, as the IP is personally responsible for their actions and those carried out in their name.

However, when an IP is an employee and/or where they work in large corporate entities, practically it is difficult for them to have complete control of all the systems that impact on their appointments. In addition, IPs sometimes encounter significant difficulties in ensuring that their cases continue to be administered correctly when they are in the process of leaving a firm or thereafter. It is also often the case that regulatory issues arise from the firm's faulty *systems* and thus an RPB's actions against the IP personally may not achieve the desired change. In these circumstances, corporate licensing may help.

The call for evidence suggests corporate licensing for "certain sectors", such as the Volume IVA field. I would urge caution in introducing corporate licensing to apply only in particular circumstances. For example, a firm may not meet the criteria of a *Volume* IVA Provider one

week, but may do so the next; it would be impractical for the need for a corporate licence to be triggered overnight depending, not only on the firm's case-load, but also on the case-load of its competitors, e.g. if the criteria depended on a firm being responsible for a certain percentage of the total number of IVAs. In addition, to achieve consistency in endeavours to meet the regulatory objectives, it seems to me that all IPs and the firms in which they work should be subject to the same regulatory processes.

Fundamentally also, if the rationale for corporate licensing is recognition of the fact that an IP may have "little control or say over the actions and policies of the firm", then this applies equally to some IPs working in large corporate entities that do not specialise in IVAs, for example the Big 4 accountancy firms. Of course, large accountancy firms already are subject to regulation on a corporate level, which is perhaps why this concern has not arisen previously. Although accountancy regulation is not free of criticism, it seems to me that this model may work alongside IP licensing so that all firms involved in insolvency appointments are accountable to the RPBs.

Q18 Should government have a role within any new or improved regulatory framework?

Insolvency is not simple nor is it welcome to many people. Consequently, it is rarely spoken of in glowing terms by those outside the profession; insolvency usually only hits the headlines as a bad news story. It is evident that new legislation emerges from some of these bad news stories; for example, some of the measures proposed by the Insolvency and Corporate Governance consultation (March 2018)[13] clearly had their genesis in the concerns arising from the BHS insolvency, which was certainly not typical of insolvencies in general. Thus, government intervention can seem capricious and lacking in serious consideration of the underlying issues and potential consequences.

At present, the RPBs are resourced with regulation departments containing many people who have worked in the profession and/or the RPB for decades. I have far more confidence in those people to understand the variety of insolvency causes-and-effects and to give appropriate weight to issues in order to deliver the regulatory objectives than I have in those in the Insolvency Service. However, I have far more confidence in people in the Insolvency Service in this regard than I do in those in other government agencies or departments, who are even more removed from the realities of insolvency.

Therefore, government's role in any new or improved regulatory framework should be no greater than it is at present. As explained above, the RPBs can do better in some respects, so the Insolvency Service may continue to have a role in ensuring that they deliver on certain service levels, e.g. speed of delivering outcomes, but on the whole I believe that they should give the RPBs the freedom to use their expertise to determine the standards that IPs should reach.

13 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/691857/Condoc_-_Insolvency_and_Corporate_Governance_FINAL_.pdf

Q19 How might any future single regulator, or alternative framework, be funded?

As the call for evidence points out, "there may be difficulties in setting up a self-funding model because of the relatively small number of insolvency practitioners". This is a serious hurdle in establishing a single regulator.

As explained previously, working as an IP in practice is already a costly business, but there seems to be little appreciation of this given the current regulatory tone of questioning the reasonableness of fees. Since 2015, the number of IPs has decreased year-on-year, despite greatly increased numbers of insolvency appointments. Any requirement for IPs to pay more for a new regulatory framework is likely to be accompanied by a further reduction in the number of IPs. I have no suggestion of how else changes may be funded, but I suggest this is a reason to be cautious of making significant changes.

Do you have any other comments that might aid the consultation process as a whole? Please use this space for any general comments that you may have, comments on the layout of this call for evidence would also be welcomed.

Thank you for taking the time to let us have your views. We do not intend to acknowledge receipt of individual responses unless you tick the box below.

Please acknowledge this reply ✓