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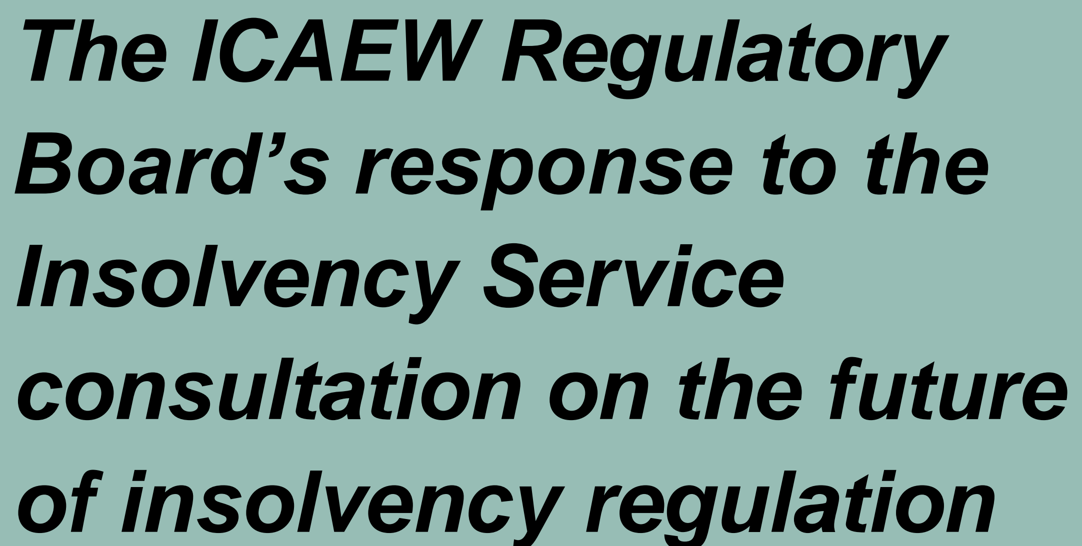
REGULATORY BOARD (IRB)



The ICAEW Regulatory Board's response to the Insolvency Service consultation on the future of insolvency regulation

25 MARCH 2022

ICAEW REGULATORY BOARD (IRB)
REPRESENTATION 03/2022

THE FUTURE OF INSOLVENCY REGULATION

Issued 25 March 2022

Dear Secretary of State,

I am very pleased to send our response to the Insolvency Service's consultation on the Future of Insolvency Regulation.

I hope that you will find our response informative and helpful when you are considering what reforms to make after this consultation closes.

Our response has four sections:

1. **Executive Summary** – our overall views on the proposals in the Consultation Document

2. **The role of the ICAEW Regulatory Board** – our journey and why we are an important part of the insolvency regulatory landscape

3. **Answers to the specific questions which have been asked in the Consultation Document**

4. **Appendices** – these includes an organogram of our oversight ecosystem, a legal opinion on the proposed disciplinary and enforcement arrangements and an independent report we have commissioned with the Insolvency Practitioners Association on the Impact Assessment

Thank you for the opportunity to respond to the Consultation. We are happy to answer any questions you may have or to expand on the ideas we have put forward. We have already suggested that a meeting takes place post consultation to discuss other potential solutions which are not canvassed in the Consultation Document.

Yours sincerely,

Philip Nicol-Gent
Chair, ICAEW Regulatory Board

EXECUTIVE SUMMARY

1. While we support a number of the proposals in the Consultation Document and believe that the Government should introduce legislation to make the current insolvency regulatory framework more effective, we do not believe that Government has come close to making out a convincing evidential case for removing the Recognised Professional Bodies (RPBs) from their important role in insolvency regulation.

2. Despite the repeated references in the Consultation Document to the regulatory framework being top-heavy, the reality is very different. ICAEW and the Insolvency Practitioners Association (IPA) currently license over 91% of all insolvency practitioners (IPs) in the UK with the joint regulatory footprint of being wider due to ICAEW carrying out insolvency monitoring work for ICAS. This caters for nearly 100% of the licensed IPs operating in England and Wales. In determining what reforms would make insolvency regulation more effective, we believe that the Government should build on the consolidation which has taken place within the regulatory framework since 2015, bearing in mind that the regulation of Scottish and Irish IPs requires knowledge and expertise in the different local legal framework.

3. The other important starting point for reforms is a proper analysis of the nature of complaints made against IPs to gauge the true extent of the alleged poor behaviour. While there is criticism within the Consultation Document and the earlier APPG Report about the number of complaints being made against IPs and how they are handled, the statistics show that, in 2020, there were only 371 complaints referred to the RPBs out of 124,000 personal and corporate insolvencies during that year (one complaint per 334 cases). Of these, approximately 90% were closed by the RPBs on assessment. While the APPG Report highlighted some instances of poor behaviour, we believe that it is very important the Government puts those cases into the right context before it concludes that there is a good reason not just to change the regulatory framework but to dispense with the experience and expertise of those bodies who have been at the forefront of regulation for many years.

4. We believe the reform which would make the biggest difference to the effectiveness and robustness of the insolvency regulatory regime is not a change in who regulates this area of work but how it is regulated. This is why we support the Government's proposal to introduce firm regulation. This would be, in our view, the real game-changer.

5. Our only concern with the current proposal is that we do not consider that it is radical enough as the Consultation Document appears to suggest that the primary focus will still be on the regulation of individual IPs. We would urge instead the Government to introduce legislation to make firms the primary focus of regulation with nominated individuals within the firms being approved separately to be suitable for taking on appointments, making the regulation of insolvency work consistent with audit

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regulation.

6. We believe that a long overdue change to firm regulation will improve the internal oversight within firms over the work carried out, provide added protections for creditors and third parties and will allow the RPBs to impose financial penalties on the entities which benefit financially from appointments which should not have been accepted or where there has been misconduct. It will also make more realistic the creation of a compensation fund and potential solutions to the malfunctioning insolvency bond process.

7. So, we do not support the “Do Nothing” option but, equally, we do not understand why one of the options under consideration is not a staggering of the reforms rather than the proposals suggesting that there is need to do everything at once. We believe that the introduction of firm regulation on its own may be all that is needed. The Government could continue to reserve the power to replace the RPBs if the firm regulation reform does not produce the improvements we believe it would.

8. If the Government is still minded, despite our detailed critique of the case for removal of the RPBs, to create a single regulator, we have pointed out the serious concerns we see in the Government Regulator proposal. If this is implemented, the Government would have succeeded only in replacing perceived (but, in our informed view, non-existent) conflicts of interest within the RPBs with significant actual (and perceived) conflicts of interest in the operation of the Government Regulator. This is due to the likelihood of other government bodies or departments being direct or indirect major creditors in an increasing number of insolvencies over the coming years and the new regulator’s oversight of IPs/firms competing with the Official Receiver’s Office with the latter not being subject to the same degree of oversight.

9. We believe that, even aside from the very obvious conflicts, the Government Regulator does not appear to have been well thought through. We have appended to our response to Question 8 an Opinion from a specialist regulatory QC pointing out the proposed disciplinary and enforcement processes offend the key tenets of the right to a fair trial enshrined in Article 6 of the European Convention on Human Rights. Conversely, the processes set out for the investigation of complaints do not appear to provide any of the current protections and safeguards for complainants which are present within our, and other RPBs’ disciplinary processes including, for example, the right to challenge the rejection of a complaint on assessment before an independent panel. Complainants have become increasingly tenacious in recent years and a lack of independent review will no doubt lead to a sharp increase in complaints heading to Ministers and local MPs.

10. We also do not believe that the claims of being able to operate on a lower cost base, providing a reduction in the cost of regulation to IPs, withstands careful scrutiny. We have instructed (jointly with the IPA) a review of the Government’s Impact Assessment by Oxford Economics, one of the leading forecasting and costs analysis consultancies and this review has concluded that it is unlikely that any of claimed reductions will be realised with it being more likely that the cost of operating of the

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Government Regulator will exceed the current costs of regulation by the RPBs.

11. We are concerned that much greater care has not been taken in comparing the current and future costs given that this is an important factor in any decision to introduce radical reforms. The claimed cost savings have been based on an inaccurate current licence fee revenue figure (18% overstated) and a significant underestimation of future operational costs as the figure used in calculating the cost savings is the minimum costs prior to including the costs of outsourcing core regulatory activities. The actual operational costs will be significantly greater than £4.1m as they will either include the costs of the outsourcing contracts or it will be increased by significant additions to the payroll to carry out these core functions in-house if outsourcing is impossible or proves to be prohibitively expensive. The £4.1m figure is also based on the expectation that staff salaries will be lower which we consider to be highly unlikely. Suffice to say, we do not believe that the Impact Assessment supports the case for change.

12. Finally, we consider the key factor which has been neglected by the Government in drawing up these new proposals is the strong public interest in ensuring that any changes do not come at a cost of losing the limited pockets of insolvency regulatory expertise which exists currently within the regulatory departments of the RPBs. We believe there is a very real danger that, if the Government proceeds with the implementation of its current proposals, most, if not all, of the current expertise and years of experience will be lost. Due to the increase in insolvency work post-pandemic, staff with insolvency expertise are in high demand with firms who are looking for additional resources. They are very likely to accede to offers to return to front-line work than wait around to accept lower salaries to work for a Government Regulator.

13. If we are right about the specialist staff 'flight risk', by confirming that it will go ahead with the current proposals post consultation, the Government could be responsible for creating a complete regulatory vacuum for a long period of time before the Government Regulator is established at a time of rising levels of personal and business insolvencies. This would clearly not be in the public interest.

14. This latter concern should focus the Government's considerations on the strength of the evidential case to remove the RPBs and whether their removal – rather than the introduction of firm regulation – would really create any improvements in the effectiveness and efficiency of insolvency regulation. From our informed viewpoint, we do not believe it would. If the Government's only concern is about perception, we have suggested in our response how it might be able to make changes to provide additional assurance to the public on the operations of the RPBs. We would also be happy to engage with the Government after the consultation closes to discuss other potential solutions which we have been discussing with the other RPBs.

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THE ROLE OF THE ICAEW REGULATORY BOARD

15. Following an independent review in 2014 by Sir Christopher Kelly into the governance arrangements around ICAEW's regulatory and disciplinary work (ahead of its first application to be authorised as a regulator of legal services and the more stringent requirements of the Legal Services Act 2007), ICAEW Council approved a series of reforms in 2015 which:

    - created an independent regulatory board, the IRB, to oversee all of ICAEW's regulatory and disciplinary work with a constitution of six lay members (i.e., individuals who are not/never have been a member, affiliate or employee of ICAEW or any other accountancy body) and six chartered accountants where the lay chair has a casting vote;
    - devolved all responsibilities for the setting of regulatory policy and strategy to the IRB, together with the oversight responsibility for ICAEW's regulatory and disciplinary work, including the work of ICAEW's Professional Standards Department (PSD) and all of ICAEW's regulatory and disciplinary committees;
    - required lay parity of those serving on all regulatory and disciplinary committees, and a lay majority in disciplinary tribunals and appeal panels; and
    - prohibited ICAEW officeholders and members of council from membership of the IRB or any disciplinary or regulatory committees.

16. In 2020, further changes were approved by ICAEW Council which included:

    - the IRB becoming the 'regulatory board' for legal services regulation required under the internal governance rules (IGRs) issued by Legal Services Board in 2019;
    - the appointment of an IRB alternate chair (who is not legally qualified) to chair debates at the IRB in relation to legal services regulation policy and strategy issues;
    - the creation of the Regulatory & Conduct Appointments Committee (the RACAC), an independent appointments committee with a lay majority with the responsibility to appoint, evaluate and re-appoint future IRB chairs and appoint, re-appoint and evaluate IRB members; and
    - transferring responsibility to the RACAC for the appointment, re-appointment and evaluation of all members of all regulatory and disciplinary committees.

The role and performance of the IRB in regulation at ICAEW

17. The breadth of the IRB's responsibility is set out clearly in the IRB's Terms of Reference. Paragraph 3 of the Terms of Reference enshrines the principle requiring the IRB to

    'have regard to the objectives of the profession, as set out in ICAEW's Royal Charter, ***subject to a primary consideration of the public interest****.*

18. Our principal tasks are:

    - to set ICAEW's regulatory strategy and regulatory policies;

    - to set budgets for the discharge of ICAEW's disciplinary and regulatory work;

    - to set fees in order to ensure all work is fully funded; and

    - to oversee the work of the PSD and all of the regulatory and disciplinary committees.

19. We publish annual reports detailing our activities and our intended objectives for the next 12 months. These are published on icaew.com/irb

20. As well as reacting to regulatory and disciplinary issues as they arise, we have been proactive in identifying public interest issues arising out of the work of the chartered accountants and taking actions to respond to those issues. Examples of this include:

    - introducing new powers to the Practice Assurance Committee to agree orders imposing sanctions on members and member firms. The speed in which orders can be made has provided a far greater incentive to firms to ensure that that they comply with all of the regulations (including, for example, Clients' Money Regulations) and run their practices in the public interest.

    - approving changes to the Professional Conduct in Relation to Taxation (PCRT) to ensure that it would be easier for PSD to bring misconduct complaints against members who engage in highly artificial or highly contrived tax avoidance schemes. We have also encouraged PSD executives to lead the project to agree those changes with all other professional bodies with tax adviser members so that the PCRT would apply to all tax advisors who were members of professional bodies.

    - encouraging regular meetings between PSD executives and senior officials in HMRC to share intelligence and identify issues arising in respect of the work of tax advisers. We have also input into all of the recent consultations carried out by HMRC in respect of issues such as the regulations tackling the Promoters of Tax Avoidance Schemes and Raising Standards in the Tax Advice Market. We have also taken an active role in responding to thematic reviews produced by the Charities Commission on the work of chartered accountants acting as auditors or

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independent examiners and has overseen the response of PSD staff to those reviews including wider compliance checks and educational webinars to raise awareness of accounting developments.

- setting up a dedicated AML Project Board to consider further initiatives on how to raise awareness of risks to members, how to improve the number and quality of SARs (Suspicious Activity Reporting) and how to improve the risk-based monitoring and assessment regimes. We have also encouraged the participation of the PSD Chief Officer as a member of the Economic Crime Strategic Board chaired by the Home Secretary.

- actively monitoring the adverse developments in the PII market for accountancy firms (and professional services firms more generally). We have also made changes to the PII Regulations and guidance in order to ensure that accountancy firms maintain substantial insurance cover in line with our minimum requirements even if no commercial insurance cover is available for every part of a firm's business and we have also considered changes to the arrangements for firms entering ICAEW's Assigned Risks Pool to ensure that it remains a viable safety net. The changes ensure that the public interest is protected as much as possible.

- encouraging and overseeing the development of an interactive disciplinary database which provides businesses and individual members of the public with the ability to search disciplinary records before determining whether to engage a member or firm.

- making a number of significant incremental changes to the Disciplinary Bye-laws since 2016 to make the ICAEW disciplinary scheme more efficient and more effective in investigating and sanctioning members for misconduct or poor work. Reforms have included the introduction of a Fitness to Practise process to ensure that ICAEW members who are suffering from mental health illness are not subject to the disciplinary process but who are also suspended from practising and offering services to the public.

- commencing and overseeing a two year project to change the structure of ICAEW's disciplinary framework to make it more efficient, effective and easier to use and understand. This has included reducing the number of Disciplinary Bye-laws (DBLs) from 49 to 16 Core DBL and the creation of a new set of Investigation & Disciplinary Regulations which set out the entire process from start to finish rather than each committee having its own inconsistent regulations. We are consulting publicly for the first time on changes to ICAEW's disciplinary process in order to improve transparency and to encourage third party ideas.

21. We have encouraged and provided financial support for the PSD Chief Officer to continue with his initiative to create educational drama films to help ICAEW members and firms understand the consequences of not abiding by the Code of Ethics and maintaining high standards. The *False Assurance* and *Without Question* films have

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helped to highlight the importance of scepticism on the part of accountants, auditors and directors. The most recent film is a joint venture project between ICAEW and HMRC to create a drama film focusing on the importance of knowing your client and professional scepticism to avoid enabling money laundering and to ensure compliance with the money laundering legislation. *All Too Familiar* was launched at Chartered Accountants' Hall on 8 March 2022 with a keynote speech from John Glen MP, the Economic Secretary to the Treasury.

22. In addition to PSD's regulatory obligations under statute, we oversee the Licensed Practitioner scheme which is a bespoke assurance scheme for firms who work for ATOL-bonded travel companies. It was designed with the Civil Aviation Authority to ensure that greater assurance is provided around the work of accountancy firms in this sector. This scheme was developed with the primary purpose of protecting the public from the trauma which can be caused by insolvent travel companies.

23. All of these initiatives and actions have been started and overseen by us without any interference from ICAEW Board and ICAEW Council. While the IRB Chair and the PSD Chief Officer attend meetings of the ICAEW Board and ICAEW Council, this is to brief them on what we are doing rather than seeking permission to start or continue with any initiative in relation to ICAEW's regulatory and disciplinary work. Where ICAEW Council and ICAEW Board have been required, through the ICAEW governance processes, to endorse our recommendations, they have all been approved.

24. While members of the IRB observe meetings and hearings of the regulatory and disciplinary committees to consider how effectively and efficiently they operate as part of our quality assurance programme, all of the regulatory and disciplinary committees also act with complete independence not only from ICAEW Council and ICAEW Board, but also from PSD, in reaching decisions on key regulatory issues (e.g., the granting or removal of a licence) and on disciplinary cases.

25. We have a lot more contact with ICAEW's many oversight regulators than with the ICAEW Board and Council. We have regular interaction with:

    - the Financial Reporting Council (FRC);
    - the Office for the supervision of Professional Body AML Supervisors (OPBAS);
    - the Insolvency Service; and
    - the Legal Services Board (LSB).

    Senior officers from many of those bodies observe one or more of our board meetings during the year with our consent and encouragement.

26. The pivotal role which we play in the oversight of ICAEW's regulatory and disciplinary work and in our interaction with ICAEW's main oversight regulators can be seen pictorially in the diagram in Appendix 1.

QUESTIONS 1-2: INTRODUCTION OF A GOVERNMENT REGULATOR

Question 1: What are your views on the Government taking on the role of single regulator for the insolvency profession?

Question 2: Do you think this would achieve the objective of strengthening the insolvency regime and give those impacted by insolvency proceedings confidence in the regulatory regime?

27. We have set out below a detailed combined response to these two questions which will adhere to the following structure:

    a. Need for change?
    b. Observations on the current insolvency regulatory framework
    c. Response to the criticisms arising out of the Call for Evidence
    d. Response to the criticisms of the Insolvency Service
    e. Summary of evidential case for change
    f. Proposal to create a Government Regulator
    g. Do Nothing / Non-legislative reform / Government's preferred option

Need for change?

28. We note that Lord Callanan refers in the Foreword to the UK having a *"first class insolvency regime"* and that the Government is committed to ensuring that it keeps that reputation. While the Minister goes on to suggest that the insolvency regulatory regime is no longer fit for purpose, there appears to be no reflection or realisation that it would be difficult, if not impossible, to produce a *"first class insolvency regime"* without a robust well-led regulatory regime. If insolvency practitioners (IPs) were not properly vetted before being licensed by the Recognised Professional Bodies (RPBs), if they were not properly monitored to ensure that licences were removed from the dishonest and the incompetent and if IPs were not deterred from poor conduct by the threat of robust enforcement action, this would inevitably permeate through to the quality of insolvency services in the UK. The fact that it does not is, in our view, an indicator that the current regulatory regime is fit for purpose.

29. The Government does not also appear to have reflected on what factors – other than a robust regulatory regime – must have contributed to producing a *"first class insolvency regime"* because, if it had done so, it would have identified the key role of the RPBs in encouraging, nurturing and educating IPs and ensuring that, in parallel to the "tough love" required of a regulatory body, there is a significant educational piece provided which is as important, if not more important, in producing a first class regime. Our philosophy has always been that it is far better to stop bad things happening than being able to identify bad things through good monitoring or enforcement actions.

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30. If these other factors had been considered, the Government may have identified the harm which might be done to the quality of the insolvency profession if it were to divorce the regulatory role from the support and education provided by the RPBs, and the impact these reforms might have on the attractiveness of the profession at a very critical time for insolvency in the UK. As the Government knows from the current statistics, UK plc may be standing on the precipice of a significant wave of corporate insolvencies in the UK as a result of the withdrawal of the financial support provided by HM Treasury to businesses during the pandemic and the requirement on businesses to pay back those loans. Even since the Consultation document was published, the short and medium term financial outlook for many businesses and many individuals may well have deteriorated as a result of the likely impact of the war in Ukraine.

31. As a board, we have overseen the insolvency regulatory work carried out by ICAEW's Professional Standards Department (PSD) since 2016 and we are struggling to recognise the picture which has been painted in sections of the Consultation Document insofar, at least, as it relates to the performance by PSD. Indeed, as we point out in sections of this response, there are very good examples of just how well PSD has performed in what is a very challenging role. Indeed, the evidence included appears to be limited to what might support the proposal to replace the RPBs with a single regulator rather an objective review of all of the relevant evidence.

32. We have also noted the various references throughout the Consultation Document to whether the current regulatory system can function effectively *"in a modern insolvency market"* which we find curious given that, while the current regulatory regime has been in place for nearly 40 years, significant amendments were made to the regulatory regime only in 2015. The current regulatory system was not regarded then as being outdated and there has been no seismic change in the insolvency profession over the past 7 years. This leads to the conclusion that either the Government got it wrong in 2015 or criticisms of the regime being unfit for the *"modern insolvency market"* have been overblown.

Observations on the current insolvency regulatory framework

33. We have identified a number of phrases which are repeated throughout the Consultation Document to justify the proposed changes but which do not withstand close scrutiny. One of the frequent refrains is to the existence of four RPBs and the Insolvency Service all being involved in regulation and how this is top-heavy for the number of licensed IPs and how it breeds inconsistency. While there are 4 authorised RPBs[1], the table set out on page 24 of the Consultation Document shows clearly that most insolvency regulation in the UK is carried out by just two RPBs; ICAEW and the Insolvency Practitioners Association (IPA). The table shows that ICAEW and the IPA license 91.5% of the IPs in the UK. In fact, the joint regulatory footprint is larger as PSD has been carrying out all monitoring work for ICAS since 2019.

[1] There are actually 5 RPBs as Law Society Northern Ireland is also still officially a RPB but our response will focus, like the Consultation Document, on the 4 main RPBs.

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34. We consider the reduction of the number of RPBs since 2015 from eight to four, with two of the four now responsible for over 91% of insolvency regulation to be a very significant development. We believe this change has inevitably brought with it a significant reduction in inconsistencies of approach and outcome. When this is overlayed by the steps taken by the Insolvency Service to ensure consistency of approach and outcomes, for example by the RPBs agreeing to work to a Common Sanctions Guidance, the picture painted in the Consultation Document of four bodies competing and taking different approaches starts to look unrealistic.

35. Given the reduction in the number of RPBs and the concentration of most regulatory work in two, we are disappointed that, prior to launching the consultation, the Government has not explored further ways in which even greater consistency might be achieved in approaches and outcomes even between ICAEW and the IPA as this might have produced, and might still produce, the essence of a single regulator without the need to implement all of the proposals.

36. The other repeated observation in the Consultation Document about the current regulatory regime is that the RPBs' role in regulation undermines confidence in the robustness of insolvency regulation due to the model of "self-regulation"[2]. However, there is no analysis in the Consultation document of whether the RPBs do, in fact, operate a model of self-regulation. If such an analysis had been conducted of the governance arrangements at ICAEW, it would have concluded that what may have started off as a self-regulatory system has evolved over the past decade into a regulatory system which, not only operates independently from any influence from the representative functions, but one which is also subject to layers of independent checks, providing assurance against bias in our regulatory work. The standard dictionary definition of *"self-regulation"* refers to a system where members set the rules with members monitoring and adjudicating on whether fellow members have complied with the rules. However, it is difficult to see how this description applies any more to the regulatory model at ICAEW given:

    a. No changes can be made to ICAEW's regulatory arrangements without approval of the Privy Council (which seeks advice on changes from the Financial Reporting Council) and obtaining the consent of oversight regulators who have a specific statutory power to approve changes (e.g. Legal Services Board);

    b. No complaint can be rejected by ICAEW case managers without a complainant having the right for that decision to be reviewed by ICAEW's Investigation Committee which has parity of lay and chartered accountant members with a lay Chair;

[2] For example*: "There is a perception of a lack of impartiality by RPBs in carrying out their functions, which undermines confidence in the regulatory regime. In other professional sectors, such as audit and accountancy, there is a growing view that self-regulation through industry bodies is not always appropriate where there is a strong public interest."* ***(page 27)***

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c. Annual delegated powers' reviews are carried out by lay majority sub-committees of the Investigation Committee to check all complaints which were closed without reference to it to ensure that no meritorious complaints have been rejected by case managers (there has been no case identified during the period since the IRB was created);

d. Annual delegated powers' reviews are carried out by lay majority sub-committees of our regulatory committees (including the Insolvency Licensing Committee) to check that all delegated work not reported to the committees on licensing, grading of monitoring reports and supervision of remedial action for matters has been carried out correctly and without bias;

e. All decisions taken on whether to uphold complaints against members or member firms are made either by ICAEW's Investigation Committee (lay parity in membership), or by a Disciplinary Tribunal or Appeal Panel, which have lay majoritie;s

f. All decisions taken on whether to continue or withdraw an insolvency licence or impose a restriction or condition are taken by ICAEW's Insolvency Licensing Committee which has a parity of lay members with a lay Chair. Any application to the Review Committee or any appeal against the Review Committee's decisions are decided by lay majority Review or Appeal Panels;

g. All ICAEW's regulatory work (including insolvency regulatory work) is carried out on a self-funded basis i.e. work is funded by levies on IPs and no subsidy is provided from membership fees (so there is no financial leverage from this area);

h. Regulatory strategy and all new regulatory policies and amendments to existing regulatory policies and all changes to disciplinary processes must be approved us, the IRB and our board has a parity of lay and chartered accountant members with a lay Chair who has a casting vote.

37. We note that reference is also made to similar conclusions being reached about the inadequacy of the self-regulatory model in relation to the proposed change to the regulation of audit[3]. However, the references to the Kingman Review fail to recognise that, even if the current proposals are implemented, ICAEW will remain the largest audit regulator with responsibility for registration of all audit firms and the monitoring and enforcement work in relation to all non-PIE audit work. The references also fail to mention the response which we submitted to the BEIS consultation where we pointed out the Kingman Review had failed to carry out any

[3] *"For example, the Independent Review of the Financial Reporting Council by John Kingman recommended that self-regulation of the largest audit firms should be reduced in some circumstances, and the subsequent Government consultation on Restoring Trust in Audit and Corporate Governance proposes the creation of a new regulator, the Audit Regulation and Governance Authority (ARGA), to replace the current regulator for audit." (page 27)*

review of the existing governance arrangements at ICAEW (and at the other RSBs) and that the criticisms in that report were limited to alleged failures by the RSBs to implement all recommendations made by the FRC in 2009 which was well before the the new internal governance arrangements were introduced.

38. Despite the public disclosure of our response, the Consultation Document does not set out the current governance arrangements or attempt to analyse them. The lack of understanding of our governance arrangements would not have been helped by the fact that the Insolvency Service is now the only one of ICAEW's oversight regulators which does not issue any guidance as to the minimum internal governance arrangements it expects to see at any of the bodies it oversees and it is the only one of our oversight regulators who does not carry out any inspection of our governance arrangements. Perhaps if this practice had been adopted, greater confidence could have been given to those who continue to hold wrong perceptions of the operational separation of functions and the lack of conflicts in the work of ICAEW and the other RPBs?

39. Any analysis of ICAEW's internal governance arrangements would have identified the assurances taken by our other oversight regulators about the robustness of those arrangements and the separation of representative and regulatory functions including:

    a. ICAEW's compliance with the revised, tighter Internal Governance Rules introduced by the Legal Services Board in 2019 (which require the separation of the regulatory and representative functions, a lay parity oversight board and an independent appointments committee for appointments to the oversight board)

    b. ICAEW's positive inspection reports by OPBAS (the Office for Professional Body AML Supervision) of ICAEW's governance arrangements which is one of the 7 sourcebook areas

    c. No significant concerns being raised by the Financial Reporting Council on ICAEW's governance arrangements in any of its annual inspection reports.

40. If a proper analysis of existing governance arrangements had taken place, the Government would have concluded that the wrong perception is held by those bodies / persons who have raised concerns about bias or partiality in response to the Call for Evidence. The Government would have had the appropriate insight and context to weigh up those concerns given that, while they carry out important work to assist those impacted by insolvency, many of the bodies raising concerns would have little insight into the RPBs' governance arrangements and the layers of oversight surrounding our regulatory work. The Government might have considered instead what steps could be taken by it and the Insolvency Service to change those perceptions which might, perhaps, be an effective and far easier, cheaper and less disruptive solution to the apparent lack of confidence in the current regime.

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41. We have also noted the implied criticism of the existing regulatory system at page 26 of the Consultation document where the Government suggests that it is *"important, more now than ever, that there is a robust framework for insolvency practitioners which is impartial and transparent"*. We were very disappointed to read that reference because there is no evidential base to it. Taking "impartial" first, neither the Government, nor the Insolvency Service, has been able to identify provide any case where, upon independent review, it has been determined that a partial approach had been taken in favour of an IP. As for "transparency", we believe that there is more transparency about our processes as a result of the published inspection reports by our many oversight regulators than there is likely to be in the future if a Government Regulator is created (see paragraphs [ ] for our concerns about this).

42. We were also disappointed to see the repeated reference to the current regulatory arrangements being weak due to there being "competition" or even *"unhealthy competition"* between the RPBs. If this point has been analysed in any depth, the following points would have been identified to counter the hypothesis:

    a. ICAS mainly licenses Scottish IPs and has no competition from other RPBs because none has the specialist knowledge of the important differences in the Scottish insolvency regime;

    b. CAI mainly licenses Irish IPs and has no competition from other RPBs because none has the specialist local knowledge of the important differences in the Irish insolvency regime;

    c. ICAEW and the IPA specialise for the most part in very different areas of the insolvency market, with ICAEW licensing the majority of IPs who work in the largest firms on the largest insolvency appointments and the IPA specialising in the licensing of the large volume IVA providers;

    d. A review of the RPBs' licensing records would show that there has hardly been any movement of licensees from one RPB to another after their initial approval (which you might expect to see if the RPBs were actively competing);

    e. There is no evidence of any of the RPBs having engaged in any open marketing processes to lure IPs away from other RPBs.

43. The Consultation Document also fails to identify the significant advantages that are present when there are more than one regulatory body in a sector which can be seen most readily in insolvency regulation in the efforts which the RPBs make in relation to educational initiatives. ICAEW's insolvency specialists put on conferences, events and webinars and issue regular news bulletins and sector updates in order to help prevent IPs making mistakes or to improve their practices but also to ensure that the IPs believe that they are getting value for money in the licence fee they pay.

44. The Consultation Document also fails to recognise that there are a number of regulatory bodies involved in other areas of professional services without any

concerns being expressed by the relevant oversight regulators or government departments about the dangers of competition. For example, there are currently 9 legal services regulators including ICAEW and 4 recognised supervisory bodies who regulate firms carrying out audit work. No concern has been expressed by the Government or the respective oversight regulators in those sectors about the presence of *"unhealthy competition*". This is due to the statistics there too proving that there is, in reality, very little movement.

Response to criticisms arising out of the Call for Evidence

45. We note the reference in Annex C to the negative responses on the performance of the RPBs had emanated in the main from *"creditor groups, credit unions and the non-profit debt advice sector"*. While we respect the important work that these bodies do in order to achieve the best outcome for businesses and individuals who are affected by insolvency, none of these bodies has any insight into the way in which ICAEW and the other RPBs are structured or the way in which regulatory work is carried out.

46. Given that lack of insight, we are disappointed that the Government appears to have attributed considerable weight to these criticisms in reaching its decision that the RPBs should lose their role in insolvency regulation. It would be unfair, in our view, if more weight was attached to the views of bodies lacking the relevant insight than might be attached to the views of this board which includes 6 lay members who have very good insight into how our regulatory work is carried out.

47. As the Government has chosen to summarise and aggregate the responses at Annex C, it is also not possible for us to know whether, for instance, a concern was based on one specific case or on a series of cases or whether the concerns relate to the performance of just one RPB or all RPBs. Despite this, we have sought to respond below to the summary of criticisms on page 28.

<u>Failure to hold to account / ineffective disciplinary outcomes</u>

48. As we have already explained, it is impossible for an IP to be cleared in respect of a complaint without the complainant being able to exercise his or her right within our processes to challenge any decision taken by an ICAEW case manager to reject the complaint. If a complaint is then rejected, this decision will have been approved by a committee (Investigation Committee) consisting of a parity of lay and chartered accountant members with a lay Chair.

49. If what is meant by *'ineffective disciplinary outcomes*' is that sanctions are not sufficiently robust, this is an issue which stems from the Common Sanctions Guidance which is produced by the Insolvency Service and issued to the RPBs for use by our decision-making committees and tribunals. The interpretation of that guidance is undertaken either by committees or tribunals with lay member parity or lay member majorities.

<u>Inconsistences in outcomes</u>

50. As we have already mentioned, there should not be a great disparity in the sanctions applied for similar types of misconduct either by different Tribunals within ICAEW or

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across RPBs given the requirement to apply the same starting points and aggravating / mitigating factors set out in the Common Sanctions Guidance.

51. However, we would accept that there are inconsistencies in outcomes even among ICAEW's own decisions. Why? Inconsistent outcomes are inevitable for a number of reasons. The first and most important reason is that it is very rare that any two cases coming before our committees or tribunals have exactly the same facts. Many cases can turn in terms of liability or sanction on the difference of just one fact in a fact pattern. The second reason for inconsistencies is that the membership of our Investigation Committee changes every year as it is refreshed with new members replacing those who come to the end of their term. The regular refreshing accords with regulatory best practice and is common among all regulators. New members may place a different emphasis on the same set of facts.

52. The third cause of inconsistencies would arise from the way in which our Disciplinary Tribunals are convened. Tribunals of 3 members are convened from a pool of 16 members and this means that two insolvency cases considered in the same month may be determined by two completely different tribunal panels. Again, the convening of tribunals from a pool of members is standard regulatory practice and this process is reviewed and approved by all of our oversight regulators.

Delays

53. While some delays on the investigation of complaints made to ICAEW will be due to delays in response by case managers (usually caused by spike in workloads/resignations reducing numbers temporarily), delays are often caused by one or more of the following factors:

    a. Delays in obtaining information/evidence from either the complainant or the IP. The investigation teams can do little about the former and can bring separate complaints against any IP who fails to respond to enquiries but this will inevitably delay the process;

    b. Volume of evidence/documentation which is required to be reviewed (in some cases, our investigation teams will be provided with 100,000+ documents);

    c. The time which elapses before conclusion may be elongated by the Investigation Committee deciding to refer a matter (usually a serious matter) to the Disciplinary Tribunal or an IP opting to have an oral hearing, and possibly further by an IP appealing against a Tribunal decision. All of these processes are necessary in order that ICAEW's disciplinary scheme is compliant with the right to a fair trial under Article 6 of the European Convention on Human Rights.

Many of these delaying factors are outside of the control of a RPB as a careful balance must also be struck between the cost of licence fees and staffing levels. If licence fees are increased too high, this could lead to a further unhealthy diminution of the limited number of licensed IPs in the UK.

54. Delays in the investigation of complaints have also been more frequent due to an increase in recent years in IPs and their firms instructing solicitors from an early stage who are more likely to make procedural challenges and to demand more time to respond to enquiries. There has been a distinct change over the last decade in how many complaints are now defended by legal representatives.

55. While all efforts are made to minimise delays – which not only frustrate complainants but add to stress on IPs being investigated – complaints about delays in the investigation of complaints into whether professionals are culpable of misconduct or poor performance are a common complaint impacting all regulators, whether professional bodies or otherwise, including the Financial Reporting Council[4], the Financial Conduct Authority[5] and the Legal Ombudsman[6]. We consider that, before making any radical changes, the Government considers whether any new Government Regulator will be immune from a similar complaint. Given the concerns we express later about the proposed operational costs and quality of staff dealing with complaints, we believe delays are more likely to increase at the Government Regulator.

Not impartial

56. We have already set out above the reasons why we believe that such criticisms are unfounded.

Concerns about IPs' fees

57. We were pleased to see that the Government did balance out this criticism by noting that some respondents pointed out that there was no role for a regulator if creditors have approved the fees charged by an IP.

58. Our investigation teams find this a particularly difficult area to determine whether to bring complaints against an IP. This is because an assessment can only be subjective because the Insolvency Service has not issued any guidance as to what hourly rates it would consider to be acceptable for IPs to charge or guidance as to what overall fee it would expect IPs to charge for standard aspects of their work. If such guidance was issued, assessments could be made against this. Many experienced regulatory staff members will have been away from practice for some time and any complaint will require expert evidence from a current IP to succeed. Even then, complaints may flounder without any issued guidance because this whole area is very subjective unless there is evidence that charges have been made for work which has not been done.

Lack of compensation / redress

[4] Page 39 of the Kingman Review Independent Review of the Financial Reporting Council (publishing.service.gov.uk)
[5] FCA criticised for slow response to complaints | Financial Times (ft.com)
[6] News focus: Legal ombudsman - a rebalancing act | News | Law Gazette

59. This criticism results from a fundamental misunderstanding of the role of a RPB and the outcomes which members of the public can expect from any disciplinary scheme which is set up to consider allegations of misconduct by members. While our Committees and Tribunals can order IPs to refund or waive fees, the disciplinary scheme has been set up so as not to interfere with /duplicate/undermine a complainant's right to seek financial compensation through the Courts.

60. We have, however, welcomed to a limited extent the proposal by the Government to put in place a compensation scheme to cover some losses suffered by creditors/third parties (see our response to Questions 18-20).

Unethical practices of volume IVA providers

61. As explained above, ICAEW does not license many IPs who work for volume IVA providers so we will leave any rebuttal of this criticism to the IPA.

Response to the criticisms by the Insolvency Service

62. We were disappointed to read the criticisms levelled at the RPBs by the Insolvency Service at pages 29-31 of the Consultation Document. Very few, if any, of these criticisms have either been shared with the PSD Chief Officer or his team prior to the publication of the Consultation Document or have featured in any of ICAEW's published inspection reports. While many of the criticisms duplicate those raised in the Call for Evidence, we feel it important to make the following observations on what has been said:

    a. Delays
    The Insolvency Service is well aware of the size and complexity of some of the complaints which must be investigated by our insolvency team and which can, with little notice, take up most of all of the time of one or more case managers.

    Investigation cases like Silentnight and Comet would always have taken many years to investigate for any regulator given the volume of material. They have required hundreds of hours of case manager time and the Insolvency Service have followed these cases closely and seen what impact they can have on the progress of other matters. They also understand the difficulty in maintaining the right level of case managers when workloads can change radically overnight and the increasing difficulty in recent years of recruiting quickly for any additions or replacements.

    b. Sanctions
    Sanctions imposed on IPs are those considered appropriate by committees/tribunals/appeal panels with lay member parity or majorities working from the starting points in the Common Sanctions Guidance which is issued by the Insolvency Service. We were not aware that the Insolvency Service had any specific or general issues with the level of sanctions imposed. We would also note that the Secretary of State was provided with a

power to substitute a higher sanction in any matter and has not used that power once since it came into effect in 2015.

c. <u>Fee complaints</u>
As mentioned above, the Insolvency Service has failed to issue any guidance for the RPBs to use to assess the reasonableness of fees and to ensure consistency of approach among the RPBs. Without such guidance to bring complaints based on two differing subjective assessments of reasonableness absent evidence of charging for work which was not done.

d. <u>No progress made on introducing compensation payments</u>
The Insolvency Service has made little effort since 2016 to devise or promote any compensation scheme concept which would need to be implemented by all RPBs for it to work. The Insolvency Service knows that this is a complex area and we have pointed some of the pitfalls and fundamental problems in establishing any such scheme in our response to Questions 18-20.

e. <u>Volume IVA providers</u>
As above, we will leave the response to this criticism to the IPA which licenses the IPs working at most of these entities

f. <u>Delays in issuing standards by the Joint Insolvency Committee (JIC)</u>
What is not apparent from the commentary is that the Insolvency Service is part of the JIC so, in effect, its criticisms are directed as much at itself as the RPBs who only make up a minority on the JIC.

63. We are concerned generally at the lack of balance in the observations of the Insolvency Service throughout this section. The number and seriousness of its concerns are not reflected in the many inspection reports it has published about ICAEW's work as a RPB over the past few years. We have also noted the recent very positive published inspection report on the IPA. The Insolvency Service has first-hand insight into the difficulties which we, and other RPBs, have faced in recruitment, retention of specialist staff, the increases in recent years in the number of complaints, the increasing legal challenges our teams are meeting from lawyers acting for IPs and the increasing amount of time which is sucked out of the system in dealing with complainants who will not accept the rejection of their complaints by independent committees and tribunals.

64. We had expected that any criticisms would be balanced by references to the incredible amount of work which ICAEW's insolvency investigation team carried out on the investigation of the administrators/liquidators of Comet, the record penalty imposed in that matter and the challenge made in the High Court to the payments being made by the Liquidators. The Insolvency Service followed closely the progress in that case and echoed (privately) the plaudits we received (publicly) from the High Court Judge for the efforts we had made to try to protect the interests of unsecured creditors. Disappointingly, none of this is repeated in this largely negative section where the emphasis appears to have been to focus on negatives to support the Government's proposal to remove the RPBs from the regulatory framework.

Lack of use of remedial sanctions by the Insolvency Service

65. Our concern on this front is amplified by the evidence showing that the Secretary of State, through the Insolvency Service, has only once used any of the remedial powers provided to it by the changes to the Act in 2015. Those new powers (the ability to issue directions, issue public reprimands and impose unlimited financial penalties on the RPBs) were introduced in order that the Secretary of State had tools to ensure compliance with the new regulatory objectives which stopped short of de-authorisation of a RPB and the chaos that would bring. The stark fact is that ICAEW and two of the other RPBs have not been the subject of any remedial action at all.

66. We consider the references in the Consultation Document to new regulatory objectives and use of these powers to be confusing and contradictory. At page 25, the Government cites the introduction of the new powers for the Secretary of State through the Small Business, Enterprise and Employment Act to take action against the RPBs to ensure compliance with the regulatory objectives and to apply to Court to sanction an individual IP yet states*;*

    "the policy of the Insolvency Service, as oversight regulator on behalf of the Secretary of State, has generally been to resolve any issues through discussion and agreement with the relevant RPB, rather than through use of formal sanction, as stated in the 2015 guidance on the new regulatory objectives and sanctions".

    Yet, just 9 pages later, the Government says;

    "given that a non-legislative, advisory approach has been tested over the last 6 years and has not had the desired effect, it seems unlikely that continuing with such an approach will lead to any significant improvements."

67. The two sharply contrasting statements beg the question; if the new approach adopted in 2015 has failed to such a degree why has the Secretary of State not been issuing remedial sanctions much more frequently and to more than one RPB? If the approach of resolving issues with the RPBs *"through discussion and agreement"* has failed so badly, why have actions not been escalated? How does the Secretary of State/the Insolvency Service explain the lack of action if performance in many areas of the RPBs is as poor as is made out to be in the section headed *'Findings of the Oversight Regulator'* starting on page 29.

68. It would also have been helpful if the Insolvency Service had been more transparent in this section on the number of times it has tried to resolve issues through discussion and agreement. We understand from the PSD Chief Officer that none of those discussions have taken place with ICAEW during this period and we are the largest RPB by the number of IPs licensed. As a board, we do not get the sense of issues reaching even that level from our review of the published inspection reports. This can only lead to one of two conclusions; either the RPBs' collective performance has been as poor as has been made out in this section in which case the Insolvency

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Service has failed to articulate this in its inspection reports and then failed to act properly in respect of the powers provided to the Secretary of State by Parliament, or the RPBs' performance has been much better than set out and the failings have been exaggerated to support the Government's proposals.

Lack of use of power to impose a higher sanction

69. The changes in 2015 also provided the Secretary of State with the power to intervene in any disciplinary case to impose a new higher sanction where it was considered that the sanction imposed by a RPB had been too low. This power to intervene has not been used during the last 7 years. Why? Our reasonable presumption, and the presumption of the other RPBs, must be that the Secretary of State, through the Insolvency Service, is satisfied with the sanctions which have been imposed on IPs in all matters during that period. But how is this consistent with the following statement on page 29 expressing the Insolvency Service's view of the performance of the RPBs in relation to sanctions:

    "There are issues with repeat misconduct not being considered on a cumulative basis and this can result in relatively low level and repeated sanctions without fundamentally addressing the underlying mischief. The sanctions therefore do not act as a sufficient deterrent or effectively tackle systemic issues."

    If there had been such issues, why has the Secretary of State not used his powers to intervene in any case since the power was granted in 2015?

70. If the Insolvency Service does not consider the concerns it has raised in the Consultation Document to be sufficiently serious to merit any form of remedial action (not even the issue of directions), and if the Secretary of State does not consider any sanction imposed by any of the RPBs over the last 7 years to be so low that they need to intervene, then surely this is the context through which they should be viewing the concerns being expressed by those responding to the Call for Evidence who, however well meaning, have no actual insight or knowledge into the work of the RPBs.

Summary of evidential case for change

71. The Government's evidential case for change appears to be built upon a combination of:

    a. criticisms made by respondents to the Call for Evidence who, despite their important work in assisting those impacted by insolvency, have little or no insight into the governance arrangements at RPBs, the amount of independent inspection and review or the restrictions on what the RPBs can do within the confines of the current regulatory framework;

    b. criticisms made by the Insolvency Service, in its capacity of Oversight Regulator, which have not been voiced in its communications with the RPBs over the past 7 years, which are not borne out in most of their published inspection reports on

performance and which are not consistent with failure by the Insolvency Service to use the remedial powers provided to them 7 years ago.

72. The most disappointing aspect of the Consultation Document is that the criticisms of the RPBs work in it will only enhance further the misperception that the RPBs are not sufficiently competent, resourced and robust to regulate insolvency. In our view, the Secretary of State/the Insolvency Service has missed a golden opportunity to champion all of the good work carried out by the RPBs and to correct some of the incorrect and misleading narratives from those pushing for the RPBs to be removed (we have set out our concerns about the APPG report and other commentary later). In particular, we are disappointed at the failure to mention the work carried out by ICAEW in relation to the Comet Group Limited in this part of the Consultation document despite the Insolvency Service having followed closely the High Court challenge in that matter and the disciplinary proceedings. Given this omission, we have set out the salient facts in the first of two case studies below:

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CASE STUDY 1: COMET GROUP LIMITED

73. This investigation into an original complaint regarding the objectivity of the Deloitte partners in accepting and acting as administrators of Comet was the largest investigation which ICAEW has undertaken with the investigation team having at one point a document database containing over 100,000 documents. It required a huge investment of internal resources accounting for three quarters of the working hours of the insolvency investigation team's senior manager for several years and heavy personal involvement of the PSD Chief Officer.

74. The disciplinary action was ultimately the subject of a settlement agreement in January 2020 which resulted in Severe Reprimands and fines (£50k / £25k) for two of the three administrators and a Severe Reprimand and a £925k fine for Deloitte.

75. The ICAEW insolvency investigation team were restricted by the current regulatory framework from bringing any complaints against the firm for vicarious liability for the actions of their principals/staff so all complaints regarding recklessness/incompetence had to be directed at the individual IPs only. A complaint was only brought against Deloitte because the ICAEW insolvency investigation team considered that the firm did not have adequate engagement acceptance processes in place at the time of the acceptance of these administration appointments and this was a breach of the general Code of Ethics. The largest part of the fine related, therefore, to a complaint brought outside of the insolvency regulatory framework.

76. The fines against the individual IPs were based on the starting point figures in the current Common Sanctions Guidance approved by the Insolvency Service and based on personal liability. While the CSG provides for the disgorging of profits made from an engagement as part of a financial penalty, the individual IPs did not receive the revenue and there were no profits made by them which could be disgorged. As vicarious liability complaints could not be brought against the firm, there was no question of any disgorgement of profits.

77. What was not known until after the publication of the settlement due to a confidentiality ruling by the Judge was that the ICAEW insolvency investigation team had challenged in the High Court during the investigation whether the same IPs, in their capacity as Comet's liquidators should be allowed to continue to make distributions to Comet's secured creditor before a full investigation had been carried out into the validity of its security.

78. In making this challenge, ICAEW not only incurred considerable legal fees (engaging two specialist QCs) but also took on a significant legal costs risk if the challenge were to fail as the IPs were represented by a team from one of the leading UK law firms and a QC. The insolvency team proceeded with its challenge nevertheless because it considered it important to protect the interests of Comet's unsecured creditors (holding debts to a value of £250m) who had no knowledge of the potential issues relating to the security or the way in which Comet had been acquired. The Judge, Sir Nicholas Warren lauded ICAEW's intervention to protect creditors, agreed with

ICAEW's concerns[7] and appointed an Additional Liquidator to carry out an investigation into the circumstances of the acquisition of Comet by OpCapita/HAL in February 2012 including the granting of the security.

79. As a result of that challenge and that appointment, the Additional Liquidator is currently pursuing an action against Darty, the former owner of Comet, for damages in excess of £80m based on the alleged payment of a preference which was one of the concerns raised by ICAEW's legal team. This claim would not have been brought if the ICAEW insolvency team had not taken a significant reputational and financial risk in challenging the actions of the Comet liquidators in Court taking a significant financial risk

[7] *"The ICAEW is the only respondent to this application. It has no financial interest in the liquidation. As it says, it is not part of its function, and it has no desire, to carry out the further extensive factual enquiries which it considers are likely to be necessary to determine whether, and if so how, to challenge the HAL Debenture. The persons with financial interests include the unsecured creditors (the major creditor being HMRC) but none of them is joined. None of them has been informed of the ICAEW's concerns, nor has it been suggested to any of them that there may be grounds on which to challenge the validity of the HAL Debenture or that they have not even been provided with information concerning the circumstances leading to its execution. Having been joined, the ICAEW has made extensive submissions. Although it may be correct that the ICAEW itself would have no standing to seek directions under section 112 or otherwise, I am obviously entitled to take account of its submissions in determining the directions which I should make on the Liquidators' application."* (paragraph 6)

"I can state my conclusions thus far reasonably briefly in the light of my lengthy commentary and analysis above. In my judgment, the concerns of the ICAEW are justified. This is not a case of the Court being asked to substitute its own judgment for the commercial judgment of the Liquidators. This is a case where there is a real and justified concern that the decisions of the Liquidators concerning pursuit of the directors and challenging the HAL Debenture do not reflect a properly informed exercise of commercial judgment. The complaint is not that, on the basis of all the material available, the Liquidators have made decisions outside the range of reasonable decisions, but that they have (i) made their decisions without proper consideration of the material which is available and (ii) made their decisions without proper investigation of matters which should have been investigated. Further, in my view, there is a conflict of interest, or at least a perceived conflict of interest, which makes it all the more important that decisions are made after consideration of all of the relevant material and after all appropriate enquiries have been made so that it can be seen that decisions have been properly made and also that the decisions fall within the range of decisions which a reasonable liquidator could make." (paragraph 173)

80. We consider that the Comet case should have been mentioned as a counter-balance to the recital of the criticisms made by respondents to the Call for Evidence about whether the RPBs could be *"truly impartial because of the dual roles of the RPBs as membership bodies and regulators"* in the same way it noted the counterpoint to the complaints regarding IPs' fees. The identify of those being challenged – three partners in one of ICAEW's largest regulated firms - also raises questions about the Government's statement at page 26 where it suggests that it is *"important, more now than ever, that there is a robust framework for insolvency practitioners which is impartial and transparent"*.

81. A more balanced commentary in pages 25-31 of the Consultation Document might also have focused on the current restrictions on the actions which the RPBs can take within the confines of the current insolvency regulatory framework – highlighted by the Comet case - which might have led to the perception of a lack of robustness in their regulatory work. These include:

    a. The inability to bring complaints against firms for misconduct or breaches of the ethics code by their principals and staff even in circumstances where the firm, not the IPs, has received all of the fees;

    b. The inability to impose sanctions which are inconsistent with the Common Sanctions Guidance where starting points – agreed with the Insolvency Service – are necessarily low because sanctions can only be imposed on individual IPs and must be based on their own personal income not the fees generated by an engagement which are collected by their firms

82. These issues could be cured instantly by a move to firm regulation. This is something which ICAEW has been championing for many years and referred to again in our response to the Call for Evidence. While we have welcomed in our response to Question 12 the Government turning its attention to this reform, we still consider that the changes are not radical enough. We do not believe yet that the Government has understood just how much of a game-changer a change to firm regulation could be and we do not understand why the Government has not sought to make that change first to see whether it would have the significant impact the RPBs expect before changing the whole of the current architecture including those who have been hamstrung in their work through the failure to address that change earlier. While the APPG has pointed to the outcome in the FRC case against Silentnight as an example of why an independent regulator should replace the RPBs, we believe that it is actually the best example of how the Government might not need to tinker with the RPB system if it introduced firm regulation as we have explained in the second case study below:

CASE STUDY 2: FRC/SILENTNIGHT

83. This is an unusual case which has been the subject of two parallel investigations by the FRC and ICAEW into the conduct of Mr Costley-Wood and KPMG. The FRC called in this matter under the Accountancy Scheme[8] after receiving a complaint from the Pensions Regulator while, at the same time, ICAEW opened an investigation as it was the licensing body for Mr Costley-Wood. It was ultimately decided that, to avoid duplication, the FRC's investigation should focus on the conduct of Mr Costley-Wood in the period prior to the administration of Silentnight and ICAEW would focus on the taking of the administration appointment.

84. After completing its investigation, the FRC served three formal complaints on both Mr Costley-Wood and KPMG in respect of Mr Costley-Wood's conflict of interest in advising Silentnight at the same time as advising HIG, a private equity fund which was interested in acquiring the Silentnight business and in relation to misleading communications made by Mr Costley-Wood to the Pension Protection Fund in the weeks leading up to the pre-pack administration. The FRC was able to bring identical complaints of misconduct against KPMG as those made against Mr Costley-Wood because this is provided for within the rules of the Scheme[9].

85. After a Disciplinary Tribunal hearing, the final Tribunal report in 2021 concluded that Mr Costley-Wood and KPMG had committed misconduct, excluded Mr Costley-Wood as an ICAEW member, imposed a Severe Reprimand on KPMG and imposed a financial penalty of £13m on KPMG and a £500,000 penalty on Mr Costley-Wood.

86. The Tribunal's decision to impose a £13m penalty on KPMG was based on the FRC Sanctions Guidance (of March 2021) which does not specify starting points but which, instead, requires the FRC Tribunal to take into account various factors including; the seriousness of the misconduct, the financial benefit derived from the misconduct, the duration of the misconduct, whether the misconduct risked the loss of a significant amount of money, whether there was an intentional or unintentional disregard of professional standards and the nature of the breached standards, whether reoccurrence is likely, whether KPMG's own controls were tight enough.

87. The FRC Tribunal took into account in arriving at the appropriate financial penalty to be paid by KPMG the following specific information:

    a. The Guidance (paragraphs 36-40) which suggested that the Tribunal should consider the annual revenue of KPMG in its last full year (£2.3bn)

    b. The financial gains which KPMG made from the misconduct in the form of administration/liquidation work (£1.5m) and further instructions by HIG in the

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[8] Accountancy-Scheme-Effective-1-January-2021.pdf (frc.org.uk) The Scheme started in 2004 and allows the FRC to call in complaints about the misconduct of members or member firms which raise important matters affecting the public interest from Participants which include all of the accountancy professional bodies

[9] This is set out at paragraph 4(9) of the Scheme

future (a proportion of £2.3m)

88. The FRC Tribunal took into account in arriving at the appropriate financial penalty to be paid by KPMG the following specific information:

   a. Mr Costley-Wood’s earnings as a partner (£833k in last full year)

   b. The fact that KPMG would indemnify him for the fine to the extent it is not covered by insurance.

89. We consider that this case stands as the best possible example of how the robustness of any regulator, and the perception of their robustness, would be improved instantly if the insolvency regulatory framework was changed to put the emphasis on the regulation of firms or, at least, to amend the existing legislation so as to allow complaints to be brought against firms. This is because the recipients of the fees earned by insolvency work are the firms and it is much easier and reasonable for any financial sanctions to be levied on firms to disgorge the profits which they have made from engagements which they should not have taken or where misconduct has taken place.

90. What has been misunderstood by many commentators, including the Chair of the APPG[10], is that this is not an example which supports the replacement of the RPBs by an independent regulator. Why? Because if the FRC had investigated this matter within the restrictions of the current insolvency regulatory framework it would not have been able to bring misconduct complaints against KPMG on the basis that it was vicariously liable for the actions of its partners. The FRC Tribunal would also have had to apply the Common Sanctions Guidance where the starting point for Mr Costley-Wood's conduct would have been less than £50,000. Any imposition of a fine more than 100% higher than the starting point would have been challengeable by judicial review on the reasonableness of the application of the sanctions guidance. It could not disgorged the profits made by Mr Costley-Wood because the profits on the engagements were made by KPMG. The PSD Chief Officer explained all of this in a letter to the Chair of the APPG but did not receive a reply and the press release remains unamended on the APPG website.

91. What the two case studies show quite clearly is that it is manifestly unfair for the Government to accept and promulgate the perceptions around the lack of robustness of the RPBs while not taking into account the restrictions which the current legislation places on their actions in circumstances where the Government has failed to heed for a long time the calls from ICAEW and the to the RPBs for a move away from the licensing of individuals.

Proposal to create a Government Regulator

92. We do not support the creation of a Government Regulator to take over the current responsibilities of the RPBs. While we can understand why the Government is considering proposals to create a single regulator despite our concerns about the lack of balance in the review of the RPBs' performance, we consider the proposal to introduce a Government Regulator to be an inappropriate and unsatisfactory development and one which is not in the public interest.

Why a Government Regulator instead of the other options?

93. It is fair to say that the suggestion that a Government Regulator should replace the RPBs came as a big surprise to most people involved in insolvency as this is a solution which has not been suggested before. Indeed, it is a solution which currently

[10] The APPG released the following statement.

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sits outside of the ambit of the very reserve power whose expiry prompted the Call for Evidence in the first place. This is an important factor in evaluating the merits of this proposal as it will require the Government to pass primary, as well as secondary, legislation to implement it. The lengthy period of implementation is a real concern to us and we believe that this cannot be in the public interest given the lengthy regulatory vacuum which this will create. We deal with this latter point below.

94. We do not understand the reasoning behind the rejection of the creation of new "body corporate" which does not require primary legislation and whose running costs will be no different to the running costs of the Government Regulator once these are properly evaluated. We have expressed our concerns later in this section and in response to Questions 21 and 22 in respect of the Impact Assessment. We also do not understand the rationale for why the Government has dismissed creating a new regulatory division of the FRC or the FCA if it is intent on moving regulation away from the RPBs. The Government also does not appear to have considered adopting a similar system as to that which is in place for audit whereby an 'independent' oversight regulator deals with high profile public interest aspects of insolvency work and oversees the remaining work carried out by the professional bodies.

95. We do not understand also how the Government has managed to interpret the principles issued by The International Association of Insolvency Regulators (IAIR) for insolvency regulation and best practice to requiring, or even supporting, the Government taking a bigger role in insolvency regulation. In developing its Principles for the Regulatory Regime for Insolvency Practitioners[11], IAIR noted that choice between state and "self-regulation" is not a mutually exclusive or 'either/or' one and that a fine judgement is required within the particular context of each jurisdiction to decide upon the balance of costs and benefits in imposing a particular form of co-regulation. It is not apparent from the consultation document that Government has undertaken such an exercise.

96. Indeed, the IAIR principles also reflect that many countries continue to operate with a system of co-regulation by the Government and professional co-regulation as is currently the case in the UK with the Insolvency Service's oversight of the RPBs. As a result of our submissions in relation to the lack of benefits and potential increased costs of moving to the new Government Regulator model, we do not believe that the Government has made out a case at all for the proposed change of model. Indeed, the evidence we have put forward (supported by independent opinions from Oxford Economics and Leading Counsel) suggests that such a move would be a retrograde step and one that would undermine confidence in the UK's standing around the world in the important insolvency sector.

[11] IAIR Principles

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Conflicts of interest

97. We are concerned that, in suggesting the creation of a Government Regulator, the Government is in danger of replacing a system where there is a perceived conflict of interest in the operation of the RPBs with actual conflicts of interest at the heart of the new regulator.

98. The Government appears to have failed to appreciate that (1) most insolvency complaints are made by creditors who have lost money; (2) HMRC is likely to be a creditor in many if not most insolvencies, and the recent changes to restore HMRC as a preferential creditor will mean that HMRC, whilst not necessarily the largest creditor will be the principal recipient of any funds distributed to creditors and may be more active if there is any sense that the funds it receives may be harmed by the actions of IPs and (3) the Government itself is also likely over the next few years to be either the largest or one of the largest creditors of many businesses indirectly as result of the guarantees which it has given to banks who have provided financial assistance to businesses to keep them afloat during the pandemic.

99. The obvious conflicts which will arise in relation to these complaints, where one government body is assessing a complaint made by another government body or department, will be exacerbated further if the Government implements the disciplinary and enforcement processes set out in the Consultation document (see our concerns on this in our answers to Questions 7 & 8) and/or if the Government implements its proposal that the Government Regulator should be provided with the power to direct that compensation is paid by IPs/firms to one or more creditors where one of the beneficiaries (if not the largest) may be a government body or department. We have set out our concerns on this in response to Questions 18-20.

100. The Government also appears to have failed to appreciate that the new Government Regulator would be regulating, including the taking of enforcement actions against, IPs/firms who are competing directly with the Official Receiver's office and the unfortunate perceptions which will arise from these circumstances. It also appears to be content to create a new, 'more robust' regulatory framework for IPs/firms but which does not have any oversight or powers over the actions of the Official Receiver's office which looks both odd and inappropriate, and certainly not a level playing field.

Lack of accountability

101. Just taking this last point first, while we note that the Government states at page 35 that there will be *"an appropriate separation of duties"* between the Government Regulator and the Insolvency Service which houses the Official Receiver, it is unclear who is going to police or oversee the separation of duties. It appears to us that, instead of deploying the Insolvency Service to monitor the separation of duties within RPBs (something done by all of our other oversight regulators) and to report publicly on this, the Government is proposing to move to a system where, despite there being actual conflicts of interest requiring a separation, there will be no oversight body tasked with ensuring that the separation is properly policed or public reporting of its

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work.

102. More generally, we are concerned that the new proposals do not appear to cater for any form of oversight of the operations of the new Government Regulator. This would mean that there would be no external monitoring of the level of resources, competency of staff, the robustness of licensing decisions, the reliability of grades for performance arising out of monitoring work and the reliability of decisions taken on liability and the appropriateness of sanctions and any compensation award. There would be no external body which IPs/firms could complain to if they consider that they are being treated unfairly which is likely to lead to a rise in judicial review challenges in the High Court.

103. There also appears to be no proposed oversight of the operation of the new disciplinary and enforcement processes. If we have understood correctly the proposed new disciplinary and enforcement processes, the Government does not appear to have contemplated the creation of a separate body to review the complaints which will inevitably be made by complainants about any decision to reject complaints made by the new Government Regulator's investigation team. We say "inevitable" from an informed viewpoint as a considerable amount of hours are spent at the moment by ICAEW and the other RPBs dealing with challenges which are made by complainants against any negative decision.

104. It would appear that the Government is suggesting that we move from a system where complainants have the right to challenge the rejection of their complaints before an independent committee or the right (when complaints are rejected post investigation) to ask for a full review by an external lawyer to the receipt of a letter from the new investigation team at the Government Regulator rejecting the complaint. If there is no body which is perceived to be independent from the Government Regulator which complainants can contact if they are unhappy, and no body which can hold the Government Regulator to account, this appears to us to be a serious erosion of complainants' rights. It will inevitably lead either to legal challenges (e.g. judicial review) or to a sharp increase in complaints being made directly to Ministers or local MPs.

105. Given the emphasis which the Government has attached to the need to establish a new system which is "transparent", it is difficult for us to see what is being proposed here other than a retrograde step compared to what is currently in place from the viewpoints of both IPs/firms and complainants. Without proper cross-checks and accountability it is difficult to see how this change will bring about *"greater public and creditor confidence in the effectiveness and independence of the regulatory regime"* (page 36)

Will it improve on the work of the RPBs?

106. While the Government claims also on page 36 that the Government Regulator will be able to *"able to act more swiftly and deliver quicker outcomes"*, it is not clear to us, for example, how the Government Regulator will deliver quicker outcomes if the caseload of complaints and investigations remains at its current level unless it is not

going to investigate complaints as thoroughly as they are investigated at the moment. What is it that will be done differently by the Government Regulator to produce these *"quicker outcomes"?* For reasons we have explained below on staffing, we believe that the reverse will be true.

107. While the Government also claims that the establishment of the Government Regulator will produce *"more consistency in complaint handling and disciplinary outcomes"*, no insight is provided as to how this will happen. If the Government were to implement the proposed disciplinary and enforcement processes, there will inevitably be inconsistency in complaint handling or outcomes given that no two cases have exactly the same facts.

108. If the Government realises after considering the concerns raised by Leading Counsel in the Opinion, which we refer to in our answer to Question 8 and which is in the Appendix to this response, that it will have no alternative but to create independent committees from which smaller tribunals are convened, they will be importing a further layer of potential inconsistency because different panel members will have different views on similar sets of facts on liability and sanctions.

109. We would suggest that there is nothing set out in the commentary in the Consultation Document which makes us believe that there will be any improvements in relation to these areas. This must then lead to questions as to whether anything will actually be gained by the implementation of this proposal particularly given the regulatory vacuum risk set out below and the additional costs we have set out in answer to Questions 21 and 22.

Set up and running costs

110. We have set out in detail below in our answer to Questions 21 and 22 our concerns about the Government's claim that it will be a *"more streamlined and efficient regulator"* and that the costs of the new Government Regulator will be either *"cost neutral"* or might even offer up *"opportunities for economies of scale"*. Our concerns have been supported by the review which has been carried out for ICAEW and the IPA by Oxford Economics, one of the leading forecasting and analysis consultancies. We believe that the reverse is true and that the running costs of the Government Regulator have been significantly underestimated.

111. However, we are concerned about the areas where the Government considers that it will be able to make cost savings and its likely negative impact on the promises which the Government is making about the future performance of the Government Regulator. For example, the Impact Assessment states that there is likely to be a cost saving on payroll for staff as traditionally lower salaries have been paid in the public sector. We know that we are not the only RPB which is trying to work out how the Government believes that it will be able to attract and retain experienced insolvency specialists to carry out its core functions for lower salaries than the RPBs are paying their staff currently.

112. The stark reality is that ICAEW and the other RPBs have always traditionally been at a significant disadvantage in the competition for insolvency specialists against the lure of private practice due to the difficulty of competing on salaries. ICAEW has traditionally managed to attract and retain good quality staff by offering non-financial benefits such as greater flexibility in hours, more options for homeworking but these benefits have now become universal because of the change in working practices brought on by the pandemic. This was all before the continuing sharp upturn in the number of businesses becoming insolvent and the spike that this has created in vacancies among firms for specialist insolvency staff. The continuing rise in insolvencies will just make recruitment and retention even more challenging. So, we are very concerned at what the Government is proposing to do because it is not clear to us where they will find staff with the specialist knowledge to carry out those roles for lower salaries than are paid by the RPBs at the moment.

113. If the Government were to stick to this plan, it will inevitably have to take difficult decisions on the quality of staff it is prepared to hire into these roles or the degree of insolvency expertise or experience they will have and, if this is the route to be followed, we do not understand how the Government can then confidently predict that the new Government Regulator will operate more efficiently, deal with matters more swiftly and ensure better outcomes. We know from our own experience that the ability to function effectively and efficiently depends almost entirely on the quality of staff which you can attract and retain. Of course, the Government could change tack and compete head-on with firms for staff but this will cause significant increases in running costs.

114. We also do not understand how the Government is proposing to deliver savings from the economies of scale given the necessary separation of duties and how such economies will get close to the economies of scale which we achieve by carrying out insolvency regulation as one of the many areas which we regulate with all of the different regulatory teams which include benefitting from shared IT systems and the services of in-house legal teams and committee and tribunal administrators, and the read-across from monitoring several different regulatory areas.

Loss of specialist regulatory staff / creation of regulatory vacuum

115. The importance of staffing is an area where, we believe, the Government has seriously underestimated the impact of the proposals which it published in December. In particular, the Government has failed to heed the clear warning we gave in our response to the Call for Evidence about the likely inability of ICAEW and the other RPBs to be able to hold onto our specialist insolvency staff if the Government published proposals indicating the removal of regulatory responsibility from the RPBs.

116. If we were concerned then (in October 2019) about the loss of staff, we are even more concerned now given that we did not know then that (1) there would be a pandemic which would accelerate changes to working practices which would remove the non-financial benefits we had deployed to attract and retain staff; (2) the damage caused by the pandemic to businesses and the withdrawal of the Government's

financial support would lead to an increase in insolvency work and an increase in the number of new staff required by firms to carry out this work and (3) the Government would propose the creation of a Government Regulator where staff would be employed on lower salaries.

117. While the Government acknowledges on page 18 that; *"there is a wealth of knowledge and skill amongst the existing 4 RPBs, which it is keen to retain"*, in publishing these proposals, the Government has failed to:

a. realise the scarcity of specialist insolvency regulatory expertise in the UK;

b. recognise the high risk that most current staff will opt to head back into practice for higher salaries rather than wait for the possibility of being engaged at lower than current salaries at the Government Regulator;

c. appreciate the enormous difficulty of persuading those staff to return to regulatory roles when the Government Regulator is set up (even if the Government is more realistic about salaries);

d. foresee the impact which the loss of specialist staff will have on the RPBs' ability to carry on their regulatory roles pending the creation of the Government Regulator;

e. foresee the lack of available options for the proposed outsourcing of specialist functions by the Government Regulator if the RPBs are all forced to withdraw from regulation during the implementation period.

118. Our PSD Chief Officer has already had to persuade members of our insolvency teams to remain in position, and not succumb to offers being made now proactively by firms to tempt staff, until the final outcome of this consultation is known, taking the Government at its word that it will listen to the feedback it receives. However, it has become clear that, while staff will wait to hear the outcome of the consultation, if the Government confirms that it intends to press ahead with its proposal, we are likely to experience a significant exodus of staff. It is also clear from the conversations held with staff by the PSD Chief Officer and members of his management team that no existing staff member would contemplate joining the proposed Government Regulator based on what they have read in the Consultation Document. We understand from the PSD Chief Officer from his conversations with his counterparts that this is a position replicated in all other RPBs.

119. As the Government has acknowledged that it will take a significant amount of time to implement the new Government Regulator, because it has opted for a solution requiring both primary and secondary legislation, there is, therefore, a real likelihood that the Government will create a complete regulatory vacuum for insolvency work of it publishes a feedback statement confirming that it intends to go ahead with its proposal. We do not consider any regulatory vacuum to be in the public interest.

120. Given that the 2015 reforms introduced the remedial sanctions which can be levied at the RPBs for poor performance/failing to satisfy the regulatory objectives, it will be difficult for RPBs to remain as regulators if staff numbers dropped below a critical level as the risks of continuing to regulate would be too high.

121. The exodus of staff will not just create an interim regulatory vacuum but it will undermine the ability of the new Government Regulator to operate effectively and efficiently as it would almost certainly need to start life with a significant lack of specialist insolvency staff if we are right in our belief that staff will head back to firms and are unlikely to be tempted back. The improvements promised by the Government would then be unlikely to be realised while new staff are recruited and trained. We understand from the PSD Chief Officer that it takes up to 6 months for a new recruit even with extensive insolvency experience to be trained either to carry out insolvency investigations or to carry out insolvency monitoring visits unsupervised.

122. While the Government has already indicated that it sees a potentially large role for the outsourcing of regulatory activities by the new Government Regulator, it is not clear to us which bodies/entities will have the necessary insolvency regulatory expertise to be able to offer credibly to take on any outsourced work. It seems unlikely that such work could be outsourced credibly to an entity other than a RPB and we are concerned as to how we would retain our own staff during the implementation period. Even if external outsourcing is an option, the Government has failed to realise that there will not be many options and it may, therefore, come at a premium cost.

The APPG Report

123. We have noted that there are several references within the Consultation Document to the report published by the APPG in September 2021 (the Report). While the APPG is, of course, entitled to express a view on the future of the insolvency regulatory framework, we are concerned at the weight which might have been given by the Government to the many criticisms within the Report without a proper understanding of how it was compiled and the accuracy or correct context around many of the facts used in that report. Given that it is important that the Government gets right the decisions it needs to make on the future of the framework, we consider that it is incumbent on us to comment on the Report in this response.

124. We should comment first on how the Report was compiled. ICAEW and the other RPBs were sent a questionnaire to complete by the authors of the Report which, in the view of the PSD Chief Officer, appeared to be seeking only information to support a conclusion that the RPBs should be removed rather than containing open questions. The PSD Chief Officer responded instead by letter setting out ICAEW's position on the review. No further information was sought from ICAEW other than one question asked about disciplinary actions taken against IPs connected to the HBOS Reading matter.

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125. There was no further contact from the authors of the Report and neither ICAEW, nor any of the current RPBs were provided with any opportunity to see a draft of the Report in order to ensure that it was factually accurate or to ask for various matters to be put into the right context. Neither ICAEW, nor any of the current RPBs, were asked to join the roundtable which was set up at the launch of the Report to provide a challenge to the conclusions reached in the Report.

126. Given this context, it is not surprising that we have concerns about a lot of what is said in the Report. The Report is divided between criticisms of aspects of the work of IPs and criticisms of the robustness of the current regulatory regime. If the Government shares some or all of the APPG's concerns about the various practices by IPs highlighted in the Report, the Government can legislate to prohibit some or all of those practices or can consider the current effectiveness of the JIC's role in setting standards for the profession.

127. Where the Report focuses on the performance of the RPBs, it contains numerous errors and takes facts completely out of context through a lack of insight into how the RPBs carry out their work including:

   a. Repeated references to the RPBs only being allowed to regulate their own members which is incorrect. Indeed, nearly half of the IPs currently licensed by ICAEW are not ICAEW members;

   b. RPBs get their funding from membership fees. This is incorrect. ICAEW operates its regulatory work on a self-funding principle and we set the regulatory fees for the next 12 months to cover the projected costs of ICAEW's regulatory work;

   c. Repeated criticisms of the level of fines issued. There is no mention of the fact that all sanctions are determined by independent committees and tribunals. There is also no mention that all of these committees and tribunals are, in turn, obliged to use the Common Sanctions Guidance which the Insolvency Service issues and requires the RPBs' decision-making committees to use and that this Guidance contains low starting points for fines because the sanctions can only be imposed on individuals under the existing regulatory framework.

   d. References to a low number of IPs having lost their licences between 2012-2019. While the figure is low, it does not include those IPs who choose to give up their licences after regulatory or disciplinary action is started. The references also do not make clear that the decisions on appropriate sanction are taken by lay parity or lay majority committees or tribunals.

   e. References to the delays in RPBs' investigations and, in particular, focus on the number of investigations taking longer than 6 months. The 6 month aim to complete is only realistic in respect of complaints which can be closed down without needing to be considered by independent committees and tribunals. The criticisms fail also to take into account the size and complexity of some

investigations. Matters such as those referred to in the Report such as Comet and Silentnight consist of 100,000+ documents and will clearly take a lot longer than 6 months to investigate properly whether carried out by a professional body regulator or a differently structured regulator. Indeed, taking again the case study used in the Report, the FRC's investigation of Silentnight took 5 years to reach its conclusion.

f. References to the low proportion of complaints received by RPBs which result in disciplinary action. While over 400 complaints per annum are passed on by the Insolvency Service Gateway to the RPBs, the Gateway errs on the side of caution (not unsurprisingly as it does not employ any experienced insolvency managers). This means that approximately 90% of the insolvency complaints passed to ICAEW are ultimately assessed as having no potential liability to disciplinary action. There is a robust safeguard against case managers rejecting complaints without proper consideration as complainants are entitled to challenge the case manager's decision before an independent committee and many do exercise this right.

   The Report also does not reference the important fact that onsite reviews of rejected complaints are carried out every year by a lay majority sub-committee of the Investigation Committee who have unrestricted access to the case files for complaints closed within the previous 12 months. The reports of the results of their reviews are submitted to the full Investigation Committee and to us for review. No issue has been flagged in any report submitted since the creation of the IRB in relation to any complaint being closed down without being properly investigated. This internal auditing process is carried out in addition to regulator inspection of complaint-handling by the Insolvency Service.

g. There are several references to IPs moving between RPBs to avoid sanctions. These statements are incorrect from a number of perspectives. The statistics would show that there is hardly any movement of IPs between RPBs. Secondly, if an IP has committed misconduct while licensed by a RPB, that IP cannot escape disciplinary action by moving to another body. This is because, firstly, the RPBs' disciplinary processes allow complaints to be pursued against former licensees (and this happens) and, secondly, because a standard check for a RPB receiving a new licence application will be a reference from the applicant's prior licensing body where information will be requested about any ongoing disciplinary matters. So, it is difficult to understand any of the case studies referred to in the Report.

h. There is a very unfortunate reference to *'chaps regulating the chaps'* in the Report. However, this comment is not borne out by any proper scrutiny of the degree of control chartered accountants and licensed IPs have over changes to policies and procedures and over decisions leading to regulatory or disciplinary action or over the sanction imposed. All such decisions are made by us as a lay parity regulatory board or by lay parity or lay majority regulatory

or disciplinary committees.

i. While reference is made to the powers incorporated into the Act in 2015 to ensure the RPBs' compliance with the new regulatory objectives. There is no reference to the fact that, in the 7 years which the APPG has reviewed, there has only been one instance where a remedial action has been taken against one RPB.

128. We should also address the specific criticism which is made about ICAEW's inactivity in relation to HBOS Reading. As the PSD Chief Officer made clear in his correspondence with the APPG, the ICAEW insolvency investigation team has never received any complaint about the conduct of any IP relating to that matter nor has the team seen any evidence emerging out of any of the reviews into what happened which we can assess to determine whether any disciplinary action should be taken against any IP licensed by ICAEW. If complaints had been made and/or evidence had emerged, an investigation would have been commenced. In those circumstances, we are unsure what further could or should be expected of ICAEW.

Conclusions:

Do nothing? / Non-legislative reform? / the Government's preferred option

129. For all of the reasons we have given above, we do not believe that the Government has made out its case for removing the RPBs from their role in the insolvency regulatory framework.

130. However, we agree with the Government's rejection of the 'Do Nothing' option as there are clearly reforms which the Government can make which will make a significant improvement in the effectiveness and efficiency of insolvency regulation. These include, in particular, the introduction of firm regulation accompanied by a revised Common Sanctions Guidance setting out new sanctions for firms which can properly focus on the disgorging of profits made out of appointments which should not have been taken or where there has been misconduct.

131. We are disappointed that the Government has not considered a further option which would be to stagger the introduction of the reforms in order to see whether, for example, the introduction of firm regulation would on its own result in a more robust regulatory environment. While this reform would not solve the perception issues around the continued work of the RPBs, the Government could help to give more confidence about the RPBs work by:

a. Publicising good work carried out by the RPBs and commenting favourably on achievements (e.g. ICAEW's successful High Court challenge in the Comet case). It is not helpful for the Insolvency Service only to comment on negative events

b. Providing the Insolvency Service with the power to issue internal governance rules similar to those issued by the Legal Services Board to all legal service regulators and giving the responsibility to the Insolvency Service to carry out an annual check of the robustness of governance arrangements at the RPBs and to publish an annual report

132. The Government could also then consider creating a new reserve power in the legislation to introduce a single regulator if the RPBs failed to demonstrate that they were working effectively with the new firm regulation powers. The Government could then draft that power to be as wide as possible so that it covered off the option of creating a Government Regulator (if the Government still considered that to be a suitable future option) so that the interim period for the introduction of a single regulator would be much shorter than the current proposed implementation period.

133. If the Government is concerned about the speed of response of the JIC or wishes to introduce a separation between standard-setting and monitoring/enforcement, the Government could also legislate to reserve to the Insolvency Service the responsibility for standard-setting (albeit we would urge strongly that there is a process for IPs to comment on any practical problems with any intended changes and to flag up changes which might be useful and effective).

134. While we recognise that our conclusions might be labelled as self-interest, we are expressing this view as a board made up of a parity of lay and chartered accountant members with a lay Chair which has a unique insight into the workings of the current insolvency regulatory framework. We also know first-hand how many layers of oversight of work of ICAEW staff which provide us, and should provide the Government, with confidence in the retention of the RPBs. We believe that a staggered approach to the reforms would be the best option in the public interest because it stands the best chance of retention of the specialist insolvency regulatory staff which are essential to insolvency regulation in the UK.

135. If, however, having considered this and other responses, the Government is still uncomfortable about leaving insolvency regulation in the hands of the RPBs based on their current structures, we would welcome the opportunity to set out other potential solutions which we have been discussing with the other RPBs since the consultation was issued.

QUESTION 3: OBJECTIVES FOR THE NEW GOVERNMENT REGULATOR

Do you consider the proposed objectives would provide a suitable overarching framework for the new government regulator or do you have any other suggestions? Please explain your answer.

136. While we do not support the proposal to introduce a Government Regulator, we have approached the answer to this question on the basis of what should a new single regulator have as its objectives if the Government decided to introduce a single regulator.

137. Our overall view is that the current Regulatory Objectives in the Act are appropriate to guide the work currently carried out by the RPBs and, other than updating the language to capture the proposed regulation of firms, we do not see that the objectives need to change just because the nature of the regulatory body might change. Indeed, we note that no explanation has been provided in the Consultation document as to why some of the additional changes have been made to the wording. We note also that the Consultation document references that responses to the Call for Evidence in 2019 generally considered the current objectives were fit for purpose which also suggests changes are not necessary.

138. We would also suggest that a comparison is undertaken between the proposed objectives and the proposed functions of the regulator to establish whether the functions enable the objectives to be fulfilled. We note, for example, that there is a reference in the proposed objectives to the regulator "supporting" those regulated but the functions of the regulator set out later in Chapter 5 do not mention anything regarding support for IPs and future regulated firms. If there is a mis-match, the new regulator is likely to fail to achieve the stated objectives.

139. Our main specific concern concerns the wording of the first proposed objective:

    "secures fair treatment of those impacted by insolvency and acts impartially and transparently with regard to those regulated"

    We see a number of issues with the wording of this objective. Firstly, the opening words widen significantly the regulator's objective from securing fair treatment for those affected by the acts of IPs to securing fair treatment of all impacted by insolvency. Recasting the new objective to cover all persons / entities impacted by insolvency is a significant extension of the objectives.

140. As we referenced in our response to the Call for Evidence, the treatment by an IP of those directly impacted by insolvency is directed by the requirements of the Act which requires an IP to administer an insolvency in a particular way. Actions which on the surface may appear unfair and which might adversely impact a person or entity, such as the sale of a bankrupt's home, or the receipt of a capped sum as a redundancy payment, are simply the consequences of an IP discharging their

statutory duties to maximise returns for creditors. The new wording creates a very wide population whose interests are required to be taken into account when judging the actions taken by an IP where specific interests of those within that population may be diametrically opposed. The definition would draw in, for example, an energy customer who has been automatically moved to another supplier by OFGEM, after the failure of their original supplier. Is the Government really intending that any new regulator should be getting involved in such situations to secure fair treatment?

141. We are also concerned as to how a Government Regulator, set up as set out in the Consultation document, is going to be able to satisfy, or be seen to satisfy, the requirements to act both "impartially" and "transparently". Our concern about "impartially" relates to an issue which we have raised already in our answers to Questions 1 and 2 which is that a Government Regulator will likely be put in the position of dealing with complaints which are made to it by other government bodies (e.g. HMRC) or other government departments (e.g. HMT in respect of the guarantees given for pandemic loans to businesses) or in trying to determine whether an IP or regulated firm has unreasonably preferred the interests of another government body or department. Even if a Government Regulator acts completely impartially in its assessment, it is unlikely to be seen to be in a position where it is acting impartially, particularly by those who lose out as a result of the decisions taken.

142. Our concern in relation to whether the proposed Government Regulator will be able to achieve the objective of acting impartially and transparently concerns the proposed disciplinary and enforcement processes. As we have explained in our response to Question 8, we believe the proposed process to offend the key tenets of Article 6 of the European Convention on Human Rights (ECHR) and this has been confirmed in an opinion prepared by Leading Counsel who specialises in regulatory work. If the objective is to be implemented with the current wording, fundamental changes would need to be made to the proposed disciplinary and enforcement processes for the new Government Regulator.

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QUESTIONS 4-5: NEW REGULATOR'S FUNCTIONS

Question 4: Do you consider these to be the correct functions for the regulator in respect of Insolvency Practitioners and in respect of firms offering insolvency services? Please explain your answer.

Question 5: Are there any other functions for which you consider the regulator would require powers? Please explain your answer.

143. While we do not support the proposal to introduce a Government Regulator, we have approached the answer to this question on the basis of what should a new, single regulator have as its objectives if the Government decided to introduce a single regulator.

144. We are assuming, though this is not referenced in the consultation paper, that in developing the list of functions, Government has considered the functions of comparable regulators including the RPBs. At a high level, the functions appear appropriate for a regulator. Indeed, the functions listed bear a close resemblance to the regulatory role currently carried out by the RPBs.

145. In our view, great care should be taken where a regulator has responsibility for standard setting in order to ensure separation of functions – we will expand on this further in our response to Question 6.

146. The functions are drafted at a high level, meaning it is difficult to know if anything is missing or what would be covered by the general descriptions. The following matters are not listed and should be among a new regulator's functions:

    a. Responsibility for determining whether insolvency licences for individuals or firms should be renewed or made subject to conditions or restrictions as a result of monitoring activity;

    b. Responsibility for the current bonding process or whatever system could replace the current arrangements. This could be part of authorisation, but if there is no fundamental reform of the bonding system, the Government's proposed modifications would impose obligations on the RPBs, which we assume would transfer to the new government regulator;

    c. Dealing with fitness to practise arrangements relating to health of IPs who are the subject of complaints (the proposed disciplinary and enforcement processes do not cater for how to deal with IPs who may be suffering from physical or mental health issues when an investigation is started);

    d. An obligation to organise through the Courts the transfer of appointments when authorisation ceases;

e. Any reference to anti-money laundering supervision. There is a brief reference to the need for discussions with OPBAS and the RPBs how this function might best be carried out under the new regulatory framework later in the chapter. But side-lining such an important function, is in our view an obvious omission in the proposals. We would have expected more detailed consideration of how anti-money laundering supervision will function under the proposed new arrangements to be included in the consultation document.

f. Responding to complaints regarding the way in which complaints have been handled / why complaints have been rejected

g. Responding to judicial review and other legal challenges

h. Enforcing and recovering fines and costs orders made against IPs

i. Liaising with the professional bodies of IPs to be informed of any investigation or disciplinary action which might be taken against them for their general conduct by that body

147. As noted in our response to Question 3 above, there is a reference in the proposed regulatory objectives to the regulator “supporting” those regulated, but the functions of the regulator do not mention anything as regards support for the insolvency profession.

148. There is also no mention of any function in relation to the proposed compensation arrangements whereby the Government regulator is proposed to have the power to direct the payment of compensation.

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QUESTION 6: RESPONSIBILITY FOR STANDARD-SETTING

Do you agree that the single regulator should have responsibility for setting standards for the insolvency profession? Please explain your answer.

149. We would first like to address the criticisms levelled at the Joint Insolvency Committee (JIC) in the Consultation document. We were surprised to see the JIC criticised in that way given that the Insolvency Service is an active member of the JIC and the current form of the JIC has been shaped by previous Government recommendations. It has also been the case for some time that the representatives of IPs (the RPBs) are in the minority in terms of JIC membership. We do not understand, therefore, how it can be suggested that a lay (non-IP) majority committee could be categorised as lacking independence in carrying out its valuable role.

150. The participants of JIC add real value to the standard setting process. There is limited expertise within the Insolvency Service of the practical application of insolvency law (beyond some bankruptcies and compulsory liquidations) or any direct knowledge of how creditors interact with insolvency procedures.

151. We are also disappointed to note the criticisms of the time taken to produce standards. The fact that a process has taken time does not necessarily mean that it is inefficient, but rather that it has been conducted properly and with rigour. The Consultation Document makes specific reference, as a bald statement, to the time taken to revise the Insolvency Code of Ethics as example of slow progress in standard setting. However, the revision of the Insolvency Code of Ethics was aligned with the introduction of changes to the main IESBA code to avoid conflicts between the Codes, and the Insolvency Service (as a member of JIC) agreed to this synchronisation on the timing of its introduction.

152. There are also obvious examples of the JIC being able to respond quickly where rapid change has been required. For example, when the change to the law regarding pre-packs was introduced, the JIC acted promptly and a new version of statement of insolvency practice 16 was produced to coincide with the legislative change.

153. We consider that, whatever insolvency regulatory framework is put in place for the future, it would be a retrograde step to allow the setting of standards to be overseen by a body or entity without any representatives of the insolvency profession, even if this is maintained as a minority representation. While we note that the Consultation Document refers to the possible creation of another non-statutory committee to provide advice to the proposed new Government regulator, it is unclear how well this will represent the views of IPs and how influential the committee as a whole may be on the changes to new standards.

154. We believe that it is important that those considering changes to standards are able to hear from IPs about practical issues which may be created by any increase in requirements from those who will be required to follow new or changed standards. It

would also be a significant loss to the standard-setting function if there was no opportunity for IPs, working on the frontline, to suggest changes to standards themselves to reflect the changing nature of the environment in which they are working.

155. We can make those statements from a position of experience as the ICAEW Regulatory Board has a parity of lay and chartered accountant members and the lay members find it very useful to hear from the chartered accountant members in the development of policy what practical issues may be created by a new policy or change in existing policy.

156. We do not agree that the proposed new Government regulator should have responsibility for standard-setting. We believe that the addition of this function alongside responsibilities to monitor and enforce could produce a conflict of interest whereby the Government Regulator could be influenced to lower standards in order to improve monitoring results/reduce investigations or raise standards in order to produce more monitoring failures and increase the number of enforcement actions. We have expressed our concerns in response to Question 8 about the potential lack of separation between key regulatory activities.

157. As we have made clear in our answers to Questions 1 and 2, we do not consider that the evidential case has been made out for the removal of regulatory responsibilities from the RPBs and we will be making a counter-proposal to the Government of what form of single regulator should be put in place if the Government is minded to dispense with the current RPB system. If a new single regulator is introduced which does not take the form of the proposed Government Regulator, we would suggest that the Government separates the standard-setting responsibility from the monitoring and enforcement responsibility by, perhaps, leaving the responsibility for setting standards with the Insolvency Service on the basis that it would create a policy committee which would have representation from IPs. The new single regulator would then be free of any accusation of conflict and could concentrate all of its efforts on licensing, monitoring and enforcing.

QUESTION 7: INVESTIGATION OF COMPLAINTS

Question 7: Do you agree that it would help to improve consistency and increase public confidence if the function of investigation of complaints was carried out directly by the single regulator? Please explain your answer.

158. We have commented already in our answer to Questions 1 and 2 on the criticisms in the Consultation document regarding the inconsistency of outcomes. We have explained how inconsistencies in outcomes and sanctions are inevitable in the work of all professional service regulators because:

    a. Each case will be determined on its facts and most cases have a unique fact pattern

    b. Members of independent adjudication committees change when they come to the end of their terms and the committees are refreshed and new joiners may hold different views or place a different emphasis on certain elements

    c. Where a tribunal process is operated (which happens in nearly all professional regulatory systems), tribunals of 3 or 5 members are drawn from a wider pool of members and the membership of tribunals considering complaints can change 100% between cases, and different tribunal members may again hold different views and place a different emphasis on the facts presented to them from another tribunal

    d. The current sanctions regime – governed by the Common Sanctions Guidance – provides for starting points for most common breaches or instances of misconduct but it also provides for each starting point tariff to be increased or decreased depending on the identification of aggravating or mitigating factors where some of these factors may be present in one case but not a similar case

    e. Sanctions are also allowed to be adjusted to reflect the financial means of the IP and this can make a significant difference to the outcome

    All of this points to the fact that a new single regulator, particularly one which incorporates an independent committee/tribunal system, will also produce inconsistent outcomes on liability and also on sanctions unless the new regulator has fixed penalties which do not allow for adjustments to be made even if there are aggravating/mitigating factors or to take into account the financial means of the IP which would be unfair and potentially subject to legal challenge.

159. As for whether the investigation of complaints by the single regulator would increase public confidence, we would again refer to our answer to Questions 1 & 2. We pointed out the likely erosion in public confidence in the regulatory system if the Government were to implement its current proposals as described in the Consultation document. The disciplinary and enforcement processes provide for investigations to

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be carried out by the new regulator and for the regulator also to determine liability and make recommendations for sanction without the complaints being considered by a body or persons independent of the investigation process. There is no mention of a right of appeal or review by a complainant against a decision by the investigation team to reject a complaint which contrasts sharply with the safeguards which are currently present within the RPBs' processes where complainants can challenge decisions to close down complaints before an independent committee and can also complaint to the Insolvency Service about the way in which their complaint has been handled. None of these checks and balances are present in the new proposals and we believe that this is likely to diminish public confidence in the processes, not increase it particularly given the very high percentage of insolvency complaints which are rejected and the increasing trend of complainants accepting decisions to reject.

160. We believe that the current system would give the public confidence if the Government/Insolvency Service worked with the RPBs to help change the misperceptions of how the RPBs operate and to emphasise the importance of the following safeguards/assurances:

   a. That there are internal governance arrangements in place within all of the RPBs which prevent the representative functions influencing the regulatory functions

   b. That the RPBs' regulatory work is self-funding and does require contributions from membership fees

   c. The independent decision-making in place with high degree of lay member involvement at all key stages of the investigation/disciplinary process

   d. The safeguards which are embedded within the ICAEW's processes to ensure that complainants can challenge the rejection of their complaints on assessment or after investigation

   e. The regular inspections which are carried out of the work by the RPBs' investigation teams (and the lack of evidence of any bias / influence

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QUESTION 8: DISCIPLINARY AND ENFORCEMENT PROCESSES

Question 8: What are your views of the proposed disciplinary and enforcement process and the scope to challenge the decision of the regulator? Please provide reasons to support your answer.

161. Having been concerned about the legality and fairness of what is being proposed, we have sought the views of leading regulatory counsel, Kate Gallafent QC of Blackstone Chambers (Leading Counsel), on the proposed process. A copy of Leading Counsel's Opinion can be found in Appendix 2.

162. In her Opinion, Leading Counsel has confirmed our concerns that the proposed process is not compatible with the requirements of Article 6 and has described it as *"manifestly unfair"*. It is of some concern to us that the Government appears to have failed to consider the essential elements of a fair process for the determination of misconduct allegations prior to the publication of the Consultation Document. It is also clear that there has been a failure to carry out any analysis of the processes in place for the determination of liability and punishment for all other professional service providers in the UK. If such a review had taken place, the Government might have realised that what it is proposing is far removed from the usual process for determination of misconduct allegations against professionals.

163. While Leading Counsel's opinion covers and supports our main concerns about what is being proposed to replace the disciplinary processes currently administered by the RPBs, we would also draw the Government's attention to the following additional points:

Independent committees / lay member majority tribunals

164. We were disappointed to note that the proposed new process seeks to remove many of the fundamental 'must haves' which ICAEW and the other accountancy professional bodies have been pressed to adopt by the Insolvency Service and many of our other oversight regulators over the last decade. These include:

    a. *The separation of the investigative work from those adjudicating on whether there may be liability to disciplinary action*

       The current proposals appear to provide for no separation between those conducting the investigation and those making the initial decision on liability which is the basis for the recommendation. This removes an important check and balance which is provided, for example, by ICAEW's Investigation Committee. This acts both as a protection for complainants and IPs to ensure that the objectivity of the decision-maker is not impacted by any issue which has arisen during the investigation process. We do not consider the current proposal for this to be in the public interest.

    b. *The need to involve independent lay members in the decision-making process in order to provide the 'public view' of conduct*

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The current proposal does not provide for any lay member involvement in the decision-making at any stage. Even the review by the Appeals Officer would appear to be a review by one person with expertise in insolvency. We consider the involvement of lay members to be important for the determination of insolvency complaints given that the test of whether an IP is considered to be in compliance with the Insolvency Code of Ethics is in many provisions what a *"reasonable, informed third party"* would think or consider. It is unclear how those important questions will now be answered.

c. *The right for a complainant to challenge to an independent body an initial decision by staff to reject a complaint*

No provision appears to have been made to provide complainants with a right to challenge a staff decision to reject. The creation of the process outlined in the Consultation document will therefore reduce complainants' rights from the current processes in place at the RPBs where no complaint can be rejected without the right for a complainant to ask an independent committee or an independent external lawyer (the Reviewer of Complaints) to review the decision reached by the case manager.

Given the importance attached by the Insolvency Service and all of ICAEW's other oversight regulators to maintaining this important safeguard for complainants we are very surprised that the process does not provide for this.

165. We cannot see an explanation on pages 45-46 or anywhere else in the Consultation document, as to why the current processes used by the RPBs are deemed to be inadequate or inappropriate. We are unaware of any correspondence from the Insolvency Service taking issue with any aspect of ICAEW's existing disciplinary process nor any criticism being expressed in any of the Insolvency Service's published inspection reports including its thematic reviews on complaint-handling.

166. We have recently overseen a two year project to review ICAEW's disciplinary and regulatory processes which will lead to the launch of a new disciplinary framework later in 2022 which will set out the way in which complaints against IPs as well as other members and licensees will be administered in the future. While we are proposing to maintain most of the current key cornerstones of the disciplinary process, the new Disciplinary Bye-laws and regulations have recently been part of a 8 week consultation period. We have had input from most of our oversight regulators into the new framework and there has been no objection from any of our oversight regulators to the maintenance of the current key cornerstones. If our current processes are considered to be inadequate, requiring a whole new process to be devised, we would have expected to have been told this by the Insolvency Service which was sent the new draft documents and an explanation of what was being maintained and what was changing.

Lack of a wider review of disciplinary processes for other professionals

167. Like Leading Counsel, we were surprised to see that a substantial part of the new disciplinary process had been based on the process employed by the Community Interest Company Regulator which deals principally with determinations on whether companies continue to qualify to be Community Interest Companies and is not a process which was devised to assess allegations of misconduct by individuals where an adverse ruling could lose them their professional livelihood.

168. It does not appear from anything said on pages 45 and 46 that the Government carried out a review of other regulatory processes in place in the UK for the determination of misconduct claims against professionals before selecting the CICR model. If it had done so, the Government would have realised that the processes currently administered by the RPBs are consistent with the processes in place at other regulators for the determination of such issues. Given that the Government has clearly considered the licensing regimes in place for auditors, surveyors and solicitors (referenced in the table on page 54) we are disappointed that the Government did not also review the disciplinary processes in place for those professionals and did not compare them to what the RPBs have in place before discarding the existing model. We are aware from the two year project we have undertaken on ICAEW's disciplinary framework that it is very similar to the current models used to determine misconduct issues in respect of most other professionals.

169. We hope that the design of the proposed new disciplinary processes has not been driven by a quest to show that the new Government Regulator might be able to operate more efficiently. We note that, flowing from the design of this process, no costs have been built into the Impact Assessment section on operating cost of the new regulator for the creation and administration of an independent committee to participate in the original adjudication of complaints nor for the cost of creating and maintaining a committee from which tribunal members can be drawn or the costs of administering these committees and providing them with independent legal assessors. If Leading Counsel is correct with her conclusion that the new process will be considered to be "manifestly unfair", the Government may have to think again about its chosen model and build all of these additional costs into the assessment of the new regulator's running costs.

Lack of separation

170. We share Leading Counsel's concern that the lack of separation between investigation and adjudication in the proposed process is even more concerning when, in the future, we may have the spectre of a Government Regulator investigating and adjudicating on complaints against IPs which have been made by other government bodies or departments. While Leading Counsel has correctly referenced complaints which may be brought by HMRC given its recently restored preferential creditor status, we can also see many complaints being brought in the future where HM Treasury is either directly or indirectly one of the major creditors of the insolvent business. This is due to the financial assistance provided by HMT, through banks, to businesses during the pandemic where that assistance has now been curtailed and businesses are expected to start repaying those loans.

171. We are also concerned about the perception issues which will also surround the staff at the new Government Regulator not only being given the power to make findings on complaints without there being any independent review but also being given the power to recommend the payment of compensation by IPs to creditors which could include another government body or department.

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QUESTIONS 9-11: DELEGATION OF FUNCTIONS TO OTHER BODIES

Question 9: Are there any other functions which you think should be carried out directly by the single regulator? Please explain your answer.

Question 10: In your view should the specified functions be capable of being delegated to other bodies to carry out on behalf of the single regulator? Please explain your answer.

Question 11: Are there any other functions that you think should be capable of being delegated to other bodies to carry out on behalf of the single regulator? Please explain your answer.

172. We are presuming that Question 9 runs on from Question 7 (not Question 8) which focuses on whether the Government regulator should carry out investigation work directly and is seeking to understand whether we believe that any other services should be reserved to the Government Regulator. We see Questions 10 and 11 as being the flipside of this question so we have combined our response to all of these questions to avoid duplication between answers.

173. We believe that the proper allocation of work between that which is reserved to the regulator and that which is outsourced to other bodies should be determined by a risk-based approach which would also take note of what is likely to become a high profile public interest matter. This is what happens currently in the regulation of other professional services such as audit where, following the implementation of the EU Statutory Audit Directive, the FRC was confirmed as the Competent Authority for audit in the UK and the legislation and accompanying Ministerial Direction provides that only the FRC can monitor audit work carried out for Public Interest Entities and only the FRC can impose sanctions for poor audit work in respect of Public Interest Entities. All other work can, and is, outsourced currently to the accountancy professional bodies who have been authorised to act as Recognised Supervisory Bodies and which include ICAEW.

174. Given our views about adopting a risk-based model, we do not believe that a single regulator should ideally be outsourcing any of the core functions listed on page 48 in their entirety. We are particularly surprised at any suggestion that the regulator would choose to outsource the entirety of the licensing function which would include key decisions which are taken about whether IPs' licences should be renewed based on the results of monitoring visits. We believe that the regulator should, instead, be considering where the main risks lie within each of those functions and reserving the work required to deal with the key risks to itself.

175. We also do not believe that it is sensible for a single regulator to reserve a whole function in its entirety to itself if it is considering the operation of an outsource model. For example, on the question of whether the regulator should be reserving the entirety of the investigation function to itself, this would mean reserving to itself the investigation of hundreds of complaints which appear to be lacking in merit almost

from the first read-through as the RPBs regularly receive and assess complaints from creditors who have lost money as a result of the liquidation of a business and appear to blame the IP for failing to ensure that they have been fully reimbursed. Other meritorious complaints relate to minor breaches of regulations or guidance. In a risk-based model, all of these complaints would not necessarily be reserved to the regulator particularly if the regulator is thinly staffed.

176. However, this model only works if there is at least the same level of expertise/experience among staff working in the top regulator as there is among staff working in the bodies/entities where the work is delegated. If the balance is the other way around, a risk-based model would suggest that the high profile/public interest matters should be outsourced with the regulator acting in a supervisory capacity only to ensure that complaints were being properly and objectively investigated by the subject matter experts.

177. While the commentary on page 48 of the Consultation Document notes that the power to outsource would not be confined to the RPBs, it is unclear to us which other "bodies" would have any of the requisite experience or expertise to be able to accept an outsourcing contract for any of the functions listed on that page. We have already made reference in our response to Question 1 & 2 that it is our belief that even the RPBs will not be in a position to accept any outsourced work of this nature as we are fully expecting to see an exodus of staff back to higher paid positions in firms if the Government confirms after this consultation that it is intending to go ahead with its plans to create a Government Regulator.

178. We also believe that the Government is unrealistic in its expectations in relation to the proposed contractual arrangements for this outsourced work. Firstly, there are likely to be few, if any, bodies who would be interested and considered sufficiently expert and experienced to accept outsourcing work. If there are only one or two options, those bodies will be in a strong negotiating position in respect of any penalty clauses which the Government Regulator might ideally want to insert into the contracts. It is also unlikely that bodies in those circumstances will agree to accept any form of outsourcing agreement which provides complete flexibility to the new regulator. Any interested party will want to ensure that there is a long term, fixed commitment from the regulator so that it has confidence to be able to retain and recruit the expert staff required to carry out the work to the standard required.

179. One final observation on this topic. We believe that the suggested model of Government Regulator outsourcing work (if possible) on contracts whose terms will be subject to the commercial negotiating position of the parties and with little remedy for poor performance other than contract termination pales significantly in comparison with the current regulatory landscape. Currently, the work is delegated by the Secretary of State to the RPBs and, as a result of the 2015 reforms, the Secretary of State can try to ensure optimum performance by using one or more of the statutory remedial powers. It would seem to us that all of this is very much a retrograde step.

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QUESTION 12: INTRODUCTION OF FIRM REGULATION

In your opinion would the introduction of the statutory regulation of firms help to improve professional standards and stamp out abuses by making firms accountable, alongside insolvency practitioners? Please explain your answer.

180. In its response to the Call for Evidence in October 2019, we urged the Government to focus its attention on the reform of the regulatory framework for insolvency rather than on the question of whether a Single Regulator should be introduced. This is because we believed then, and believe now, that the regulation of firms providing insolvency and restructuring services is something which would equip the RPBs better to carry out their regulatory role more effectively.

181. Our view is influenced by our experience of the oversight of other regulatory regimes where firm regulation is at the heart of the regulatory framework. We believe that this is the single most important change which could bring about much more effective regulation of insolvency services in the UK.

182. However, the regulation of firms alone will not in itself “stamp out” abuses (real or perceived). No system of regulation results in 100% compliance and whatever system of regulation is adopted there will inevitably be failures to follow standards. It should not be assumed that the regulation of firms will be a universal panacea, it will rather, better equip a regulator to address such failings.

183. We consider that this change is necessary to:

    a. Impose a responsibility on firms to ensure the right culture in the environment where IPs operate

    b. Allow the sanctioning regime to be more robust by bringing the recipients of the financial rewards within the regulatory framework

    c. Allow firms to be informed about the regulator’s concerns about an IP

Improving culture

184. In other regulated services overseen by us, such as audit and legal services, the regulation of the firm, rather than the individual, has placed a responsibility on the firm to monitor and address issues with its culture which is appropriate where a poor culture may ultimately be a challenge to an individual insolvency practitioner in the performance of their duties. These other regulatory frameworks also place the primary responsibility for compliance with the law, regulations and ethical principles on firms which is appropriate in circumstances when the financial rewards for providing insolvency and restructuring advice are almost invariably received by firms, not the individual insolvency practitioners.

185. While the introduction of firm regulation would be welcome, we believe that it is not of itself sufficient to drive improved standards. We believe that it needs to be

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accompanied by requirements around whole-firm quality procedures. For example, the Government could introduce something along the lines of the new quality management standards that are being introduced in audit towards the end of 2022 https://www.icaew.com/technical/audit-and-assurance/faculty/audit-and-beyond/audit-and-beyond-2021/audit-and-beyond-june-2021/quality-management-isqm The key requirements of a whole firm quality management system cover:

a. the introduction of risk management processes;

b. a new emphasis on quality management;

c. changes to monitoring and remediation, including the requirement to use root cause analysis; and

d. documentation requirements

More robust sanctioning regime

186. Indeed, criticisms have been levelled at the RPBs by the APPG and other commentators for the low level of sanctions which are imposed on IPs who are found to have been in breach of a regulation or where misconduct is upheld. However, it does not appear to be properly understood by any of those commentators that the RPBs are hamstrung from imposing significant financial penalties, even if they considered such sanctions to be appropriate, due to the fact that their powers are limited to sanctioning the individual IPs who do not receive the financial rewards.

187. The RPBs must abide by the Common Sanctions Guidance which is produced by the Insolvency Service and which the RPBs have been asked to follow in order to produce consistency in sanctioning outcomes. However, the CSG prescribes relatively low fine starting points due to the fact that the liability rests under the current legislation with the individual IP, not the firm, and the latter receives the financial rewards. While, in the latest version of the CSG, an attempt was made by the Insolvency Service to focus the RPBs on ensuring that sanction disgorging the profits made out of an administration or liquidation appointment which was taken in breach of the Code of Ethics, the individual insolvency practitioner did not receive any revenue and, therefore, no profits can be disgorged.

188. The recent outcome of the complaints taken by the Financial Reporting Council against KPMG and David Costley-Wood (details of which are set out in the second case study at pages 27 and 28) highlight completely the need for firm regulation and how the lack of it is the current biggest failure in the system and how RPBs would be far more effective in their work if this was changed.

189. In that case, the very large fines were possible only because the FRC had brought these complaints under the Scheme and was not constrained by the current insolvency regulatory framework with its focus on the regulation and sanctioning of

individual IPs. If the FRC had been bound by the current framework, it would have been unable to bring vicarious complaints against KPMG for the failures of Mr Costley-Wood. It would also have then been constrained by the current CSG when considering what financial penalties could be imposed on Mr Costley-Wood. The starting point fine in the CSG would have been £10,000 and the fine could not have been increased to have reflected a disgorging of profits accruing as a result of the misconduct because KPMG, not Mr Costley-Wood, received all of the fees reviewed by the FRC Tribunal.

190. While it is referred to in many places in the APPG Report, we consider it to be disappointing that the APPG did not realise that, far from a case which could be used to highlight the weaknesses of the RPBs, it is actually the best possible example of showing why a change to firm regulation is the single most important step which the Government could take to make insolvency regulation more effective. Indeed, if this had been done back in 2019 when we had urged the Government to focus its attention instead on this area, there may now not be room for any criticism to be levelled at the RPBs by the APPG or any other commentator for being weak due to the size of their fines.

191. While ICAEW received a £1m fine in January 2020 as a result of the settlement of its disciplinary action against the Deloitte partners who were the administrators of the Comet Group (details of which are set out in the first case study on pages 24 and 25), only £75,000 was imposed in fines on two individuals for complaints brought under the Insolvency Code of Ethics. The balance of £925,000 was paid to settle a separate complaint which had been brought under the General Code of Ethics against Deloitte for failing to have in place adequate client take-on procedures at the time of the appointments taken at Comet. The existing insolvency regulatory framework did not allow ICAEW to bring vicarious complaints of misconduct against Deloitte which had received all of the fees earned during this high profile administration.

Firms being informed of complaints about IPs

192. Another good argument for the introduction of firm regulation is that this stops IPs from concealing regulatory or disciplinary issues from fellow partners in their firms at least until such time as liability is established and the sanctions published. Due to the framework focusing on the individual, the RPBs are only able to deal and correspond with the insolvency practitioner whose work has been called into question.

193. The RPBs cannot raise issues regarding the conduct of that IP more widely within the firm where the IP works because it has no jurisdiction over the firm and its dealings with the insolvency practitioner must remain confidential between the RPB and the IP. The firm is, therefore, prevented from having the opportunity at an early stage to carry out its own investigation into the conduct which is the subject of the complaint.

194. This can produce (thankfully rarely) situations where IPs have been under investigation for some time without the knowledge of anyone else in their firms and have continued to act unethically or in breach of the law during the period of the investigation. If firm regulation was introduced, the firm's management would

immediately be on notice of the commencement of any investigation into one of its IPs and could put in place any necessary safeguards to protect creditors, the public and the firm itself. Given that IPs are often responsible for the handling and distribution of significant sums of money in insolvent estates, the lack of notice to the firm prevents the firm from ensuing

Not radical enough

195. We do not believe, however, that the proposal for firm regulation set out in the Consultation goes far enough. The Consultation document appears to suggest that the regulation of firms would be introduced as a bolt-on to the current system of licensing of individual insolvency practitioners. We believe that this would miss a golden opportunity to introduce more radical reforms and move to a system where the firm or entity is the primary licensee/registrant, with suitably qualified individuals being authorised within those firms to accept appointments.

196. We would strongly urge the Government to adopt a model akin to audit where the primary registrant is the firm and Responsible Individuals are also authorised by the regulator to sign audit reports. Such a system would place the primary responsibility on the firms earning the financial rewards while maintaining the very important personal accountability of individual insolvency practitioners. This would also ensure that only suitably qualified and experienced competent individuals would be nominated by their firms for approval to take on appointments and would place equal responsibility on the firms to ensure that all of their nominated individuals are properly trained and supervised in their handling of insolvent estates.

197. We recognise that such an approach may require a more radical rethink of the nature of insolvency appointments and the underlying legislative framework in aspects such as the vesting of assets in an individual and the personal liability of office holders. However, as the changes being proposed by Government will require changes to primary legislation, there is an opportunity to undertake more fundamental reforms to the regulation of those who undertake insolvency appointments.

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QUESTIONS 13-14: ADDITIONAL REGULATORY REQUIREMENTS

Question 13: The Government believes that all firms offering insolvency services should be authorised and meet certain minimum regulatory requirements, but that additional regulatory requirements should mainly be targeted at firms which have the potential to cause most damage to the insolvency market. What is your view? Please explain your answer.

Question 14: In your view should certain firms be subject to an additional requirements regime before they can offer insolvency services? If so, what sort of firms do you think should be subject to an additional requirements regime? Please explain your answer.

198. We have identified inconsistencies in the way in which the concern raised in Question 13 is referred to in the Consultation Document and Impact Assessment. Question 13 asks whether there should be special measures in place for firms which have the potential to cause most damage to the insolvency market, whereas the Impact Assessment refers to firms which pose the most risk and the explanation of the additional requirements regime on pages 56 and 57 refers to the risk the firms is assessed to pose to the public. These are not necessarily the same thing and different firms will be caught by different descriptions.

199. We believe that the Government needs to consider which perceived problems it is seeking to address through the suggested 'additional requirements regime'. Unfortunately, these perceived problems are not articulated in any detail in the consultation document. This makes it difficult to offer suggestions as to the scope of any additional requirements as different risks will require different mitigating actions. For example, the risk posed by a volume IVA/PTD provider potentially directing insolvent individuals into an inappropriate solution is different to the risk posed by the potential failure of a firm controlling large sums of third party monies or the failure of a firm managing an insolvency process for an entity of huge economic significance. The former could have a serious and direct personal impact on one or more members of the public and could affect their future prospects and mental health. The latter could cause a less than optimum outcome for either the survival of the business or the ultimate return to creditors due to the delays caused by another firm becoming involved. There is also then the risk posed by firms whose IPs act either recklessly or incompetently in their management of a company in administration or liquidation if all risks are considered.

200. The consultation document already identifies a desire to avoid regulatory duplication. Whilst a laudable aim, this additional regulatory requirements proposal adds a further layer of complication as there is no standardised form for an insolvency practice, and insolvency practices may already be subject to multiple layers of regulation due to their structure or may only be subject to regulation via the licensing of individual IPs.

201. Rather than impose additional 'entry' requirements for firms which pose the highest risk, the Government might instead consider the way in which firms are currently regulated in other sectors. For example, firms registered for audit are assessed for the risk within their operations and the safeguard employed by the FRC and the

Recognised Supervisory Bodies is to ensure that firms posing the greatest risk are subject to the most regular inspection regime so that the regulators stay close to developments within those firms and are able to pick up on early warning signs of any deterioration in the firm's resourcing or quality of work. This risk-based approach to monitoring has also been adopted by the RPBs and we see no reason why this way of monitoring risk should not be continued by whatever regulatory regime is in place for the insolvency market in the future.

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QUESTIONS 15-16: APPOINTMENT OF SENIOR RESPONSIBLE PERSON

Question 15: Do you think that regulation of firms should require a firm subject to an additional requirements regime to nominate a senior responsible person for ensuring that the firm meets the required standards for firm regulation? Please explain your answer.

Question 16. If so, would you envisage that the senior responsible person would be an Insolvency Practitioner? If not, please specify what requirements there should be for that role?

202. Given our experience of this in other regulated areas, we would welcome this proposal. This is something with which firms regulated by ICAEW for audit, investment business and probate are familiar. Under ICAEW's Audit Regulations, all firms are required to appoint an audit compliance principal. The role of the audit compliance principal is to be responsible for ensuring that the firm complies with the audit regulations and any applicable obligation that is imposed on the firm.

203. There are further parallels in the other areas we regulate:

    a. For legal services, firms are required by our Probate Regulations to appoint of Heads of Legal Practice and Heads of Finance and Administration within firms who are required to have adequate influence at board level and are bound directly into the statutory objectives in the Legal Services Act. These individuals are responsible for the conduct of the regulated service within the firm.

    b. Our Designated Professional Body (Investment Business) Handbook, requires firms to appoint a Contact Partner to ensure compliance with the Handbook.

    And these requirements apply to all firms regardless of their size.

204. We believe that it would not be particularly onerous for all firms to be required to appoint the equivalent of an audit compliance principal (or similar) for their insolvency work and it should be the case that all firms, irrespective of their size or risk profile meet the required standards. All insolvency practitioners are currently required to meet the obligations imposed upon them by the law and their regulator, and if firm regulation is introduced, it should be a given that firms should meet those standards too.

205. In our view, the key requirement is that the individual is of sufficient seniority to influence behaviours within the firm. There are obvious benefits in that individual being an insolvency specialist but it is important to recognise that not all firms will have the same structure and there may not be an insolvency specialist within the firm

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of sufficient seniority to influence firm-wide behaviours.

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QUESTION 17: SINGLE PUBLIC REGISTER FOR IPS AND FIRMS

Do you think that a single public register for Insolvency Practitioners and firms that offer insolvency services will provide greater transparency and confidence in the regulatory regime? Please explain your answer.

206. We would support the introduction of a public register of all IPs and firms regulated to provide insolvency services.

207. However, we would question whether this change will, on its own, *"provide greater transparency and confidence in the regulatory regime"*. We say this for two reasons. Firstly, there is little evidence in the work carried out by our insolvency investigation team that members of the public carry out much due diligence before deciding who to engage. Members of the public and even directors of businesses in trouble are much more likely to be swayed in their choice of IP by the likely costs of providing the desired services. In a recent case generating complaints, most creditors had chosen to engage a particular IP due to the low fixed price for MVL work and none of them had carried out any checks on the records published on our website about that IP's disciplinary history.

208. The creation of a single regulator is also not going to impact the many appointments made by secured creditors such as banks as their appointment of IPs will be based on who is on that bank's panel of trusted advisers, not the information contained on a public register.

209. The second reason why we are doubting the impact of the proposal on transparency and confidence is because there is already a lot of information available to members of the public and businesses about IPs if they were wanting information prior to deciding who to engage including:

    a. The Insolvency Service already has a public register of IPs on its website called "Find An Insolvency Practitioner. Although this register is operated on a non-statutory basis and does not include all licensed IPs, we understand that nearly all IPs' details are currently contained in that public database

    b. All RPBs publish all disciplinary and regulatory sanctions on their websites and are obliged to provide details of all such sanctions to the Insolvency Service to re-publish all of these sanctions on their website.

    c. ICAEW launched in 2021 a fully searchable disciplinary database containing disciplinary records for all of its members and firms and this includes disciplinary and regulatory sanctions against all insolvency licensees

210. As for compliance with professional standards and CPD, this is something which is currently checked by ICAEW's insolvency monitoring team when they carry out visits to check on the quality of the work carried out by IPs. Any concerns regarding the compliance with professional standards or the CPD policy will form part of the

monitoring report and will be discussed during the closing meeting. Serious breaches are reported and reviewed by the Insolvency Licensing Committee which will withdraw licences of any IPs whose work falls significantly below expected standards. Once a licence is withdrawn, that decision will be entered onto our disciplinary database and the IP will be removed from the Insolvency Service's list of IPs. So, given that the system for ensuring that only competent IPs are able to continue offering services is already in place, it is difficult to see whether the proposed change in creating the public register will increase transparency and confidence.

211. We would also note that we highlighted in our response to the Call for Evidence the importance of the Insolvency Service taking steps to measure confidence in the insolvency regime so as to provide a benchmark to measure the impact of any changes. However, we are not aware that anything has happened on this issue. Certain responses to the Call for Evidence are cited in the Consultation document as evidence of a lack of confidence in the regulatory regime but, as we have already mentioned, many of the criticisms have emanated from bodies who, while carrying out important work to assist those impacted by insolvency, have no insight or awareness of what processes are already in place and the degree of work which is currently carried out to monitor the competence and conduct of IPs.

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QUESTIONS 18-20: COMPENSATION SCHEME

Question 18. What is your view on the regulator having a statutory power to direct an Insolvency Practitioner or firm, to pay compensation or otherwise make good loss or damage due to their acts or omissions? Please explain your answer.

Question 19. What is your view on the amount of compensation that the regulator could direct an Insolvency Practitioner or firm to pay for financial loss? Please explain your answer.

Question 20. Which option or options do you consider would be most suitable to fund a compensation scheme for the insolvency profession? Alternatively, do you have a suggestion on how a compensation scheme for the insolvency profession might be funded? Please explain your answer.

212. We support the Government's proposal to introduce a compensation scheme for those suffering losses as a result of the actions of an IP to a certain extent. However, the IRB believes that such a scheme should be limited to making compensation payments to those who have no other way to claim compensation.

213. We consider the current proposal – that the new Government regulator makes awards of compensation – to be both impractical and potentially unfair (given the conflicts of interest highlighted below) and are concerned that this will blur the very important line between the purpose of a disciplinary and compensation schemes which are two very different animals with different purposes. If the Government is intent on introducing a compensation scheme wider than a scheme of last resort, we believe an independent ombudsman model with maximum payments as an alternative to litigation through the Courts is a much better alternative.

214. We also believe that that the Government should carry out extensive research of the potential impact on professional indemnity insurance before creating any new compensation scheme otherwise the Government may fail to maintain the necessary balance between ensuring access to compensation for creditors and ensuring that there are sufficient insolvency practitioners to cope with the increasing number of insolvencies in the UK.

215. Before expanding on these points, we consider it important to set out the current options for creditors or third parties seeking compensation for losses suffered as a result of the actions or omissions by IPs.

Current options for seeking compensation

216. We believe firstly that it is important that we comment on the reference on page [61] to certain RPBs' disciplinary arrangements having prevented the recommendations of the Insolvency Service's 2016 themed review of complaints being progressed. As we noted in our response to the Call for Evidence, in in February 2019, the

Insolvency Service communicated subsequently to the RPBs that it had concluded that all of the RPBs have some mechanism (although to varying degrees) to allow for their committees to make orders to recompense a complainant if the actions of the insolvency practitioner have resulted in some kind of loss. There has been no attempt made by the Insolvency Service to reopen any discussions about any enhanced process for compensation since 2019.

217. All current RPBs have the ability under the rules of their disciplinary schemes to provide for at least the repayment or waiver of professional fees charged by those they license if not further compensation arrangements.

218. Any person who considers that they have suffered loss and damage as a result of the actions of an insolvency practitioner has the right to seek compensation through the Courts. While there are references to creditors potentially being deterred from making claims in the Courts due to the potentially significant expenses which might be incurred in pursuing such claims, and the costs risk if a claim were to fail, there is no mention of the increasing number of litigation funders in the market or law firms who are prepared to take on cases on contingency fees and who may also be able to procure insurance against an adverse costs order.

219. It should also be borne in mind that, while there are often hundreds, if not thousands of unsecured creditors involved in the administration / liquidation of large businesses, the major creditors in the collapse of large businesses are likely to be well-funded companies or individuals who can afford the expensive costs of litigation and who frequently bring claims at the moment against insolvency practitioners if they consider they have suffered financial losses as a result of their actions.

Comments on the proposal that the Government regulator to direct payments of compensation

220. We are concerned that the introduction of powers for the Government regulator to direct that an IP should pay compensation or take steps to make good the loss and damage caused by his / her actions or omissions will blur the important distinction between the very different purposes of a disciplinary scheme and a compensation scheme.

221. A disciplinary scheme should operate to examine whether there is evidence of misconduct or whether the competence of an IP fell below relevant standards and, if so, the tribunal or panel should be focused only on determining what sanction should be imposed on an IP with the primary purpose of ensuring that the same conduct does not re-occur either as a result of requirements for training or by imposing sanctions which might act as deterrents. Sometimes this means that there may be little correlation between the amount of financial loss suffered by creditors or other third parties as a result of an IP's actions or omissions and the level of sanction which is imposed. This is because a tribunal or panel may determine that a high financial or non-financial sanction is necessary due to the egregious nature of the IP's behaviour even where there has been little or no loss. Conversely, low sanctions may be imposed where significant losses have been caused but the tribunal / panel

determined that this was due to an inadvertent breach.

222. The object of a compensation scheme is completely different. The tribunal / panel would be charged with trying to determine what losses have been suffered by creditors or third parties as a result of an IP's actions or omissions and how to quantify those losses so as to put the creditors or third parties back in the position they would have been in but for the IP's actions or omissions. This is a lot more complex to do than the determination of a disciplinary sanction as the tribunal / panel would have to consider the following issues:

    a. Whether the IP owed a duty of care to the creditor or third party making the complaint

    b. Whether the misconduct or lack of competence identified constituted a breach of that duty of care

    c. Whether the action or omission caused some or all of the losses suffered by the creditor or third party

    d. Whether the creditor or third party had contributed to their own losses by their own actions or omissions

    e. What position would the creditor or third party have been in but for the actions or omissions of the IP and how much compensation would need to be paid to restore the creditor or third party to that position.

223. The first issue would be in relation to whether an IP owes a duty of care to an individual creditor. Insolvency proceedings are collective arrangements and an IP's obligations are typically to the general body of creditors rather than to individuals. There is no traditional client relationship and no equivalent duty of care. Beyond the legislative framework, an IP's obligations to individual participants in an insolvency process will be governed by the Insolvency Code of Ethics and, in particular, the fundamental principles of professional competence and due care and professional behaviour, subject to the reasonable and informed third party test.

224. The Consultation also refers to restoring the parties to the position they would have been in had a wrongdoing not occurred. This raises questions about how such a scheme would work in practice. Repaying sums to the estate may be straightforward, but other actions could have a more fundamental impact on the insolvency proceedings. It would be very complicated to unpick transactions where an asset had been sold for example and the purchaser had acquired good title to the asset, or the proceeds distributed by way of dividend to creditors.

225. All of the issues in paragraph 222 will require to be worked through in order to determine whether any compensation should be paid and how much that compensation should be if the proposal is that the Government regulator's determination in this regard should usurp the current role of the Courts. All of the issues in paragraph 222 are complex legal issues with considerable amount of case

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law determined by Judges over decades with many of these issues featuring regularly in contested litigation before the High Court, Court of Appeal and even the Supreme Court. These are not matters which are capable of being determined by the tribunals which are currently deployed by the RPBs to determine liability and appropriate sanctions as they lack the requisite expertise.

226. Given the complexity of the issues which would need to be addressed, it is unclear who would be making the determination as to whether or not compensation should be paid and, if so, how much. We presume that orders for compensation would need to be tied into the process which is set out on pages 45 and 46 for the investigation of complaints against IPs. We have already expressed our concerns about the lack of separation between the investigation and adjudication functions within the Government Regulator but it is also clear that, if this proposal were to be implemented too, those involved in the initial adjudication process would need to have the requisite legal expertise to determine all of the issues set out in paragraph 222. There would also need to be a process to appeal against any decision made to award compensation and/or the amount of compensation and that Appeal Officer or Appeal Panel would also have to have the relevant expertise to determine whether the original adjudication decision was justified taking into account the factors identified in paragraph 222.

227. If creditors had suffered significant losses and an IP or firm was concerned that there may be an order made for substantial amount of compensation to be paid, we can envisage a situation where extensive legal submissions would be made in order to show either that the actions / omissions did not constitute a breach of duty of care or that they did not cause the losses which were suffered, in addition to arguments as to the appropriate quantification of compensation. All of this will require a significant degree of expertise within the staff employed by the Government Regulator to consider in the decision-making process at the end of an investigation.

228. We are also concerned about the conflict of interests which would be created by this additional power for the Government Regulator. The first conflict of interest which this additional power would create is at the adjudication stage where decisions are likely to be made simultaneously on a finding of liability as to whether a financial penalty should be imposed on the IP as a sanction and whether any an order should be made for the payment of financial compensation. Given that the payment of a sanction will provide funds directly to the Government Regulator which will offset the running costs of the Government Regulator (which we believe have been significantly understated) and an award of compensation will see payment of money to creditors, we are concerned at the tension which this may cause on the determination of amount of sanction and compensation.

229. The second conflict of interest arises due to the recent decision to restore HMRC as a preferential creditor which will lead to an increase in cases where HMRC is the major creditor on the collapse of a company. We also note that the Government is the guarantor of many of the loans which were provided to businesses during the pandemic which may make the Government either directly or indirectly the largest creditor of failed companies which received Government financial support. This puts

a Government Regulator, armed with this additional compensation power, in the position where it is having to determine whether any compensation should be paid (and, if so, how much) when the largest recipient of any compensation order may frequently be either another Government body or department. We consider the optics around that proposition to be particularly concerning.

230. The proposal also creates other issues such as, if one creditor makes a complaint about the actions or omissions of an IP and alleges that this has caused losses, is it being proposed that the Government Regulator would determine purely that creditor's claim for compensation even if it is identified that the same action / omission caused similar losses to one or more other creditors or third parties?

231. There is also no indication in the commentary in this section that there would be an intention to extend the Government Regulator's new power to award compensation to cover losses suffered by creditors/third parties as a result of the actions or omissions by the Official Receiver. Given that the latter currently competes with IPs for business, this seems to be creating an uneven playing field. However, to extend the current proposal to cover the Official Receiver also brings into stark focus another conflict of interest in one government body sitting in judgment on the culpability and the amount of compensation which might have to be paid by another government body.

232. Our final concern regarding this proposal is the incentive that this will give to creditors and third parties to make complaints about actions / omissions by IPs. We know from our oversight of the work carried out by the insolvency investigation team within ICAEW's Professional Conduct Department that there are already a disproportionate number of complaints made against insolvency practitioners compared to the providers of other accountancy services. This appears to stem from the fact that insolvency complainants have all lost money as a result of what has happened to their investment and appear determined to try any route which might provide them with the partial or full recovery of their losses. Complaints made against IPs already form the highest percentage of complaints which are closed on assessment by case managers due to complaints lacking any merit.

233. While limited compensation is available through ICAEW's disciplinary process, complaints are lodged, it appears, in the hope of an adverse ruling which can form the basis of a compensation claim in the Courts. Any change to the current system whereby there was a chance to obtain compensation by order of the regulator without the need to go to Court would almost certainly increase the number of complaints lodged against IPs, probably by a substantial amount. While many of these additional complaints may prove to be lacking in merit, this could increase substantially the resource required by the Government Regulator to review and determine any increased number of complaints. It is not clear that the Impact Assessment has factored an increased number of investigation case managers into the costings of the Government Regulator.

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Payments of £250 for distress caused/service failure

234. We have a number of concerns in relation to this further proposal which appears to be suggested in addition to the power to award compensation for financial losses.

235. We are concerned that IPs need to balance their obligations to the general body of creditors against any other obligations to individual parties. For example, a delay in responding to an individual creditor may be caused by a focus on an action that will aid recoveries into an estate for the benefit of the general body of creditors. Any payment of compensation for distress etc, must then be considered in the context of these wider obligations. Conversely, an IP who chose to focus on communicating with one individual could face criticism from the general body of creditors or from their regulator if that focus meant that the estate suffered as a consequence.

236. While a limit in payments to £250 does not seem to be something which might cause IPs concern about future penalties or cause concern to insurers, given that an IP will be acting for the whole body of creditors and, in the largest administrations/liquidations, the number of creditors could run into the thousands, the award of compensation, if rolled out across all individual creditors could amount to a considerable aggregate payment being made by the IP. We are concerned to ensure that the Government does not introduce anything which might cause a sharp and sudden decrease in the number of IPs as we explain in more detail below.

Ombudsman schemes

237. While we believe that any compensation scheme should be limited to one of last resort, if the Government was minded to introduce a broader compensation scheme, we believe that this should be done through an independent ombudsman which operates completely independently of the Government Regulator.

238. We also agree that, if the Government were minded to introduce an ombudsman scheme, it would probably not be appropriate for this to become part of the Financial Ombudsman Scheme even if consumer credit complaints, including complaints about debt advice, fall within the scope of FOS. While many insolvency complaints do not require particular insolvency expertise to determine, there are some, particularly in the largest, most complex cases, which could only be determined by someone with expert insolvency knowledge. We believe that there would be more merit in a standalone insolvency ombudsman.

239. If an ombudsman scheme were set up, we believe that the Government should make clear that such a scheme must be used for all compensation claims against an IP and that there would no longer lie any route to seek compensation through the Courts in order to avoid potentially parallel claims being made through both processes which would be unfair on IPs. We also believe that any scheme should provide for maximum compensation payment and this be set at an appropriate level taking into account the current limits in similar schemes like FOS and the Legal Ombudsman Scheme.

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240. However, we can see that, while the introduction of this type of scheme might work well in opening up an avenue of no-cost redress for smaller creditors such as small businesses and individuals, it would also deprive large sophisticated creditors with means of the possibility of pursuing their own much larger compensation claims through the Courts. This is another reasons why we believe that the Government should take care before introducing any new compensation scheme as it may not only upset the balance between access to compensation and maintaining a strong body of IPs but it will be difficult to devise a scheme which would work for both small and large creditors.

Concerns around impact on numbers of IPs / insurance arrangements

241. We believe that it is important that the Government seeks to ensure a careful balance between creating any process to award compensation to creditors/third parties and preserving an expert body of insolvency practitioners in the UK who are required to work in the public interest to maximise the returns to creditors from collapsed businesses. The altering of the current balance in favour of creditors could result in a sharp and sudden reduction in the number of licensed IPs.

242. Such a reduction could result both from the prospect of an increase in work carried out by IPs to respond to an increased number of complaints being made to the Government Regulator or to an ombudsman by creditors wishing to take advantage of a potential no-cost route to recovering some or all of their losses. The Government should not underestimate how much time will already be spent by IPs in answering investigation enquiries from case managers in the RPBs and IPs will fear that they will need to invest further resources to answer increased queries in the future.

243. A sharp and sudden reduction may also result from the reaction of IPs' insurers and the professional indemnity insurance market as a whole. We are acutely conscious from our oversight of the professional indemnity insurance arrangements in place for ICAEW firms that the number of insurers who are prepared to write policies for professional advisors has diminished sharply over the past five years. Given this marked and continuing trend, we believe that the Government should carry out extensive research on the appetite of the PII market to meet any increased insurance cover needs of IPs so as to be sure that PII coverage will be available for all existing IPs and that any increase in cost of premiums will not be so significant that it will drive IPs to give up their licences. This would not be in the wider public interest.

244. As is pointed out in the Consultation, there are only currently 1541 IPs in the UK with only 1254 being licensed to take on appointments. Given the rising number of insolvencies at the moment as a result of the withdrawal of the Government's financial support during the pandemic and due to the fall-out from the war in Ukraine, it is in the public interest now, more than ever, that the current number of IPs does not reduce dramatically.

Compensation scheme of last resort/overlap with bonding issues

245. Given the concerns expressed above about the conflicts involved in the Government Regulator being provided with powers to award compensation, and the risks which would be posed to a fragile IP cohort by the increased number of complaints which would be created by any new no-cost compensation scheme, we believe that the Government should focus its attention instead on trying to replicate a scheme which would pay out compensation to those who have suffered financial losses as a result of an action/omission of an IP but who have no other avenue to claim compensation.

246. We already oversee the administration of a financial services compensation scheme which was set up under the Financial Services and Markets Act 2000 to provide for compensation to be paid by anyone who has suffered financial losses as a result of financial services advice given to them by any person whom ICAEW has licensed to provide that advice. This scheme kicks in only where there are no other routes for the claimants to recover compensation.

247. Reference is made in the commentary in the Consultation to the Solicitors Compensation Fund (SCF) which is another potential model. The SCF provides for payments to be made to those who have suffered losses as a result of advice or a detrimental action or omission by a solicitor in circumstances where the solicitor was found to be operating without any professional indemnity insurance and has no personal means to pay compensation or where fraud has been committed by a solicitor.

248. While further actuarial risk assessment would be required, we could see merit in the Government proposing to ensure that no creditor is left without recourse to compensation by introducing a compensation scheme which would respond to claims where there is no other possible avenue of redress, where the IP has been found to have been operating with either no or insufficient PII coverage and where losses have been suffered as a result of the fraudulent acts of an IP including the theft of money from insolvent estates. Such a scheme could be funded by additional levies on IPs and firms (when the framework is extended to license firms) with contributions based on a percentage of revenue.

249. The introduction of this scheme could reduce or even eradicate the need for the current difficult bonding regime by providing an alternative means for compensation to be paid to those suffering losses due to thefts from insolvent estates. However, further thought would need to be given on how to incentivise successor administrators / liquidators to take on work relating to a book of appointments where theft is suspected.

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QUESTIONS 21-22: IMPACT ASSESSMENT

Question 21: Are there any further impacts (including social impacts) that you think need inclusion or further consideration in the Impact Assessment?

Question 22: What are you views on the above proposals for funding of insolvency regulation? Do you have any other suggestions for self-funding of regulation?

250. While we note that the Impact Assessment assumptions state; *'The scale and nature of costs and benefits cannot be precisely determined in advance'*. We were sufficiently concerned after our first review of the Impact Assessment about some of the key figures it used to compare the costs of the current regulatory system and the costs of setting up and running the new Government Regulator that we, together with the Insolvency Practitioners Association (IPA), commissioned Oxford Economics, one of the leading forecasting and quantitative analysis consultancies, to review the proposal. A copy of Oxford Economics' report (the OE Report) can be found in Appendix 3.

251. The analysis work completed by Oxford Economics, highlight that the Impact Assessment is incomplete, over-estimates current licence fee income and under-estimates costs related to the creation of the Government Regulator. The consequence of this is that the Impact Assessment underestimates the burden placed on the insolvency profession and, ultimately, those who receive the benefit of the services provided by IPs.

252. In relation to revenue, the OE Report has identified that the figure used in the Impact Assessment for current licence fee income to be £6.4m and that this figure is £1.1m or 18% higher than the aggregate income paid by IPs and received by the RPBs. This reduces immediately the claimed £2.3m cost saving of the new system from £2.3m to £1.2m.

253. The remaining £1.2m of the estimated cost saving is based on the Government's suggestion that the operational costs of the new Government Regulator would be £4.1m. The OE Report was not able to analyse this part of the proposal because the Government provided no breakdown of the £4.1m figure. However, the OE Report points out in the table (Fig 4) on page 11 that the £4.1m figure is a bare minimum figure as it excludes *"costs for services contracted out i.e. consideration of applications, provision of training and education and routine monitoring"*. This is because paragraph 135 of the Impact Assessment confirms that the £4.1m figure excludes the cost of outsourcing those functions.

254. It should also be noted that the £4.1m operational cost figure is based on the presumption that staff will be paid lower salaries at the Government Regulator than staff pay currently at the RPBs. While the OE Report notes that the true total cost of public sector hires is more than a private sector hire, we also believe that the Government Regulator will have to offer at least the equivalent basic salary being paid by the RPBs, if not a premium to current salaries, to have any chance of being

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able to secure any of the current experienced, expert regulatory staff in what is a highly competitive market for specialist professional staff which looks likely to remain so for the foreseeable future.

255. As no estimate has been given by the Government of the cost of outsourcing the review of licences, training and education and routine monitoring, the OE Report could not include a comparison of likely costs and proposed costs for this element. There is also considerable uncertainty as to whether it will be possible for the Government to outsource those specialist functions as this will depend on whether any third party would be able to offer these specialist services.

256. A further analysis has been carried out by the PSD Finance Director in an attempt to estimate the total operational costs of the Government Regulator based on the scenario that it is unable to outsource these specialist functions and would have to carry out all of this work in-house. Given that monitoring work is one of the most expensive functions of a regulator, the PSD Finance Director estimates the total additional costs of carrying out these functions in-house to be c£2.5m pa. This is based on an estimated number of additional staff on average salaries currently paid for such expertise. This includes sufficient reviewers to carry out c.220 monitoring visits pa at an average of 3 days per visit.

257. The combination of the overestimation of current licensing income by £1.1m and the underestimation of operational costs by at least £2.5m paints a completely different picture to that set out in the Government's proposals where it is claimed that there could be costs savings in changing regulatory systems of as much as £2.3m. In reality, that figure is inaccurate by at least £3.7m which means that the basic operating costs of the new regulatory system would be £1.4m more than the current system.

258. The PSD Finance Director also considers that a further cost of £0.3m pa should be added for further investment in continuous improvement. the Impact Assessment sets aside the investment and continuous improvement requirements in, for example, systems, governance, processes and staffing which are made by the RPBs. Such financial commitment is required to establish and operate a new and successful organisation in the long term. This is even more important when the Government Regulator is challenged to respond to a wider remit, with higher expectations than those currently placed on the RPBs.

259. The PSD Finance Director also considers that the operational costs should include costs for the outsourcing of the largest investigations. Due to the likely inability to recruit experienced insolvency regulatory staff, the Government Regulator may have no alternative but to outsource the investigation of the high profile, complex cases, such as Silentnight and Comet, to external law firms and forensic accountants. None of the costs of this outsourced work is currently included in the estimated running costs of the regulator. The outsourcing of the largest cases is estimated by the PSD Finance Director to cost £0.5m-£1m per year with no guarantee of this expenditure being recouped if no issues are ultimately identified or if any complaints are not

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ultimately upheld.

260. In total, therefore, the PSD Finance Director considers that a more realistic estimate of all operating costs results in the estimated cost savings of £2.3m in the Impact Assessment being at least a -£1.4m, but possibly as much as a -£2.7m, annual detriment to IPs/firms. Given the Government's stated intention to run the new regulatory system on a self-funding basis, this means a significant increase in the funding required from IPs/firms which would likely be passed on in higher charges to those impacted by insolvency whose returns will diminish further.

261. The PSD Finance Director also considers the exclusion of start-up costs and contracting-out, as non-monetised costs, from the Impact Assessment to be a serious financial omission. This also calls into question many of the conclusions such as those related to apparent benefits and costs in terms of social impact and to the profession, firms and IPs, and therefore to those who benefit from their services (e.g. creditors and distressed companies).

QUESTIONS 23-41: REFORM OF INSOLVENCY BOND REGIME

262. We have set out below our response to Questions 23-41 rather than breaking down our response into 18 different parts.

263. While we welcome the Government understanding that changes are necessary to the existing regime, we are disappointed that the proposed reforms in this section of the Consultation document are not as radical as some of the changes proposed in other areas. Bonding is a historical anomaly of the current regulatory framework as it was introduced at a time when the regulation of insolvency practitioners was in its infancy. The bonding regime has not moved with the times and remains a 1980's solution for what is now a very different profession. For example, even with the increases in the bond limits proposed in the Consultation document, it needs to be recognised that, for the majority of larger insolvencies, bond claims would exceed even the proposed increased limits, making the increase to the limits little more than a technical exercise.

264. We consider the biggest failing of the current bonding regime is that it is increasingly failing to achieve its primary objective which is to ensure that parties who have suffered loss through the fraudulent acts of IPs are restored to the position they would have been in but for the IP's actions. It is a fact that the substantial part of any payments now made by sureties will comprise the professional fees incurred by successor practitioners in conducting reviews and investigations over a number of appointments to identify where money may have been misappropriated. This problem cannot be resolved just by reducing or capping the amount of fees which successor practitioners can claim from the bonds as this would, in turn, lead to an even greater reduction in the numbers of firms who are prepared to take on block transfers of appointments from IPs who have had their licences withdrawn.

265. The nature of the bonding regime and the increased value of estates and costs of investigative work by successor practitioners means that the agreement of claims between sureties and successor practitioners has become increasingly difficult to conclude and has become a combative exercise with the involvement of law firms representing all parties including the RPBs. ICAEW, as the beneficiary of the bond, is confronted with threats of legal action if it refuses to assign the benefit of the bonds to successor practitioners to allow them to sue the sureties directly. At the same time, ICAEW is advised by loss adjustors working for sureties that any ready willingness to assign bond claims may lead to sureties leaving the market and/or a significant increase in the cost of premiums. There is a decreasing number of bond providers which has created inefficiencies in the bond market with IPs increasingly unable to "shop around" to obtain a better deal and, when claims do occur, the financial impact of settling those claims can be significant to the bond provider.

266. We would not, therefore, support the recommendation in the consultation document whereby the RPBs or a replacement regulator would become responsible for the payment of the bond payment should the insolvency practitioner not pay, as this is again simply further transference of responsibility to the regulator and it would do

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nothing to address the fundamental problems with the current bonding regime.

267. An insolvency bond is a complex product and requires detailed specialist knowledge to be properly understood. Therefore, we do not understand why the Government is proposing that the Secretary of State relinquishes the role of reviewing the bond wording when the Insolvency Service has developed its expertise in bond wording over many years. If the Secretary of State's role in this regard was to cease, all that would happen is that the role would effectively be transferred to whoever ends up regulating the profession whether the RPBs, an independent single regulator or the Government Regulator. That regulator would need to acquire or buy in equivalent knowledge which would take time and incur costs. We would recommend that, pending a wider review (which we suggest below), the Secretary of State retains the Insolvency Service's role of reviewing bond wording.

268. Compared to the fundamental changes proposed elsewhere in the Consultation document, the proposals in relation to bonding appear tentative in comparison. In our view, this is a missed opportunity to contemplate a more radical overhaul of the bonding regime now, particularly as an equivalent to the current bonding regime may not be a suitable scheme if firm regulation was introduced. We believe hat a proper wide review should be undertaken into the benefits and disadvantages of the current bonding regime and that any such review should seek to find a solution which removes the RPBs or any replacement regulatory body from being in the middle of disputes regarding the size of claims to be paid out by sureties. Such a review must seek to establish a way to achieve the fundamental objective to make good damage caused by IPs and should cover the following areas:

a. *Whether the bonding regime is worth preserving at all if victims of fraud are receiving only a fraction of bond payments;*

   At the moment, the main beneficiaries of bond payments are the successor practitioners who are reimbursed for their investigation work.

b. *Whether the bonding regime is required at all if the Government introduces firm regulation*

   One of the reasons for establishment of a bond regime was the degree of control which an IP has over the movement of money in and out of insolvent estates. If firms were regulated and became responsible by statute for supervising movements on accounts, this would introduce higher degrees of monitoring in-house. This could perhaps also be enhanced by a requirement on each regulated firm to obtain an external assurance report every year to confirm the integrity of the movements on the insolvent estates it is administering.

c. Whether the bonding regime could be replaced by a combination of other protections being enhanced for future victims of fraud.

   These might include the requirement on IPs to carry increased PII cover

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(which might be more feasible if firms became regulated as firms may be seen as a more attractive insurance risk) and the establishment of some form of compensation scheme like the Solicitors Compensation Fund where payments would be made to victims if either the IP has no, or inadequate insurance. Any fund could employ its own investigators who would review allegations of fraud and who could calculate the amount of money required to be paid out by the fund to restore victims to the position they would have been but for the fraud committed by the IP.

The compensation fund could be funded by a levy on all licensed firms/IPs and be built up over a period of time with maximum payments being increased as the fund is built up.

269. ICAEW has experience as a regulator of operating compensation schemes, for its Part XX arrangements for investment business (the Chartered Accountants' Compensation Scheme) and probate (the Probate Compensation Scheme). We would be happy to discuss the operation of these schemes with the Insolvency Service.

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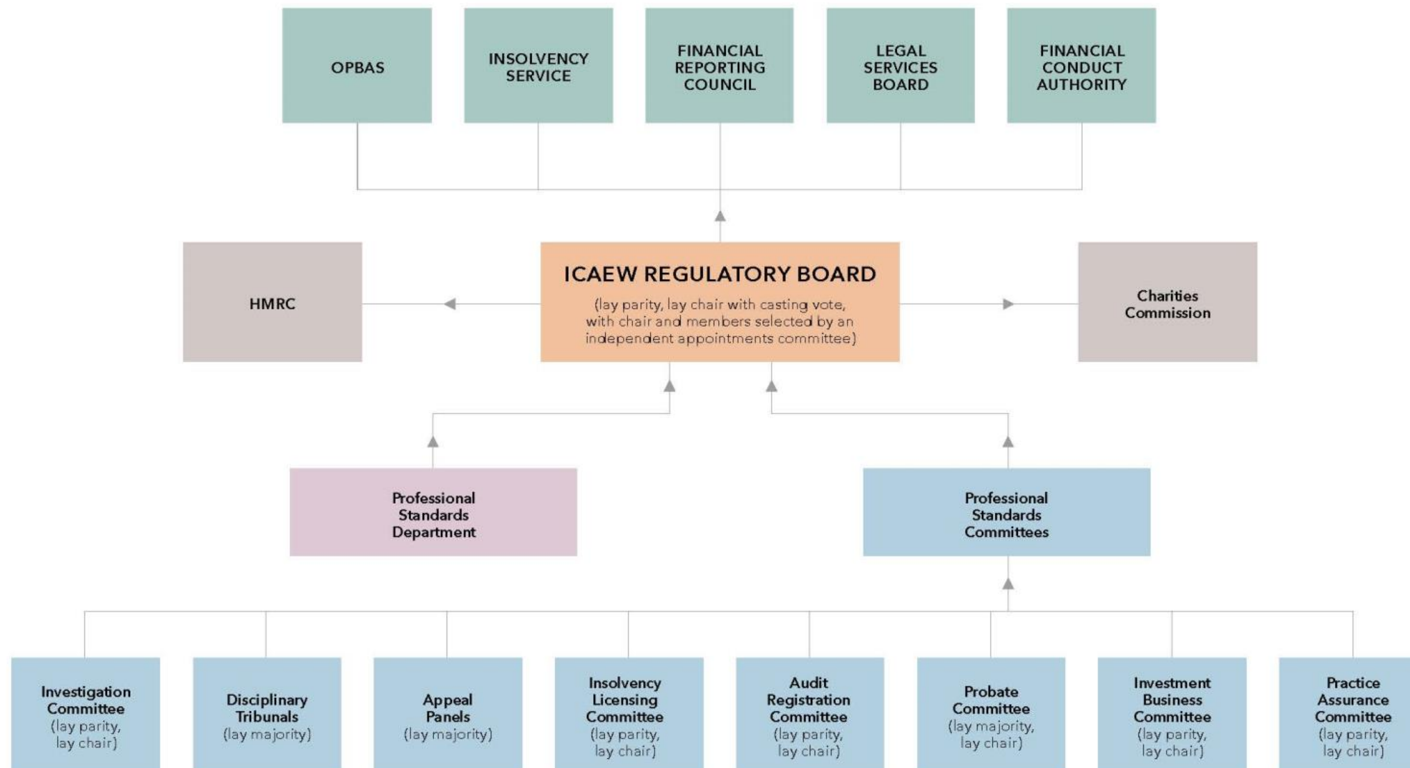
APPENDIX 1: OVERSIGHT STRUCTURE: THE ICAEW REGULATORY BOARD (IRB) AND OVERSIGHT REGULATORS



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APPENDIX 2: KATE GALLAFENT QC INFORMATION

IN THE MATTER OF THE GOVERNMENT'S PROPOSAL ON THE FUTURE OF INSOLVENCY REGULATION AND
QUESTION 8 OF THE CONSULTATION PAPER

OPINION

---

1. I have been asked by the Chief Officer, ICAEW Professional Standards Department on behalf of the ICAEW, for my opinion in relation to question 8 of the Government's Open Consultation on the Future of Insolvency Regulation, which asks:

2.

3. *"What are your views of the proposed disciplinary and enforcement process and the scope to challenge the decision of the regulator?"*

4.

5. I understand that the purpose of my instruction is to assist the ICAEW Regulatory Board in response to that Consultation, and I can confirm that I do not object to my opinion being used for that purpose.

6.

7. The proposals in relation to the disciplinary and enforcement process are set out at Part B of the consultation paper in the following terms (I have added paragraph numbering for convenience):

8.

Disciplinary and enforcement proceedings

[i] *To maintain confidence, a regulatory framework needs not only to be fair but also seen to be fair. It is important that there is consistency in disciplinary and enforcement proceedings, so that both those regulated and those who may be bringing a complaint feel that they have been treated transparently and fairly. The Call for Evidence noted that despite the availability of Common Sanctions Guidance, there is a lack of*

consistency in the application of sanctions by the disciplinary committees of the different RPBs. In imposing sanctions, there also seems to be no consideration of whether someone is a habitual offender and should therefore be dealt with in a more holistic way. There are concerns that the level of sanction can be downgraded for

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"mitigating" factors, which do not always seem to be relevant or appropriate to consider. This adds to the perception that RPBs can be reluctant to sanction their own members. The Insolvency Service's own monitoring findings have noted that RPBs can sometimes be slow to act when misconduct is found to have occurred.

[ii] *Under the proposed model the regulator would take responsibility for disciplinary and enforcement proceedings against Insolvency Practitioners and firms offering insolvency services. The regulator would have the ability to:*

- *reprimand an Insolvency Practitioner/firm*
- *impose a fine on an Insolvency Practitioner/firm*
- *impose conditions or restrictions on an Insolvency Practitioner's/firm's authorisation/registration*
- *direct an Insolvency Practitioner/firm to carry out certain actions*
- *withdraw an Insolvency Practitioner's/firm's authorisation/registration*

[iii] *As already mentioned,*[12] *the disciplinary process envisages clear separation between the investigatory and disciplinary roles of the new single regulator. Following investigation, a report would be presented to the regulator, who would consider the findings and make a recommendation on whether a sanction was applicable and the proposed level of sanction. Parties involved would have the opportunity either to agree the findings and recommendation of the regulator or to make written representations where they disagreed.*

[iv] *In the event of disagreement, the regulator would review the recommendations and proposed sanction in the light of representations. Where the recommendation was for a severe sanction, such as withdrawal of authorisation or a significant financial penalty, there would be an automatic right to a face to face hearing with the regulator, at which the Insolvency Practitioner or firm would be permitted to be legally represented.*

[v] *If the matter remained unresolved following the review by the regulator, there would be an opportunity to seek an appeal to an independent "Appeals Officer". This would be similar to the model of the Communities Interest Company Regulator. The "Appeals Officer" would be a statutory officeholder appointed by the Secretary of State as and when required to hear an appeal. It is expected that they would be from outside the Insolvency Service but would need to have the necessary skills and technical knowledge and be independent of all parties. The "Appeals Officer" would review the case in the light of representations made and determine whether the decision and the recommended sanction should stand. There would be the right to an oral hearing. To*

[12] This appears to refer back to the section relating to Q7 ("*do you agree that it would help to improve consistency and increase public confidence if the function of investigation of complaints was carried out directly by the single regulator?*"), where it is stated that "*Where a complaint was investigated by the regulator, the new model would be set up in such a way as to ensure a clear separation between the investigation of the complaint and the process for deciding on whether a disciplinary sanction should be imposed.*"

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discourage vexatious appeals there would be a fee charged for referral to the "Appeals Officer".

[vi] *We considered whether an independent tribunal should be set up for the purpose of considering appeals. However, any new tribunal jurisdiction would need to come within the aegis of Her Majesty's Courts and Tribunal Service. Given the small size of the insolvency profession, we consider that this would be disproportionate. While it is a more streamlined process and individuals can represent themselves without legal assistance, it is still a judicial process and has the potential to be as costly as a court process. In the civil courts, if the court decides to make an order about costs, the general rule is that the unsuccessful party pays the successful party's costs. Although tribunals can generally award costs in certain circumstances, this depends on the procedure rules of the relevant tribunal. Generally, the presumption in tribunals is that parties will bear their own costs and the bar for awarding costs is high. This could therefore deter appeals as it could impose an undue financial burden on parties, even if the case could potentially be successful.*

[vii] *If parties remain unsatisfied following recourse to the "Appeals Officer", it is envisaged that there would be a final route of appeal to the Court."*[13]

9. I have been asked to consider, in particular, whether the proposed disciplinary process of the new Government Regulator:

10.

10.1. Would satisfy the requirements of Article 6 of the European Convention on Human Rights ("ECHR"), which is incorporated in English law pursuant to the Human Rights Act 1998; and

11.

11.1. Is an appropriate process for the determination of allegations of misconduct by a professional and whether it is consistent with the disciplinary processes currently in place for other professionals.

12.

Article 8

13.

14. I would note two points at the outset in relation to the engagement of Article 6 ECHR:

15.

[13] For convenience, I have added paragraph numbering to the section in square brackets.

15.1. First, in my view it is clear that Article 6 ECHR would be engaged by the proposed disciplinary procedures as the outcome of the proceedings may be decisive for the individual's right to practise his or her profession.[14] It is enough that the right to continue in a profession is at stake, even if the potential outcome of the proceedings in a particular case is likely to be less severe.[15]

16.

16.1. Secondly, and for the avoidance of any doubt, Article 6 ECHR rights are not limited to natural persons but also apply to legal persons such as firms.[16]

Separation of investigatory and disciplinary roles

17. The consultation paper recognises, rightly, the basic principle that, as a matter of fairness, there should be clear separation between the investigatory and disciplinary roles of the proposed new regulator (see §iii). However, the consultation paper does not provide any explanation as to how it is proposed that this would be achieved.

18.

19. Such separation is currently generally achieved by regulatory bodies establishing a separate committee or panel to determine liability to disciplinary action and sanction, which operates independently from the regulatory body itself.[17] The rationale for making the disciplinary function independent, rather than the investigatory function, is the requirement under Art 6 for an independent and impartial tribunal in the determination of civil rights and obligations.

20.

21. I have considered at paragraphs 21-27 below whether the proposals in fact meet that requirement, but for the purposes of considering the separation of investigatory and disciplinary functions it is sufficient to note that there is nothing in the consultation paper

[14] See e.g. *Albert and Le Compte v Belgium* (1983) 5 EHRR 533 at §28.
[15] *A v Finland* Appn. No. 44998, decision 8 January 2004.
[16] See e.g. *Tre Traktoren AB v Sweden* (1989) 13 EHRR 309 at §43.
[17] For example, the ICAEW carries out its investigatory function 'in house' then puts the investigation report and recommendation to an independent investigation committee, which may refer the matter to an independent disciplinary committee. Whilst not every regulator has the equivalent of the investigation committee, all of those of which I am aware have some form of independent disciplinary committee or tribunal to determine disciplinary allegations.

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that would be consistent with separation of those functions. There is no suggestion that the part of the regulator responsible for investigating a complaint ('the investigatory arm') would or could be functionally separate from some other part of the regulator which would consider the investigation findings and make a recommendation on whether a sanction was applicable ('the disciplinary arm'). This is a fundamental flaw with the proposed scheme.

22.

Disciplinary process

23.

24. The consultation paper states that the regulator (i.e. the disciplinary arm) would consider the findings in the investigation report and make a recommendation on whether a sanction was applicable and the proposed level of sanction (§iii). If the parties disagree with the findings and recommendation then the regulator would "*review the recommendations and proposed sanction*" in the light of representations (§iv), and if the matter "*remained unresolved following the review of the regulator*" there would be an opportunity to seek an appeal to an independent "*Appeals Officer*" (§v).

25.

26. This part of the proposal raises a number of issues.

27.

28. The first is what is meant by the "*findings*" in the investigation report. Given that the disciplinary arm's function upon receipt of the report is to "*consider the findings and make a recommendation*" it is clear that they are not required to make any separate "*findings*" for themselves. Even if the investigation report left the question of liability to disciplinary action to the disciplinary arm (which is wholly unclear), it must follow that the "*findings*" in the investigation report are findings as to the facts of the case.

29.

30. This would obviously be unfair. Even if the parties involved had had the opportunity to make representations prior to the finalisation of the investigation report (and there is no suggestion in the consultation paper that that would be the case), there would not be any proper separation of the investigatory and disciplinary roles (irrespective of the structural position) where the investigatory arm is the primary fact finder, and those facts are simply adopted by the disciplinary arm when considering what recommendation to make.

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31.

32. The second issue is the nature of the "*review*" conducted by the disciplinary arm if the parties involve do not agree on the findings and the recommendation of the regulator. As the proposal does not suggest that the disciplinary arm makes the recommendation to any other part of the regulator, then the "*recommendation*" can only be understood as being a recommendation to the parties involved to accept the proposed sanction. If the parties involved do not agree the findings and recommendation, then the disciplinary arm proceeds to "*review the recommendations and proposed sanction*". However, the disciplinary arm does not review the "*findings*", i.e. the findings of fact. This is manifestly unfair, irrespective of whether those findings were made by the investigatory or disciplinary arm; in either case, the parties involved would not have an opportunity to challenge them.

33.

34. The third issue is the nature of the representations which can be made to the disciplinary arm. Under the proposal representations would be in writing, save that "*where the recommendation was for a severe sanction, such as withdrawal of authorisation or a significant financial penalty, there would be an automatic face to face hearing with the regulator, at which the Insolvency Practitioner or firm would be permitted to be legally represented.*"

35.

36. Article 6 provides for a right to a public hearing, which implies a right to an oral hearing at the trial court (or equivalent) level,[18] unless there are exceptional circumstances justifying dispensing with such a hearing, as provided for at Article 6(1) (e.g. public order or national security). However, in principle there is no absolute right to an oral hearing and it might be acceptable to decide civil proceedings on the papers if they concern solely straightforward points of law or a highly technical issue and the facts are not in dispute.[19]

37.

38. The first point that arises in this context is whether there is a practical distinction between an oral hearing (which is provided for in the context of an appeal: see §v) and a "*face to face hearing*" which is potentially provided for on a "*review*" by the disciplinary arm. It is difficult to see what the distinction might be, but given the deliberate difference in

[18] See e.g. *Fredin v Sweden (No.2)* (1991) EHRR 784 at §21 and *Bakker v Austria* (2003) 39 EHRR 162.

[19] See e.g. *Varela Assalino v Portugal* Appn No.64336/01, decision 25 April 2002.

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language the intention that the "*face to face hearing*" is something less than an oral hearing cannot be ruled out.

39.

40. The second point is the limitation of an automatic right to an oral hearing to the circumstances specified. As above, the potential sanction facing a professional person (i.e. whether the proceedings could be decisive of their right to practise their profession) is the factor which determines whether or not Article 6 is engaged. Assuming that it is engaged, an oral hearing may thereafter only be dispensed with if the facts are not in dispute and it only involved straightforward points of law or a highly technical issue.

41.

42. It follows that if the parties involved do not agree the findings (i.e. from the Investigation Report, as adopted by the disciplinary arm), then in my view they would be entitled to an oral hearing irrespective of the nature of the recommended sanction.

43.

44. Even were a party to agree the findings, such that the facts were not in dispute, in my view professional disciplinary proceedings generally neither involve straightforward points of law or concern a highly technical issue. In follows that I consider that it would be unusual for an oral hearing not to be required.

45.

46. So far as for the criteria for an automatic right to an oral hearing are concerned, as a matter of common law fairness the general principle is that a person should "*have the benefit of a procedure which fairly reflects, on the facts of his particular case, the importance of what is at stake for him, as for society*".[20] The significance of a financial penalty is obviously not absolute; for a large IP firm a fine of £50,000 may be insignificant, for an IP sole practitioner it may be highly significant. An arbitrary distinction based on the level of the fine would not be compatible with common law fairness.

47.

48. The third point is that whilst the consultation paper distinguishes between two scenarios (written representations or an automatic right to an oral hearing in specified circumstances) it does not suggest the disciplinary arm would have the power in principle

[20] *R (West) v Parole Board* [2005] 1 WLR 350.

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to direct an oral hearing in other circumstances. That would equally be incompatible with common law fairness.

Appeals process

49. The consultation paper suggests that the opportunity to seek an appeal arises "*if the matter remains unresolved following the review by the regulator*" (§v). The use of the language ("*unresolved*") is notable. The matter can properly be said to be "*unresolved*" if the parties involved disagree with the findings and recommendation of the disciplinary arm during the pendency of the "*review*" by the disciplinary arm, but an appeal can only lie against an actual, crystallised decision. The reluctance to characterise the disciplinary arm's role as a decision-making one appears to stem from a desire to characterise the disciplinary process more generally as a form of dialogue, rather than a prosecutorial and adversarial process (see too the use of the terms "*recommendation*" and "*review*"). I have considered the significance of this reluctance further below.

50.

51. The Appeals Officer's role is stated to be to "*review the case in the light of representations made and determine whether the decision and the recommended sanction should stand*" (§v).

52. This language is only consistent with a supervisory review rather than a full rehearing. That distinction is significant in the light of my view that the proposed investigatory and disciplinary structure and process does not meet the standards of common law fairness or Article 6.

53.

54. In the context of the common law it is well established that a statutory appeal which permits a "*rehearing of the broadest possible scope*" is in principle capable of curing a defective hearing at first instance.[21] What is meant by the "*broadest possible scope*" is "*a full rehearing on the merits* [which] *should cure any procedural defect or breach of natural justice on the part of the tribunal*".[22] However, "*no clear and absolute rule can be laid down on the question whether*

[21] *Lloyd v McMahon* [1987] AC 625

[22] *R v Visitors to the Inns of Court ex p. Calder* [1994] QB 1 at 59C-D.

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defects in natural justice appearing at an original hearing, whether administrative or semi-judicial, can be "cured" through appeal proceedings".[23]

55.

56. Similarly, in the context of Article 6 the starting point is that where the jurisdictional organs of professional associations are not impartial or independent, they must be subject to subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of Article 6(1).[24] In that case "*full jurisdiction*" was said to require that there should be a determination by a tribunal "*of the matters in dispute both for questions of fact and for questions of law*". Hence there was a violation of Article 6(1) where the review by the judicial body was limited to determining whether "*the discretion exercised by the administrative authorities has been used in a manner compatible with the object and purpose of the law*", such that there had not been any effective review exercised by the courts.[25]

57.

58. Subsequent cases in the European Court of Human Rights suggested that a limited review of facts may be sufficient in some circumstances, which circumstances have been considered by the House of Lords:

59.

> 60. *"The key phrases in the judgments of the Strasbourg court which describe the cases in which a limited review of facts is sufficient are "specialised areas of law"* (Bryan's *case 21 EHRR 342, 361, para 47) and "classic exercise of administrative discretion"* (Kingsley's *case 33 EHRR 288, 302, para 53). What kind of decisions are these phrases referring to? I think that one has to take them together. The notion of a specialised area of law should not be taken too literally. After all, I suppose carriage of goods by sea could be said to be a specialised area of the law, but no one would suggest that shipping disputes should be decided otherwise than by normal judicial methods. It seems to me that what the court had in mind was those areas of the law such as regulatory and welfare schemes in which decision-making is customarily entrusted to administrators. And when the court in* Kingsley *spoke of the classic exercise of administrative discretion, it was referring to the ultimate decision as to whether Kingsley was a fit and proper person and not to the particular findings of fact which had to be made on the way to arriving at that decision."*[26]
>
> 61.

[23] *Calvin v Carr* [1980] AC 574.
[24] *Albert and Le Compte* (1983) 5 EHRR 533 at §29.
[25] *Obermeier v Austria* (1990) 13 EHRR 290 at §70.
[26] *Runa Begum v Tower Hamlets London Borough Council* [2003] 2 AC 430 at §56.

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62. In my opinion professional disciplinary proceedings in the context of insolvency, which will require findings of fact to be made as well as an assessment of liability to disciplinary action, clearly do not fall within the type of case where a limited review of facts is sufficient.

63.

64. Accordingly, an appeal to the "Appeal Officer" cannot, in my opinion, cure the breaches of procedural fairness created in the investigatory and/or disciplinary phases. Even were the Appeal Officer were to be independent and impartial, the limitation on their role to a "*review*" of whether the decision of the disciplinary arm "*should stand*' rather than a full rehearing means that the proceedings, viewed as a whole, could not be said to have been fair.

65.

66. In reaching this view I have ignored the indication in the consultation paper that it is "*envisaged that there would be a final route of appeal to the Court*" (§vii). Not only is that indication inherently uncertain, but it is clearly not envisaged that such an appeal would be by way of full rehearing of the facts and law.[27]

67.

68. The absence of any determination by an independent and impartial tribunal with full jurisdiction is even more problematic when the potential conflicts of interest within Government are taken into account.

69.

70. Particularly given its recently-restored role as preferential creditor in insolvent estates, and my understanding that most insolvency complaints are made by creditors of insolvent estates, HMRC is likely to be a common complainant to the proposed Government regulator. That would create a position where one Government department is making a complaint to another Government department, without any adequate independent role or oversight in the decision-making process.[28]

---

[27] Which would be in line with the approach to statutory appeals brought against regulators such as the GMC, which are" *re-hearing*[s] *without hearing again the evidence*" (*Fish v GMC* [2012] EWHC 1269 (Admin) at §28). Such appeals are also, of course, brought in respect of decisions of independent professional regulatory tribunals such as the MPTS after full, contested hearings.

[28] This situation would be exacerbated were the proposed compensation scheme referred to in the consultation paper to be established; in that situation, a Government body would be bringing a complaint

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71.

72. I note that the consultation paper does not contain any proposal that the new regulator would oversee the work of the Official Receiver, which is clearly right as that would create a very direct conflict of interest. But the absence of any such oversight would effectively create a two-tier system whereby complainants could go to the proposed new regulator in respect of private practice IPs/firms, but not in relation to the Official Receiver. This would give rise to an entirely different type of unfairness.

Reasons for rejecting the option of an Independent Tribunal

73. The consultation paper rejects the option of establishing an independent tribunal on the basis that "*while it is a more streamlined process and individuals can represent themselves, it is still a judicial process and has the potential to be as costly as a court process … the presumption in tribunals is that parties will bear that own costs and the bar for awarding costs is high. This could therefore deter appeals as it could impose an undue financial burden on parties, even if the case could potentially be successful.*" (§vi)

74.

75. I find this reasoning very difficult to follow. Over the last few decades the vast majority of regulatory bodies have sought to create a disciplinary and appeals process that reflects the best aspects of a "*judicial*" process, namely, independence and impartiality of the tribunal / committee, representation by lay members with specialist knowledge of the subject matter involved, and formal procedures to ensure fairness to all parties. There is therefore no reason why the costs which would be incurred by a party before a tribunal within the aegis of HMCTS should be any different to the costs currently incurred by a party before the disciplinary and appeal bodies of the any of the Recognised Professional Bodies, and the consultation paper does not suggest that any issues currently arise as a result of such costs. Moreover, if the Government has any concerns about the

before another Government body for compensation ultimately payable by a levy on independent IPs / firms.

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apportionment of costs between the parties then that, as they expressly recognise, could be addressed in the procedural rules for the particular tribunal.

76.

77. Indeed, the implicit assumption underlying the Government's view that an Appeals Officer akin to the Communities Interest Companies Regulator ('CICR') is preferable to a statutory tribunal is that the process before the Appeals Officer will be shorter and cheaper. That very assumption, together with the use of language suggesting that the disciplinary process is designed as more of a dialogue than an adversarial process by which the evidence and arguments are properly tested, supports the analysis that the Government's proposals would result in a weakening of the current procedural protections for both IPs and complainants.

78.

79. As for the comparison with the CICR herself, I note that there appears to be very little in common between the role undertaken by her and that currently undertaken by independent disciplinary committees or tribunals. The main role of the CICR is to determine whether a company should be granted or retain its CIC status and the role of determining a complaint made about a CIC very much a secondary one: for example, in 2020-21 the CICR approved 6,838 CICs on the Public Register and received just 46 complaints, none of which were investigated by the CICR under her powers.[29] It is therefore wholly unclear why the Government has identified this, very different, type of regulatory body as being a relevant comparator in the context of professional disciplinary proceedings relating to insolvency.

80.

Consistency with other regulatory procedures

81.

82. I am not aware of any regulatory body for professionals in the United Kingdom which currently has a disciplinary process akin to that now proposed for Insolvency Practitioners and firms, nor of any suggestion or appetite to go down that route. This is entirely unsurprising; regulators have spent many years seeking to ensure that their procedures

[29] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1005991/cic-21-3-community-interest-companies-annual-report-2020-2021.pdf

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are fair and compatible with Article 6 ECHR. The proposals in the consultation paper represent a significantly retrograde step, giving rise to manifest unfairness.

83.

84.

85. KATE GALLAFENT QC

86. Blackstone Chambers

87. 14 March 2022

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PROPOSED INSOLVENCY PRACTITIONER REGULATION

A REVIEW OF THE INSOLVENCY SERVICE'S IMPACT ASSESSMENT

MARCH 2022

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March 2022

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To discuss the report further please contact:

Vasilis Douzenis: vdouzenis@oxfordeconomics.com

Oxford Economics

4 Millbank, London SW1P 3JA, UK

Tel: +44 203 910 8061

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APPENDIX 2: OXFORD ECONOMICS REVIEW OF THE INSOLVENCY SERVICE'S IMPACT ASSESSMENT

EXECUTIVE SUMMARY

POLICY CONTEXT AND REPORT OBJECTIVES

Insolvency Practitioners (IPs) in the UK currently operate under a dual system of co-regulation, exercised, on the one hand, through five Recognised Professional Bodies (RPBs), and independent regulatory oversight, exercised on the other hand, by the Secretary of State through the Insolvency Service. Legislation in 2015 introduced a time-limited power, expiring in October 2022, that enables the Secretary of State to create a single, independent regulatory body in place of the current system. The Insolvency Service's "Review of Insolvency Practitioner Regulation"[30] proposes the introduction of such a Single Regulator that would sit within the Insolvency Service.

In December 2021, the Insolvency Service published an impact assessment (IA) of the proposed regulatory changes, which concluded that the policy's net present social value was -£5.0 million. This figure is derived as the sum of various costs and benefits that were monetized in the IA and appropriately discounted. Alongside these monetized effects, the IA also identified a range of other effects that could not be quantified.

Oxford Economics has been commissioned by the Insolvency Practitioners Association (IPA) and the Institute of Chartered Accountants in England and Wales (ICAEW), two RPBs that account for 91 percent of the total IPs authorised by the five RPBs in the UK,[31] to undertake an independent review of the economic coherence and logic of the costs and benefits presented within the IA and to consider the wider consequences of the proposed regulatory framework.

KEY FINDINGS: COSTS AND BENEFITS QUANTIFIED IN THE IMPACT ASSESSMENT

On balance, our review of available evidence indicates that the IA has **significantly underestimated** the **social cost** of introducing this reform. Fig. 1, presented at the end of this section, provides a comprehensive summary of our analysis. It outlines the various costs and benefits that were monetized in the IA and the findings from our review in each case.

The bullet points below describe the most material points that have emerged from our analysis:

- The IA concluded that IPs would receive a recurring annual benefit worth £2.3 million following the introduction of a Single Regulator, reflecting a reduction in the cost of regulatory enforcement. Our analysis indicates that the anticipated cost savings are likely to be significantly overestimated and, if introduced, there are risks that the cost of regulatory enforcement might realistically increase. **The IA has overestimated the recurring annual benefit by at least £1.1 million due to its overestimate of the current cost of regulatory enforcement**.

[30] Insolvency Service, "Review of Insolvency Practitioner Regulation", 2021, accessed January 2022.

[31] Percentage estimate is based on Insolvency Service, "Review of Insolvency Practitioner Regulation", 2021, table 4, accessed January 2022, using the number of total IPs authorised and adding three IPs under Law Society of Northern Ireland as these have been omitted in the IA.

- The introduction of the new regulatory structure would impose a **one-off familiarisation cost** to IPs and firms. Our review suggests that the **methodology used by the IA underestimates the scale of these costs**. Although not possible to gauge precisely, our best estimate is that familiarisation costs are likely to be **at least £1.35 million higher** than in the IA.
- **The IA** estimates that the proposed reform will result in a cost to firms of **£0.76 million due to higher insurance payments**. Our analysis shows that the actual cost is likely to be materially higher due to the exclusion (in the IA) of wider legal costs and a lower loss ratio. Our best estimate is **that it will be £2.7 million higher than the IA.**

KEY FINDINGS: THE WIDER CONSEQUENCES OF THE PROPOSED REFORM

Beyond the somewhat narrow remit of the IA, the proposed reform could have wider consequences for IPs, financially distressed businesses and individuals, and creditors in the UK. Some of these factors are, indeed, acknowledged within the IA but classified as 'non-quantifiable'. In our review, we have focused on three key themes:

- Potential issues during the transition period
- The impact on competition and, therefore, choice for customers; and
- The impact of changes in regulatory incentives due to the new governance structure.

Potential issues during the transition period

The government expects that the introduction of the new system would take between two and four years to become operational. This will necessitate a transition period between the two regimes that the IA acknowledges may present a "temporary regulatory risk". In our view, the following risks are the most significant and require further evaluation:

- There may be a shortage of skilled personnel overseeing the IP market as skilled RPB staff may move to other jobs instead of switching to the new Single Regulator. Insolvency regulation is a highly specialist topic, therefore meaning that recruiting new personnel would be problematic.
- The potential regulatory vacuum may increase the likelihood of moral hazard by creating adverse incentives for IPs to take on additional risks. This would have wider adverse spillover effects for affected parties.
- Our analysis suggests that the financial costs of setting up the new regulatory systems - such as staffing and IT systems, governance arrangements, complaints gateway and compensation schemes - may be substantial. It will, therefore, be important for these to be credibly costed and to be incorporated into any follow-up IA.

Impact on competition and choice for customers

The IA estimates the proposed reform to yield a maximum benefit of £2.3 million accruing equally to all IPs irrespective of size. However, our estimates indicate that it is unlikely that these benefits will be realised, and in fact, **the proposed regulatory reform may lead to additional costs to IPs**. If shared equally among IPs, the burden of these additional costs can be expected to fall disproportionately on IPs in micro and small businesses. Moreover, small firms may also find it difficult to bear the costs of handling additional complaints and visits associated with the new firm regulation proposals.

Such an increase in the regulatory burden could increase effective barriers to entry and, therefore, reduce competition in the market. This would have adverse consequences for customers in terms of

reducing choice and pushing up the price of insolvency services. The size of any impact through this channel is highly uncertain but it should be a careful consideration for government when exploring the potential for unintended consequences.

Changes in regulatory incentives due to the new governance structure

Taking regulatory responsibilities away from RPBs would, in theory, correct any principal-agent issues that have been created by the current regulatory structure. Based on our review, however, we are not able to comment on the extent to which principal-agent conflicts may have distorted regulatory priorities to-date.

However, having the new Single Regulator sitting within the Insolvency Service may affect the regulator's independence from the government, especially given Her Majesty's Revenue and Customs' (HMRC) and the Redundancy Payments Service's (RPS) role as preferred creditors in the insolvency process. Conversely, the government's ability to examine the functioning of the market and provide feedback to the regulator at an arm's length would also be diminished without regulatory independence.

Moreover, the responsibility for appointing the Official Receiver (OR) in bankruptcy and compulsory winding up proceedings lies with the Insolvency Service. The proposed regulatory reform would create a situation where the role of the Insolvency Service as a regulator, independent of the market participants, conflicts with its role as the provider of ORs.

Costs and benefits considered in the IA and the review by Oxford Economics

IA costs and benefits	IA quantification[32]	Oxford Economics Review
Costs and benefits to IPs		
Ongoing benefit to IPs from lower fees *(IA paragraphs 107-115)*	£2.3 million	At least £1.1 million lower than IA estimate *(Detailed in section 0)*
Familiarisation cost to IPs *(IA paragraphs 66-69)*	£2.7 million	Over £1.35 million higher than IA estimate *(Detailed in section 0)*
Costs and benefits to firms and RPBs		
One off redundancy cost to RPBs *(IA paragraphs 75-86)*	£0.2 million*	Not estimated as not included in IA net present social value estimate *(See section 0)*
Familiarisation cost to IP firms *(IA paragraphs 70-73)*	£0.1 million	Over £0.05 million higher than IA estimate *(Detailed in section* 0)
Ongoing cost to IP firms from firm regulation fees *(IA paragraphs 88-91)*	£0.7 million	Not estimated due to limited information on scope *(See section* 0)
Ongoing cost to business to comply with firm regulation *(IA paragraphs 92-99)*	£1.1 million	Not estimated due to limited information on scope *(See section* 0)
Costs to firms from compensation *(IA paragraphs 100-106)*	£0.76 million	£2.7 million higher than IA estimate *(Detailed in section* 0)
Potential wider consequences of the proposed reform		
One off benefit to employees through redundancy transfer *(IA paragraphs 75-86)*	£0.2 million*	Not estimated as not included in IA net present social value estimate *(See section 0)*
Costs arising from potential issues incurred during the transition phase *(e.g., IA paragraph 119)*	No quantification*	Discussed in Section 0.
Economies of scale *(IA paragraph 117)*	No quantification*	Discussed in Section 0.
Improved public confidence in the regulatory regime and improved international reputation *(IA paragraph 117)*	No quantification*	Not included in this study
Costs and benefits to the Single Regulator		
One off cost to set up the Single Regulator (including IT, recruitment etc.) *(IA paragraph 134)*	No quantification*	Discussed in Section 0.
Ongoing cost to the Single Regulator to contract out certain functions *(IA paragraph 128)*	No quantification*	Discussed in Section 0.

[32] All IA estimates were sourced from Insolvency Service, "Review of Insolvency Practitioner Regulation", 2021, accessed January 2022. Specific IA paragraph references are provided in-table.

Ongoing benefit to the Single Regulator from IP fees to cover procurement costs for functions that will be contracted out *(IA paragraph 115)*	No quantification*	Not included in this study
Ongoing benefit to the Single Regulator from firm regulation fees *(IA page 3)*	No quantification*	Not included in this study

* Not part of the IA estimate of the net present social value

INTRODUCTION

Insolvency Practitioners (IPs) in the UK currently operate under a dual system of co-regulation, exercised, on the one hand, through five Recognised Professional Bodies (RPBs), and independent regulatory oversight, exercised on the other hand, by the Secretary of State through the Insolvency Service.

Legislation introduced in 2015 contained a time-limited power, expiring in October 2022, enabling the Secretary of State "to create a single, independent regulatory body in place of the current system".[33] In December 2021, pursuing its objective of strengthening confidence around the regulatory framework that governs the insolvency profession, the Insolvency Service launched a consultation on the future of insolvency regulation and some key proposals such as the introduction of a "Single Regulator". The Single Regulator would sit within the Insolvency Service and would have powers to cover a number of functions outlined in detail in the Government's consultation.[34] Current legislation does not allow for the Single Regulator to sit within the Government and hence the regulatory proposal would require primary legislation.

As part of the consultation, the Insolvency Service published its own analysis of the expected impacts of the proposed changes to the regulatory framework—the impact assessment (IA). Oxford Economics was commissioned by the IPA and the ICAEW, two of the RPBs, to undertake an independent review of the economic coherence and logic of the costs and benefits presented within the Government's IA and to consider the wider consequences of the proposed reform.

Oxford Economics collected high-level industry views through six interviews with IPs[35] which we combined with desk research and analysis of data and insights provided by IPA and ICAEW to conduct our review. Our review is comprised of two parts:

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[33] Insolvency Service, "Review of Insolvency Practitioner Regulation", 2021, paragraph 8, accessed January 2022.

[34] UK Government, "The future of insolvency regulation", 2021, accessed February 2022.

[35] We conducted interviews with Chris Parkman from Purnells, Laura Prescott from Debt Movement, Laurence Pagden from Menzies, Rebecca Dacre from Mazars, Rob Lewis from PwC, and Tom Ahmad from Bailey Ahmad Business Recovery (BABR).

A review of the validity of the monetised costs and benefits quantified in the IA in chapter 0; and,
An evaluation of the potential wider consequences of the proposed reform in chapter 0.

MONETISED COSTS AND BENEFITS QUANTIFIED IN THE IA

This chapter reviews the quantified estimates of costs and benefits included in the IA. These are summarized in Fig. 2. Costs and benefits are identified and quantified (monetized) from the perspective of both individual IPs and firms providing insolvency services. The validity of these estimates is assessed in sections 2.1 and 2.2 respectively.

At the outset it is worth noting that the IA does not claim to be comprehensive—various costs and benefits are theoretically identified but not quantified and several of these are addressed in more detailed in chapter 3.

Costs and benefits considered in the IA

IA costs and benefits	IA quantification[36]
Costs and benefits to IPs (covered in section 2.1)	
Ongoing benefit to IPs from lower fees *(IA paragraphs 107-115)*	£2.3 million
Familiarisation cost to IPs *(IA paragraphs 66-69)*	£2.7 million
Costs and benefits to firms (covered in section 2.2)	
One off redundancy cost to RPBs *(IA paragraphs 75-86)*	£0.2 million*
Familiarisation cost to IP firms *(IA paragraphs 70-73)*	£0.1 million
Ongoing cost to IP firms from firm regulation fees *(IA paragraphs 88-91)*	£0.7 million
Ongoing cost to business to comply with firm regulation *(IA paragraphs 92-99)*	£1.1 million
Costs to firms from compensation *(IA paragraphs 100-106)*	£0.76 million

** Not part of the IA estimate of the net present social value.*

[36] All IA estimates were sourced from Insolvency Service, "Review of Insolvency Practitioner Regulation", 2021, accessed January 2022. Specific IA paragraph references are provided in-table.

COSTS AND BENEFITS TO INSOLVENCY PRACTITIONERS

The ongoing benefit to IPs through lower annual fees

The IA concludes that the proposed reform will result in an ongoing benefit to IPs through a reduction in regulatory fees up to a maximum of £2.3 million per year. This is calculated as the difference between current RPB fee income (£6.4 million)[37] and the expected lower fees that the Single Regulator would charge (£4.1 million) based on its assumed operating costs[38].

In simple terms this section of the analysis reflects an assumption that the proposed reform will reduce the cost of regulatory enforcement. This will be fully passed on to IPs and, therefore, create a recurring benefit. Our analysis indicates that the IA's methodology, in this respect, is flawed meaning that this estimated benefit through this channel has been significantly over-estimated. In particular:

- **The current cost of regulatory enforcement**: income data provided by the IPA and ICAEW indicates that the income attributable to Insolvency Regulation, which reflects the current cost of regulation, is lower than estimated in the IA. IPs' current regulatory costs, reflected in payments IPs make to RPBs are £5.3 million[39], approximately 18% lower than estimated in the IA.
- **The future cost of regulatory enforcement**: The ultimate operating cost of the new regulator, and hence the passed-on cost to IPs, is clearly much **more uncertain**. Nevertheless, our review raises questions regarding the validity of the contention in the IA that the proposed reform has the potential to yield significant cost efficiency savings.

We take each in turn.

The current cost of regulatory enforcement: RPB fee income

The IA estimates that current RPB fee income from regulatory activities is £6.4 million. This value is derived by extrapolating the cost fee per authorised practitioner at the IPA in 2019 (£4,100) to other RPBs.[40] The breakdown of the total cost is illustrated in 0 with the two largest bodies (IPA and ICAEW) estimated to account for over 91% of fee income.

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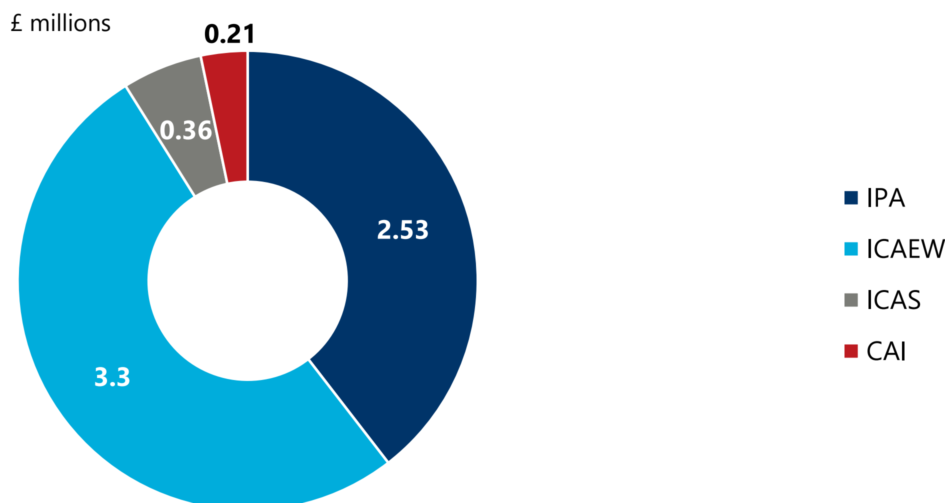
[37] Insolvency Service, "Review of Insolvency Practitioner Regulation", 2021, paragraph 112, accessed January 2022.

[38] Insolvency Service, "Review of Insolvency Practitioner Regulation", 2021, paragraph 135, accessed January 2022.

[39] These payments include the IPs' annual licence fees and any additional payments made to RPBs that are required for them to fulfil their regulatory responsibilities.

[40] Insolvency Service, "Review of Insolvency Practitioner Regulation", 2021, paragraph 110, accessed January 2022.

Breakdown of estimated fee income by RPB in the IA



Source: Government IA estimates

Although not unreasonable *a priori*, the fact that IPA's membership composition differs significantly from that of other RPBs, both due to the size of the firms involved but also because IPA attracts volume providers due to the voluntary regulation scheme that it offers them, suggests that there is scope for the method used by the IA to produce a significant computational error.

As part of our review, we have collected data from ICAEW which showed that payments made by IPs to cover the costs of regulation in 2019 amounted to £2.2 million, approximately 50% lower than estimated in the IA. In total, this implies that the ongoing benefit to IPs from no longer paying regulatory costs to RPBs would be £5.3 million, approximately 18% lower than estimated in the IA.

The future cost of regulatory enforcement: the operating costs of the new Single Regulator

Under the proposed reform, the government would take on operational responsibility for regulatory enforcement. The IA assumes that the costs of a Single Regulator undertaking the same regulatory tasks will be £4.1 million (as shown in 0 below) comprising £2.5 million of direct staff costs, £1.5 million in indirect staff costs and travel costs of £50,000.[41] At the outset, it is important to note that the IA concedes that this estimate excludes the costs of procurement of goods and services (at this point not costed). As such, the IA's assumption is best characterized as being that cost of the Single Regulator will be *upwards from* £4.1 million.

Clearly, in comparison to the current level of RPB fee income, the future operating costs of the Single Regulator are subject to greater uncertainty. Apart from the high-level detail described in the previous paragraph there is no further information provided in the IA regarding the composition of these costs. This makes formally assessing the credibility of the £4.1 million figure challenging.

The IA cost estimates, of £4.1 million, along with its estimate of the current cost of regulatory enforcement of £6.4 million, imply that the government could achieve efficiency savings of approximately 35%. Whereas, the revised fee income estimates, of £5.3 million along with the IA cost

[41] Insolvency Service, "Review of Insolvency Practitioner Regulation", 2021, paragraph 135, accessed January 2022.

estimates of £4.1 million, imply an upper bound on cost savings of 23%. Whatever the figure, the assumed benefits within the IA rest on two key lines of argument:

- The cost of employment for the Single Regulator may be lower given existing variation in the **earnings of equivalent employees** in the private- and public-sectors.[42]
- The new Single Regulator will be able to achieve cost efficiencies through **economies of scale**. Given the net saving quantified in the IA, we think that it would be reasonable to characterise the government's view as being that these could be **up to 35%**.[43]

Estimated ongoing costs associated with the new Single Regulator, £ millions

Description	Income or Costs, £ millions
Current costs of regulatory enforcement	**5.30**
New regulator costs (proposed new Single Regulator)	**4.10**
Direct staff costs	*2.50*
Indirect staff costs	*1.50*
Travel costs	*0.05*
Costs for services contracted out, i.e., consideration of applications, provision of training and education, and routine monitoring	Not included

Source: Oxford Economics analysis based on IPA/ICAEW inputs, Insolvency Service (2022) Paragraphs 135-136.

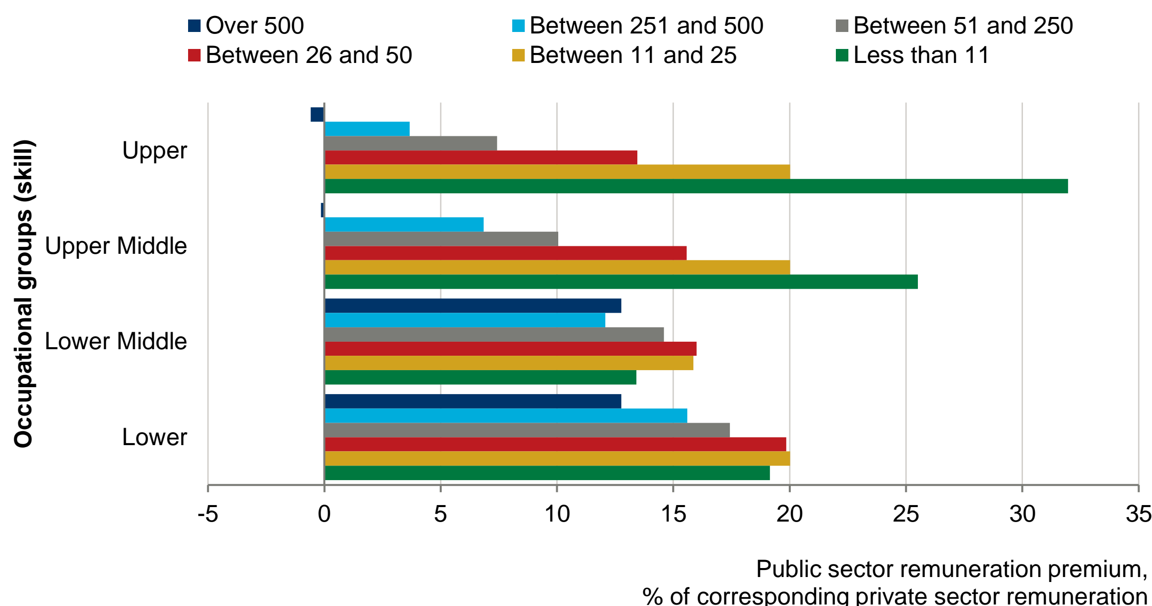
In the remainder of this section, we scrutinise the validity of these lines of argument by drawing on various sources of evidence including data provided by IPA and ICAEW, ONS data and past reports from the National Audit Office (NAO).

Will the Single Regulator face lower employment costs?

[42] Insolvency Service, "Review of Insolvency Practitioner Regulation", 2021, paragraph 114, accessed January 2022.
[43] Calculated as the percentage difference between £4.1 million and £6.4 million. Figure 4 in the IA document illustrates this conceptual view.

The IA highlights that the costs for the Single Regulator could be lower than projected based on the higher remuneration received by private sector employees compared to their public sector counterparts at the upper and upper-middle skill levels.[44] However, 0 below shows that when total pay (including bonuses, benefits-in-kind, overtime and employer pension contributions) are considered, public sector employees earn significantly more than their private sector counterparts for all organisations except those with more than 500 employees, where the difference is negligible.[45] Given that one of the organisations that accounts for more than 40% of the market, the IPA, is a small business we think that, in fact, labour market data points to the equivalent cost of employment being higher in the public sector than the private sector.

Public sector remuneration premium by occupational groups (skills) and firm sizes, UK in 2019



Source: ONS

In general, therefore, we are not convinced by this line of argument in the IA.[46] We would also note that the assumption that there would be no staff transfer between the RPBs and the Single Regulator[47]—which we suspect was made for modelling simplicity rather than the expected reality—would likely push up recruitment costs. Insolvency regulation is a highly specialised field meaning that there will be a relatively small pool of talent to draw from.

What other efficiency benefits could be achieved?

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[44] Insolvency Service, "Review of Insolvency Practitioner Regulation", 2021, paragraph 114, accessed January 2022.
[45] Public and private sector earnings: 2019, Office for National Statistics, figure 3b. https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/articles/publicandprivatesectorearnings/2019#:
[46] Insolvency Service, "Review of Insolvency Practitioner Regulation", 2021, paragraph 114, accessed January 2022.
[47] Insolvency Service, "Review of Insolvency Practitioner Regulation", 2021, paragraph 64, accessed January 2022.

The broader question of the extent to which the Single Regulator might achieve efficiency savings through economies of scale is difficult to ascertain at this stage. As part of our work, we have reviewed available literature to understand the extent of efficiency gains (or losses) that resulted in previous cases to provide benchmarks.

The most analogous recent case in the UK, where solid documentary evidence is available, involved the creation of Ofcom in 2002. This involved the consolidation of five regulatory organisations into a single body, although, in contrast to the current proposal, these organisations were previously responsible for regulating different industries.

The National Audit Office (NAO) reviewed the creation of Ofcom. Further details can be found in Box 1, overleaf, but, in general, the experience of Ofcom indicates that the scale of efficiency benefits envisaged in the IA are likely overstated. For example, the NAO concluded that Ofcom was able to achieve total efficiency savings of between 9% and 12% in its first two years. In comparison, as discussed above, the IA erroneously estimates cost savings of up to 35% whereas our analysis indicates that these efficiencies are likely to be significantly lower. Moreover, several of the key channels through which Ofcom's efficiencies were achieved are not applicable in the case of the prospective Single Regulator for IPs.

Finally, we think that two further points provide additional important context. First, the IA makes clear that certain responsibilities will be contracted out, although as highlighted these are not costed. On balance, we think that this decision will diminish the capacity for the reform to deliver efficiency savings through economies of scale. Indeed, there is a risk that outsourcing services to a very specialist market where supply is constrained could push up costs.

Second, the creation of a Single Regulator risks losing some of the economies of scale and scope currently enjoyed by ICAEW, and the IPA to a lesser extent. These organisations carry out several functions in addition to regulation, and benefit from spreading their overheads across these functions. These scale and scope benefits extend to operational and functional aspects as well: the ICAEW is able to use a combined legal team for its various regulatory and non-regulatory functions which improves staff utilisation and reduces costs.

BOX 1: EFFICIENCIES THROUGH REGULATORY CONSOLIDATION – THE OFCOM EXPERIENCE

To put these figures in perspective, Ofcom[48] was able to achieve efficiency savings of 9-12 percent in its first two years of existence.[49] Key areas for efficiency gains were the disposal of legacy regulators office property and leasing commitments – not applicable in the case of the Single Regulator –

[48] Ofcom (Office of Communications) is the UK regulator for telecommunications, broadcasting, radio and spectrum industries, as well as post (since 2012). The creation of Ofcom in 2002-2003 forms a useful point of reference to identify the potential costs involved in the creation of a new regulator. To put this in context, the setup of Ofcom took almost two years from receiving Royal Assent for the Ofcom Act in March 2002 to its vesting on 29 December 2003. The NAO considers a wider period from September 2001 to July 2005 to incorporate additional set-up processes related to legislative and organisational aspects. While the scope and industry are significantly different, the National Audit Office's (NAO) review of the costs involved in the creation of Ofcom provides helpful benchmarks to assess the proposed regulatory changes.

[49] National Audit Office (2006), The creation of Ofcom: Wider lessons for public sector mergers of regulatory agencies, paragraphs 3.12-3.13.

and through a reduction in staff costs through consolidation of roles and responsibilities and outsourcing operational functions.

For the new Single Regulator, **outsourcing of functions might not result in cost savings in the short term.** In fact, it is likely that these costs may increase in the short term as the regulatory systems are set up as regulatory staff are brought on board.

The efficiencies during the creation of Ofcom were managed by recruiting staff from legacy regulators using a job matching process. A full competency-based process may have been more appropriate but would have been more time consuming, as well as more expensive. The IA implies that the new Single Regulator will have to recruit in the 'open market', which suggests that it may have to compete with RPBs as well as IPs who will seek to hire regulatory experts to manage their interactions with the new regulator. In particular, key staff at RPBs will likely be courted by IPs who may be able to offer more attractive remuneration packages. **This will make the achievement of any staff cost efficiencies identified in the IA extremely challenging.**

The NAO identified that while Ofcom was able to achieve a reduction in headcount of 28%, this was accompanied by a reduction in staff costs of only 8%.[50] This implies that costs *per employee* increased by 28% despite the lack of a competitive hiring process. The increased costs were associated with higher compensation packages to retain more highly skilled staff. The Ofcom example indicates that achieving staff cost efficiencies identified in the IA is unlikely.

The one-off familiarisation cost to IPs

The IA estimates the total one-off familiarisation cost to IPs at £2.7 million**.** This is based on an assumption that each of the 1,570 IPs will require four hours to familiarise themselves with the new regulation. The time spent on familiarisation is treated as an opportunity cost as the IPs could instead be spending their time on profitable alternatives. To capture the opportunity cost, the IA has assumed an hourly rate of £431 which is scaled up to the market based on the number of currently operating IPs.

To assess the validity of the estimated familiarisation cost we have gathered evidence related to both the assumed time requirement and the opportunity cost of this time (IPs' hourly rates). In both cases, the balance of evidence suggests that the IA is likely to be conservative. Moreover, the IA assumes that there will be no familiarisation costs incurred by support staff.

Available data on hourly rates suggests, all else equal, that the methodology used by the IA would underestimate the familiarisation cost from the proposed reform by between 15% and

[50] National Audit Office (2006), The creation of Ofcom: Wider lessons for public sector mergers of regulatory agencies, paragraph 3.14.

22%. Industry data suggest that the average IP hourly rate is higher than £431. We analysed data, provided by IPA and ICAEW, for 14 companies currently operating in the market. On average, the (mean) hourly charge out rate was £527 with a median price of £495 per hour.

Our interviews suggested that the time required for IPs to familiarise themselves with the new regulations may be longer than four hours. The IA has assumed that the familiarisation time for an IP would amount to four hours. However, a common issue raised in interviews with IPs was that the introduction of a compensation scheme adds a new complexity to the system that might require additional familiarisation time. We would emphasise that our limited sample size (six) means that considerable uncertainty relates to this point—our view, however, is that the risk is likely tilted to the upside.

The IA ignores IPs' support staff—illustrative modelling implies that incorporating this reality results in a significantly higher familiarisation cost. IPs' support staff will need to familiarise themselves with such significant regulatory changes and the time required for them can be higher compared to qualified experts such as the IPs themselves. These costs would be separate to firm-level familiarisation costs and have not been considered in the IA. Robust data on the numbers of total support staff employed by IPs and their firms and an average representative hourly rate are not available. Nevertheless, the table below provides a sensitivity check of the additional costs that could be involved under the conservative assumption that it would take support staff the same time as an IP to familiarise themselves.[51] While the hourly rates for support staff figures are illustrative they fall well within the hourly rates observed in IPA and ICAEW data from their members, suggesting that £100 is at the lower end of the range for even smaller firms and the high end of the range varying from £250 to £325, depending on firm size. The same holds for the support staff to IP ratio for which we used a very conservative range based on available data and discussions with our limited sample of interviewees. Volume providers can have a significant impact on this ratio as they employ a high number of support staff per IP.

Illustrative range of opportunity costs associated with support staff familiarisation

Ratio of support staff to IPs	£100 hourly rate	£175 hourly rate	£250 hourly rate
1 support staff per IP	628,000	1,099,000	1,570,000
2 support staff per IP	1,256,000	2,198,000	3,140,000
3 support staff per IP	1,884,000	3,297,000	4,710,000

Source: Oxford Economics calculations based on sample of IPA and ICAEW members' data

[51] A review of a limited sample of 10 firms suggested an average of six support staff per IP and a minimum value of 1.5. The figures included in the illustrative table can therefore be considered conservative.

Our review suggests that the **methodology used by the IA underestimates the scale of these costs**. Although not possible to gauge precisely, our best estimate is that familiarisation costs are likely to be **at least 50% higher** than in the IA.[52]

COSTS TO FIRMS AND RPBs

Costs to RPBs from redundancies, training and corporate restructuring

Green Book methodology treats redundancy costs as socially neutral given that they represent a transfer from the employer to employees. We do not consider it within scope to challenge the validity of this assumption, but our analysis has indicated that the estimated **value of redundancy payments** in the IA is **likely to be too low**.

- Data provided by RPBs showed a weighted average length of staff service of 6.2 years, as opposed to five years assumed in the IA.
- The IA states that the one-off redundancy costs will not affect any small and micro businesses because the IPA has at least 50 employees based on a LinkedIn search. The IPA currently employs 36 employees which means **the one-off redundancy fees would fall on a small business.**
- In contrast to the IA's claim that any redundancies are expected to occur in London, IPA and ICAEW data highlights that 29 of IPA's current 36 employees and the majority of ICAEW employees are based outside London.

Firms' one-off familiarisation costs

One-off firm familiarisation costs, in addition to those that individual IPs will face, have been estimated differently for small, medium-sized, and large businesses, using the same Insolvency Practitioner rates of £431/hour across firm size but differing amounts of time required for familiarisation (15 minutes for small firms, one hour for medium-sized businesses and two hours for large businesses).[53] This is then multiplied with the total number of small, medium-sized and large businesses outlined in section 0 to derive the total one-off cost from firm regulation for each firm size category.

Our review of available evidence suggests that the estimated **familiarisation cost to firms** is **likely to be conservative**. In part, this reflects lines of argument presented in section 2.1.2. To reiterate, our analysis suggests that the assumed charge out rate for IPs, used in the IA to quantify the opportunity cost of familiarisation time, is below average market rates. In addition, the methodology used by the IA ignores costs to firms resulting from the time required for support staff to familiarise themselves with the new regulation.

In addition, depending on the nature of changes to firm regulation, a subset of firms could be required to introduce non-trivial changes to systems, processes, or documentation. These types of material cross-cutting changes have not been included in the IA's familiarisation time estimates. Most

[52] This is based on the mid-point of our hourly rates range (i.e., 18.5%) and an additional 41% based on support staff familiarisation costs taken from 0, representing 1 support staff per IP, a conservative value, and a support staff hourly rate of £175 (i.e., the mid-range value of £100 and £250).

[53] Insolvency Service, "Review of Insolvency Practitioner Regulation", 2021, paragraphs 71-73, accessed January 2022.

of the IPs we interviewed commonly highlighted that if system, process, or documentation changes are required in response to the new regulation then the familiarisation time accompanying such changes would be considerably higher compared to the IA estimates. Three of our interviewees, however, highlighted that such additional familiarisation costs are much less likely to apply to larger firms that already have established compliance systems in place and relatively automated processes rolled-out across their organisation.

Our review suggests that the **methodology used by the IA underestimates the scale of these costs**. Although not possible to gauge precisely, our best estimate is in line with our estimate presented in section 0 that familiarisation costs are likely to be **at least 50% higher** than in the IA.

Ongoing costs from firm regulation fees

The IA assumes that 478 small businesses will need to pay an ongoing fee of £50 every year.[54] 113 medium-sized and large businesses are assumed to cover the remaining total ongoing cost to the Insolvency Service, which is expected at £0.7 million.[55]

The IA reports a total 587 insolvency businesses, and it classifies 478 of them as small businesses and 113 as medium-sized or large.[56] **The number of small businesses (478) plus the number of medium-sized and large businesses (113) adds up to 591 total business and does not tally with the reported total**.

We have not been able to validate the expected ongoing cost to the Insolvency Service of £0.7 million as there is no further information provided.

Costs to comply with firm regulation

The IA estimates the total ongoing annual costs to businesses of complying with firm regulation as £1.1 million, composed of opportunity costs of:

(1) annual registration and compliance (all firms): £0.1 million;
additional registration and compliance requirements (large firms only): £0.9 million; and,
investigations and firm visits (large firms only); £0.1 million.

The hourly rate used in the IA calculation depends on the size of the firm and the complexity of regulatory tasks. Further, as highlighted in section 0, the average IP hourly rate is likely to be higher than the £431 hourly rate in the IA. It is also likely that the hourly rates for a Senior Responsible Person might be higher than those of the average IP. For example, at a national IP practice with a number of regional offices, the typical hourly rate for a Director or a Senior Manager carrying out complex work would be £656 per hour and £556 per hour, respectively, 52% and 29% higher than the hourly rate used by the IA (coincidentally, the same as the hourly rate for a Manager carrying out complex work at a national practice).

[54] Insolvency Service, "Review of Insolvency Practitioner Regulation", 2021, paragraph 90, accessed January 2022.
[55] Insolvency Service, "Review of Insolvency Practitioner Regulation", 2021, paragraph 91, accessed January 2022.
[56] Insolvency Service, "Review of Insolvency Practitioner Regulation", 2021, paragraphs 90-91, accessed January 2022.

As things stand, given the limited amount of detail on the regulatory requirement, the associated costs to firms are highly uncertain. Without additional detail on the specific requirements of visits in relation to firm regulation, it is not possible to gauge the appropriateness of the IA assumptions on the number of visits and the time required for this.

Costs to firms from compensation

The IA estimates the total cost to firms and IPs from compensation under the new Single Regulator to be £0.76 million based on the increased costs of insurance. This is calculated by applying the insurance loss ratio of 65% to an expected cost to business from compensation payments of £0.5 million. In other words, it is estimated by dividing £0.5 million by 65%.[57]

The expected costs from compensation, of £0.5 million, are estimated by combining:

i) Compensation for undue distress or worry of £0.05 million, estimated by combining the number of complaints not related to the sale/dealing of assets of 416 in 2019[58], and the expected value of the compensation payable for undue stress of £125 (calculated as the average of £0 and the maximum cap, of £250, under the Insolvency Service for Official Receivers).[59]
ii) Higher compensation costs of £0.44 million, estimated by combining:
    - the estimated number of IPs against whom complaints are likely to be upheld, i.e., five based on the number of complaints relating to the sale/dealing of assets in 2019 of 12[60] and assuming 38% are upheld based on the Financial Ombudsman Service statistics on complaints data on all financial products and services[61]; and
    - an expected compensation amount per upheld complaint, of £88,000 (based roughly on the 25th percentile of £0 and the maximum cap for compensation for acts or omissions under the Financial Ombudsman Scheme of £355,000[62]).

We believe that the IA assumption of 38 percent of the share of upheld complaints relating to sale/dealing of assets may not be applicable to IPs/firms. The Financial Ombudsman Service's statistics relate to all financial products including current accounts, credit cards, car or motorcycle insurance, personal loans, and packaged bank accounts.

The estimates above exclude the costs to businesses from additional legal expenses, administrative costs, and other associated costs relating to complaints. Firms and IPs will incur

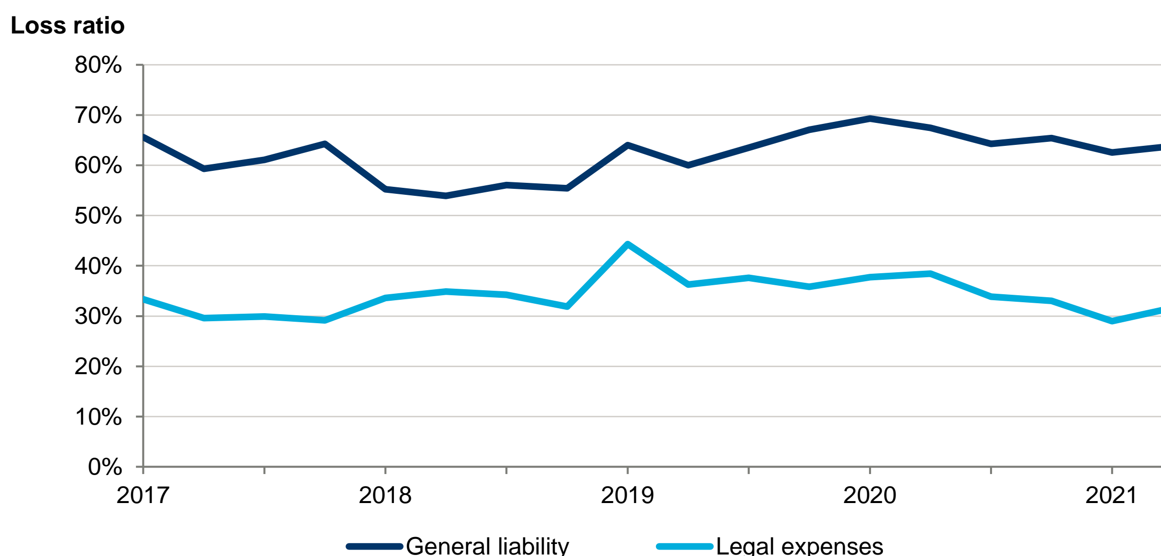
[57] Insolvency Service, "Review of Insolvency Practitioner Regulation", 2021, paragraph 106, accessed January 2022.
[58] Annual Review of Insolvency Practitioner Regulation 2019, table 12. https://www.gov.uk/government/publications/insolvency-practitioner-regulation-process-review-2019/annual-review-of-insolvency-practitioner-regulation-2019.
[59] Insolvency Service, "Review of Insolvency Practitioner Regulation", 2021, paragraph 103, accessed January 2022.
[60] Annual Review of Insolvency Practitioner Regulation 2019, table 12. https://www.gov.uk/government/publications/insolvency-practitioner-regulation-process-review-2019/annual-review-of-insolvency-practitioner-regulation-2019
[61] Financial Ombudsman Service, Quarterly Complaints Data, https://www.financial-ombudsman.org.uk/data-insight/quarterly-complaints-data
[62] Financial Ombudsman Service, Compensation, https://www.financial-ombudsman.org.uk/consumers/expect/compensation

these costs even in cases where the complaints do not result in sanctions. Data on regulatory sanctions for 27 upheld complaints showed that a total of £28,700 was collected as contributions to legal costs in 12 instances by the RPBs. This is equivalent to a (mean) average of £2,400 and the median cost was £2,200 per complaint. To put this estimate in perspective, this is roughly equivalent to a single day's cost for investigating legal claims during the insolvency process.[63]

Assuming that this total amount represents in equal measure the legal expenses incurred by IPs themselves and scaling these up by the number of complaints in 2019[64] gives us an estimate of £0.95 million per year in expected legal expenses.

Further, the loss ratio to insure legal expenses, of around 35 percent, is significantly lower than that of general insurance claims, of 65 percent, used in the IA assessment (as shown in 0 below).[65] **This translates into approximately £2.7 million in higher insurance premiums associated with legal expenses.** We believe this estimate is conservative as it is likely that the expenses incurred by IPs are higher than the amount paid as compensation for legal costs to the RPBs.

Loss ratio for general liability and legal expenses, 2017Q1-2021Q2



Source: Bank of England

Overview of monetised costs and benefits

The figure below provides an overview of the monetised costs and benefits that have been quantified both in the IA and the Oxford Economics review.

63 R3, 'Insolvency fees and the cost of regulation: the detail behind the headlines', 2022. Page 17. Average hourly rate of £289.49 translated into a day rate of £2,315 (based on an 8 hour workday).
64 Annual Review of Insolvency Practitioner Regulation 2019, table 12. https://www.gov.uk/government/publications/insolvency-practitioner-regulation-process-review-2019/annual-review-of-insolvency-practitioner-regulation-2019.
65 Bank of England, Performance metrics for key lines of business (non-life sector), https://www.bankofengland.co.uk/statistics/insurance-aggregate-data-report

Monetised costs and benefits quantified in both the IA and the review by Oxford Economics

IA costs and benefits	IA quantification[66]	Oxford Economics Review
Ongoing benefit to IPs from lower fees *(IA paragraphs 107-115 and Oxford Economics report section 0)*	A. Current cost of regulation: £6.4 million B. Future cost of regulation: £4.1 million Ongoing benefit to IPs from lower fees: A-B = **£2.3 million**	A. Current cost of regulation: £5.3 million B. Future cost of regulation: over £4.1 million Ongoing benefit to IPs from lower fees: A-B = maximum of **£1.2 million**
Familiarisation cost to IPs *(IA paragraphs 66-69 and Oxford Economics report section 0)*	A. Number of IPs: 1,570 B. Familiarisation time required: 4 hours C. Average hourly IP rate: £431 One-off familiarisation cost to IPs: A*B*C = **£2.7 million**	A. Number of IPs: 1,570 B. Familiarisation time required: at least 4 hours C. Average hourly IP rate: 15% to 22% higher than £431 D. Additional support staff familiarisation costs: over 23% of total IA value One-off familiarisation cost to IPs: (A*B*C) + D = best estimate of at least 50% higher than IA value, i.e., over **£4.05 million**
Familiarisation cost to IP firms *(IA paragraphs 70-73 and Oxford Economics report section 0)*	£0.1 million	Based on IP familiarisation costs, apply a minimum 50% uplift to IA value. **One-off familiarisation cost to firms: £0.15 million**
Costs to firms from compensation *(IA paragraphs 100-106 and Oxford Economics report section 0)*	£0.76 million	Legal expenses of £0.95 million and loss ratio of 35% = additional £2.7 million cost associated with legal expenses Total cost to firms from compensation: 2.7+0.76 = £3.46 million

POTENTIAL WIDER CONSEQUENCES OF THE PROPOSED REFORM

The proposed reform would entail fundamental changes that might have significant implications for the insolvency profession and customers through several channels. Based on our conversations and wider reading we have identified three major areas, bulleted below, that are worthy of further consideration.

The three areas discussed in this chapter are:

- Potential issues during the transition period
- The impact on competition and, therefore, choice for customers; and
- The impact of changes in regulatory incentives due to the new governance structure.

POTENTIAL ISSUES DURING THE TRANSITION PERIOD

The IA suggests that the process of setting up a new regulator might take between two and four years, but also highlights the risk that the process may take longer depending on legislative time.[67] The early days of the life of a regulatory agency are often seen as critical in setting expectations for the future. However, they also constitute a fragile time in the life of the regulatory body as statutory frameworks and a common understanding of roles and responsibilities are being developed. There is consensus that these moments are significant for subsequent agency life.[68]

A prolonged period of uncertainty around the transition phase may lead to **moral hazard** among various market participants, and a **potential regulatory vacuum due to staff movements**. Further, the IA has not yet estimated the **costs likely to be incurred during the set-up and transition phase**. We discuss each of these in turn in this section.

Moral hazard

The IA recognises that there would be a risk of moral hazard on the part of RPBs as the transition period comes to an end.[69] However, the IA ignores the risk of moral hazard **on the part of the IPs or creditors** who may take on additional risks during the transition period. The problems created by this issue may be exacerbated as the transition is likely to occur in a post-pandemic period when insolvencies can be expected to be at historically high levels.

The lack of an established complaints-handling mechanism during the transition period may create a period of legal uncertainty, and certain market participants may risk potentially illegal behaviour in the knowledge that any future complaints may not be upheld by courts purely on the grounds that the legal framework was not clear. IPs, RPBs and subsequently the new Single Regulator may have to incur

[67] Insolvency Service, "Review of Insolvency Practitioner Regulation", 2021, paragraph 33, accessed January 2022.
[68] Elizondo and Dussauge-Laguna, *Steering regulatory agencies through their infancy*, LSE Risk & Regulation, Summer 2019. https://www.lse.ac.uk/accounting/assets/CARR/documents/R-R/2019-Summer/190701-riskregulation-08.pdf
[69] Insolvency Service, "Review of Insolvency Practitioner Regulation", 2021, paragraph 119, accessed January 2022.

potentially avoidable additional administrative and legal expenses to handle complaints raised purely to take advantage of the transition period.

Skills shortage during the transition

The IA highlights the risk of understaffing during the initial days of the new Single Regulator as a key concern. It proposes mitigating this risk through a flexible open-ended transition period, which could be extended if necessary, to ensure that a fully functional Single Regulator is in place.[70] While some personnel may move to the new Single Regulator and take on regulatory responsibilities in a transitional arrangement, RPBs and IPs interviewed by us indicated that a significant number of RPB personnel may move to other IPs or remain with RPBs in different roles. This may create a shortage of skilled regulatory staff overseeing the market during the transition period.

Post-recruitment training may require extensions to the transition period which could increase regulatory uncertainty, especially if it proves difficult to hire skilled and experienced staff. The Single Regulator may need to hire staff without specific experience in IP-regulation to fill the gap left by RPB staff. For example, we understand from the ICAEW that it takes them six months or more, depending on the trainee's prior experience, to train a newly hired staff member with Insolvency qualifications (i.e., the Joint Insolvency Examination Board, or JIEB) before they are able to conduct visits independently. Our understanding from RPBs is that the required skills are mainly obtained through on-the-job learning which comes with experience but consequently would extend the transition period.

Set-up and transition costs

The IA does not quantify additional costs that may accrue to the Government or the Single Regulator during the set up or transition period. These costs, around the recruitment and training of current staff, setting up of IT systems, etc., are not included in the IA as they are not known at this stage, but are expected to be identified during the project set up phase.[71] Unlike Ofcom, the new Single Regulator will not be able to inherit legacy systems and will have to incur potentially significant set up costs. Our analysis suggests that these costs may be substantial and, therefore, should be formally considered before the introduction of any new regulation.

In the context of a Single Regulator, it is likely that significant funds would be required upfront to create a financial reserve required to fund cases in advance of potential fines. Further, in addition to staffing and IT systems costs identified (but not quantified) in the IA, costs will be incurred as policies and systems are set up and governance arrangements, such as the complaints gateway and the compensation scheme, are finalised.

The NAO report on the creation of Ofcom highlights the importance of set-up and transition costs, and how these may substantially add to the costs of the new regulator. The NAO estimated set up costs of around £79.3 million comprising planning, design, accommodation, recruitment, and IT

[70] Insolvency Service, "Review of Insolvency Practitioner Regulation", 2021, paragraph 119, accessed January 2022.
[71] Insolvency Service, "Review of Insolvency Practitioner Regulation", 2021, paragraph 134, accessed January 2022.

system design as well as transition costs accruing to legacy regulators.[72] Of the £79.3 million costs, legacy regulators' liabilities comprised £33.6 million and financing costs amounted to £4.5 million. Excluding these, Ofcom's set-up costs (£41.2 million) accounted for close to a third of its first-year operating expenditure of £122 million.

The setting up of the new Office for Professional Body Anti-Money Laundering Supervision (OPBAS) in 2018 provides another useful reference point for these costs. OPBAS, under the auspices of the Financial Conduct Authority (FCA), oversees professional body supervisors for money laundering to ensure a robust and consistent standard of anti-money laundering supervision across the legal and accounting sectors. According to the FCA, OPBAS' set-up costs were approximately £0.5 million comprising employment costs in addition to overheads such as accommodation, IT, and common services. To put these figures in perspective, OPBAS' set-up costs were roughly a third of its ongoing operation costs of £1.45 million in its first year of operation in 2018/19.[73] The OPBAS figures indicate that the inclusion of set-up costs could significantly alter the balance of costs and benefits of the new Single Regulator.

The costs of setting up the Single Regulator will depend heavily on the scope of regulation and the systems and staff required. Applying a rule of thumb measure of a third of estimated annual ongoing costs, based on the OPBAS and Ofcom examples, provides an estimate of £1.61 million in set-up costs. It should be reiterated that a more appropriate estimate of set-up costs should be based on bottom-up estimates based on the specifics of the proposed regulatory structure.

THE IMPACT ON COMPETITION AND CHOICE FOR CUSTOMERS

The IA, while in line with established government guidance (except otherwise specified in this report), does not give prominence to the impact of the proposed regulation on dynamic competition and the process of innovation in the IP market. The Competition and Markets Authority has identified that greater regulation typically reduces competition, and that policy makers must consider the costs of reduced competition, but this is not included in the regulatory IA template.[74]

The IA estimates the proposed reform to yield a *maximum* benefit of £2.3 million accruing equally to all IPs irrespective of size. [75] However, as shown in Section 0, our analysis indicates that it is unlikely that these benefits will be realised, and in fact, the proposed regulatory reform may lead to additional *costs* to IPs. If shared equally among IPs, the burden of these additional costs can be expected to fall

[72] National Audit Office (2006), The creation of Ofcom: Wider lessons for public sector mergers of regulatory agencies, table 5.
[73] Financial Conduct Authority (2019), Recovering the costs of the Office for Professional Body Anti-Money-laundering Supervision (OPBAS): further consultation on fees structure 2, CP19/13., paragraphs 2.15-2.16.
[74] *Regulation and Competition: A review of the evidence,* UK Competition and Markets Authority, January 2020. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/857024/Regulation_and_Competition_report_-_web_version.pdf
[75] Insolvency Service, "Review of Insolvency Practitioner Regulation", 2021, paragraph 128, accessed January 2022.

disproportionately on IPs in micro and small businesses who constitute an estimated 46 percent of the profession.[76]

While small and micro businesses are expected to be exempt from firm regulation fees, the costs associated with handling complaints and visits will further add to the burden on businesses. Large businesses, and to some extent medium-sized businesses, typically have dedicated compliance teams and can benefit from economies of scale with respect to the opportunity costs of firm regulation. However, the burden of these measures may be disproportionate for small and micro businesses who may struggle to find resources to comply with the additional requirements of firm regulation.

A number of studies have highlighted how increased regulatory burden on small businesses in various markets has created barriers to entry and reduced competition in the market (see Box 3). A reduction in competitive intensity in the market—either through barriers to entry or through the exit of smaller firms—increases the market power of larger firms which in turn is likely to increase prices for end-customers.[77] Other impacts of reduced competition in the market include a reduction in quality of services and a slowdown in innovation.

BOX 3: RECENT STUDIES ON THE IMPACT OF INCREASED REGULATORY BURDEN ON SMALL BUSINESSES

Several studies have highlighted the potentially anti-competitive impacts of increased regulatory burden on small businesses:

In a theoretical paper, Campbell, *et al.* (2015)[78] looked at the case of consumer data privacy regulation. They built a model which demonstrated that the requirements that were placed on companies to protect consumers would disproportionately affect smaller businesses. In their paper they showed that larger firms who were more likely to offer a suite of services would face a relatively smaller cost from asking for consent from a consumer relative to the benefit they offer, compared with a new and smaller entrant who might offer only a single service. This would make it more difficult for a new and smaller firm to enter the market and attract users.

The impact of entry restrictions created by state certification processes was studied by Ohsfeldt and Li (2018)[79] in the context of the health sector in the US. They compared the impact on the quality of home health agencies (HHA) in states with certificate-of-need ("CON") programmes with those in states without such restrictions on entry. They found that HHAs in states with CON programmes were less likely to have 'High' quality ratings, and more

[76] Insolvency Service, "Review of Insolvency Practitioner Regulation", 2021, paragraph 127, accessed January 2022.

[77] RBB Economics. *Cost pass-through: theory, measurement and potential policy implications. A Report prepared for the Office of Fair Trading.* February 2014. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/320912/Cost_Pass-Through_Report.pdf

[78] Campbell, J., Goldfarb, A., & Tucker, C. (2015). Privacy regulation and market structure. Journal of Economics & Management Strategy, 24(1), 47-73.

[79] Ohsfeldt, R. L., & Li, P. (2018). State entry regulation and home health agency quality ratings. Journal of Regulatory Economics, 53(1), 1-19.

likely to have 'Medium' quality ratings, compared to HHAs in states without the CON restrictions on entry.

The case of regulatory barriers has been more generally explored by Bailey and Thomas's (2017)[80] study of the impact of regulation in 215 different industries in the US. Their study showed that more-regulated industries experienced fewer new firm births and slower employment growth. They also found that that large firms were less likely to exit a heavily regulated industry than small firms.

Even if the financial costs to smaller businesses were designed to be proportional to their size, they may be at a disadvantage in engaging with regulators on issues relevant to small businesses. Larger incumbent firms would have the resources to dedicate to engaging with regulators and regulatory processes (e.g., consultations about changes to existing regulations) whereas smaller firms may not have the same resources to devote to these activities. For instance, McNally, *et al.* (2018)[81] point to a lack of participation on the part of smaller ISPs in the development of policies that directly affected them in relation to the provision of broadband services in remote and rural areas and indeed a lack of understanding of various policy mechanisms.

CHANGES IN REGULATORY INCENTIVES DUE TO THE NEW GOVERNANCE STRUCTURE

The Government's proposal is to create a new independent single regulator that will sit within the Insolvency Service. This would alter the incentives of various market participants.

The proposed regulatory reform would, in theory, address the principal-agent problem identified by the IA in the current regulatory system due to RPBs' conflicting interests to maintain their IP membership numbers and enforce discipline. The IA does not provide any indication or guidance on the extent to which these principal-agent problems may have distorted regulatory priorities or led to regulatory arbitrage in the current setting.

However, the suggested regulatory reform raises questions about the regulator's independence from the Government, which would need to be addressed through the implementation of a robust governance structure. Two other key points for consideration that are not addressed in the IA are the role of the Insolvency Service in appointing and managing Official Receivers and, more generally, the Government's role in providing effective oversight and feedback to the regulator. We address these four points in turn below.

Potential principal-agent problem due to RPBs' regulatory responsibilities

Taking regulatory responsibilities away from RPBs would, in theory, correct any principal-agent issues that may have been created in the current regulatory set up. As identified in the IA, RPBs were

[80] Bailey, J. B., & Thomas, D. W. (2017). Regulating away competition: The effect of regulation on entrepreneurship and employment. Journal of Regulatory Economics, 52(3), 237-254.

[81] McNally, M. B., Rathi, D., Joseph, K., Evaniew, J., & Adkisson, A. (2018). Ongoing Policy, Regulatory, and Competitive Challenges Facing Canada's Small Internet Service Providers. Journal of Information Policy, 8, 167-198.

previously responsible for enforcing discipline among IPs but also had conflicting interests in maintaining their memberships, which could, according to the IA, create incentives to relax their disciplinary processes. The IA further argues that RPBs may choose to enfeeble their regulatory enforcement to attract greater membership, which could lead to the emergence of regulatory arbitrage.[82] Based on our review, however, we are not able to comment on the extent to which principal-agent conflicts may have distorted regulatory priorities to-date.

Independence of regulators from regulated entities and the government

The independence of regulators is important as they must often balance competing needs from both regulated entities and the Government. Regulators must demonstrate impartiality, objectivity and consistency in carrying out regulation, and must act without conflict of interest, bias or undue influence.

An OECD survey of regulators[83] identifies a number of areas through which the independence of regulatory agencies can enhance the role of regulation in minimising market failures. When industry self-regulation or co-regulation exists and appears not to resolve market failures, there may be benefits from the creation of new independent regulators. However, a careful weighing of the costs and benefits of introducing a new regulatory structure is important. The OECD Roundtable on independent sector regulators highlighted the need to consider these given "the unanticipated consequences that can flow from regulation, and the potential for political intervention and political influencing activities once regulation is put in place".[84]

It is important to protect the independence of the regulator from regulatory oversight, especially in high profile liquidations. An independent regulator should be able to resist pressures to ease regulation at the expense of long-term maintenance of service quality in the regulated sector. The regulator's long-term mandate beyond the electoral cycle can help resolve time inconsistency and fluctuations linked to political as well as economic business cycles.

The proposed Single Regulator—a combined oversight and regulatory body—does not *per se* create an environment of independence required to give customers and IPs confidence in the regulatory body. Taking on regulatory responsibilities may be perceived as biasing the Insolvency Service's view on regulatory decisions which would have knock-on consequences for economic confidence. Further, given HMRC's role as a secondary preferential creditor following the Finance Act 2020, a government regulator may not be perceived to be fair and equitable in its treatment of claimants in the insolvency process. Similarly, the RPS, which pays employees sums owed by their employers, is a preferential creditor and currently sits within the Insolvency Service. The proposed Single Regulator would not be

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[82] Insolvency Service, "Review of Insolvency Practitioner Regulation", 2021, paragraph 25 III., accessed January 2022.

[83] OECD (2016), *Being an independent regulator,* The Governance of Regulators, OECD Publishing, Paris. https://read.oecd-ilibrary.org/governance/being-an-independent-regulator_9789264255401-en#page4

[84] *Executive Summary of the roundtable on Independent Sector Regulators,* OECD Directorate for Financial and Enterprise Affairs, Competition Committee, Annex to the summary record of the 68th meeting of Working Party 2.
https://one.oecd.org/document/DAF/COMP/WP2/M(2019)2/ANN2/FINAL/en/pdf

perceived to be fair and equitable if the RPS continues to remain a constituent part of the Insolvency Service.

Typically, regulators are accountable to Parliament through their sponsoring departments which sit outside the regulators. Most regulators have a distinct legal entity, either as non-ministerial departments (e.g., Ofwat), or as public corporations (e.g., the Civil Aviation Authority). Even where regulators are independent bodies, formal arrangements are often put in place to ensure regulatory independence. These include budget independence, conditions for the appointment or dismissal of key staff, accountability and reporting to executives and to the market. It is not evident from the current proposals how a combined regulator would encourage independence along these dimensions. Within the proposed Single Regulator's combined structure, an even larger number of safeguards and protections will need to be put in place than would be the case with an independent regulatory body.

Appointment and oversight of Official Receivers

The Insolvency Service also provides Official Receivers (ORs), who are civil servants appointed by the court in bankruptcy, and compulsory winding up appointments. ORs are not regulated to the same extent as IPs, do not require approval of fees from creditors, and do not have the same transparency or disclosure requirements. With the Insolvency Service taking up regulatory responsibilities, the lack of regulatory oversight for ORs—part of the new Single Regulator—will be inconsistent with the burden on private IPs carrying out the same function.

In large or complex cases, the OR may appoint an IP as a special manager to assist with the case. High profile liquidations of Carillion in 2018 and Thomas Cook in 2019 were both overseen by ORs with IPs appointed as special managers. In these situations, the IPs' fees must be approved by the Insolvency Service. This may create a situation where the regulatory responsibilities of the Single Regulator, which must maintain its independence from the workings of the market, will conflict with its responsibilities as the provider of ORs.

Government oversight of the regulator

Finally, having the regulatory oversight function within the regulator reduces the ability of the government to examine and publicly express its views on the functioning of the market and the role of the regulator at an arm's length—a valuable outcome of having an independent regulator, as highlighted by Cathryn Ross, Ofwat Chief Executive.[85] As highlighted above, HMRC's role as a preferential creditor in the insolvency process may create conflicting interests for the Government as an overseer of the regulator. This may further limit the government's ability to provide feedback to the regulator or introduce legislative and regulatory policy 8changes in an independent and timely manner.

[85] *The future of Independent economic regulation,* Keynote lecture at the London School of Economics, Centre for Analysis of Risk and Regulation, 20 June 2017. https://www.ofwat.gov.uk/wp-content/uploads/2017/06/The-future-of-independent-economic-regulation-keynote-lecture-by-Cathryn-Ross-at-London-School-of-Economics.pdf

OXFORD ECONOMICS

Global headquarters
Oxford Economics Ltd
Abbey House
121 St Aldates
Oxford, OX1 1HB
UK
Tel: +44 (0)1865 268900

London
4 Millbank
London, SW1P 3JA
UK
Tel: +44 (0)203 910 8000

Frankfurt
Marienstr. 15
60329 Frankfurt am Main
Germany
Tel: +49 69 96 758 658

New York
5 Hanover Square, 8th Floor
New York, NY 10004
USA
Tel: +1 (646) 786 1879

Singapore
6 Battery Road
#38-05
Singapore 049909
Tel: +65 6850 0110

Europe, Middle East and Africa

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Asia Pacific

Singapore
Hong Kong
Tokyo
Sydney
Melbourne

Email:
mailbox@oxfordeconomics.com

Website:
www.oxfordeconomics.com

Further contact details:
www.oxfordeconomics.com/about-us/worldwide-offices

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- **respond** and comment on proposed changes to the law and regulation; and
- **educate** through guidance and advice to help stakeholders comply with laws, regulations and professional standards.

Chartered accountants are talented, ethical and committed professionals. There are more than 1.8m chartered accountants and students in the world, and more than 187,800 of them are members and students of ICAEW. All of the top 100 global brands employ chartered accountants*.

Founded in 1880, ICAEW has a long history of serving the public interest and we continue to work with governments, regulators and business leaders globally. And, as a world-leading improvement regulator, we supervise and monitor over 12,000 firms, holding them, and all ICAEW members and students, to the highest standards of professional competency and conduct.

We promote inclusivity, diversity and fairness and we give talented professionals the skills and values they need to build resilient businesses, economies and societies, while ensuring our planet's resources are managed sustainably.

ICAEW is the first major professional body to be carbon neutral, demonstrating our commitment to tackle climate change and supporting UN Sustainable Development Goal 13.

We are proud to be a founding member of Chartered Accountants Worldwide, a network of 750,000 members across 190 countries which promotes the expertise and skills of chartered accountants around the world.

We believe that chartered accountancy can be a force for positive change. By sharing our insight, expertise and understanding we can help to create sustainable economies and a better future for all.

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ICAEW
Metropolitan House
321 Avebury Boulevard
Milton Keynes
MK9 2FZ
UK

T +44 (0)1908 248 250
E contactus@icaew.com
icaew.com/regulation

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Our role as a world-leading improvement regulator
Our mission is to strengthen trust in ICAEW Chartered Accountants and firms. We do this by enabling, evaluating and enforcing the highest standards in the profession.