ICAEW
REPRESENTATION 30/22

THE FUTURE OF INSOLVENCY REGULATION

Issued 25 March 2022

ICAEW welcomes the opportunity to comment on *The Future of Insolvency Regulation* consultation published by Insolvency Service on 21 December 2021, a copy of which is available from this link. For questions on this response please contact our Business Law team at representations@icaew.com quoting REP 30/22.

As the Minister states in his foreword to the consultation, 'the UK is rightly regarded as having a first-class insolvency regime, which is respected and admired internationally'. Even a first-class regime can be improved, however, and we agree with the proposals in the consultation that the bonding arrangements should be reformed, a public register introduced and that firms should be regulated in addition to individual office holders. Firm regulation would be a significant and welcome reform. It would, for example, give Recognised Professional Bodies (RPBs) the powers they need to address known concerns in the volume IVA sector.

If further measures are felt to be needed to address the concerns in that sector, other reforms should be considered, eg, whether responsibility for consumer IVAs should be moved from the Insolvency Service (and RPBs) to the Financial Conduct Authority (which is already responsible for other consumer debt solutions). A single coherent regime could then apply to consumer debt and matters such as consumer compensation could then be considered in a focused way. On the matter of compensation, we do not support the proposal for a broad compensation scheme which treats creditors as if they are equivalent to consumers.

However, the proposal for a state regulator to replace independent RPBs lacks foundation and if taken forward will damage, not enhance, the UK's first-class reputation. The state has conflicting interests. Government is, through HMRC, typically the largest creditor and recent reforms have given it preference over other creditors. A good regime should instil confidence that all creditors will be treated in an impartial way; but introducing state regulation will reduce confidence that the state's interests will not be put first. A move towards nationalisation like this will not promote and facilitate business investment in the UK.

There are shortcomings in the regime that were not considered in this consultation and adverse perceptions about the regime that we do not believe the proposals will solve. We have suggested some alternative solutions and hope that these will be taken forward at the earliest opportunity. However, if Government wants the UK's regime to remain world class, a much more extensive review on insolvency law and practice should be instigated. 2022 marks the 40th anniversary of the publication of the Report of the Review Committee on Insolvency Law and Practice, chaired by Kenneth Cork (the Cork Review). We believe that Government should instigate a modern-day equivalent to the Cork Review to ensure insolvency law and practice are suitable for the demands and requirements of the 21st century UK economy.

ICAEW
Chartered Accountants' Hall Moorgate Place London EC2R 6EA UK

ICAEW is a world-leading professional body established under a Royal Charter to serve the public interest. Our vision is that ICAEW Chartered Accountants enable a world of sustainable economies. In pursuit of this, ICAEW works with governments, regulators and businesses and it leads, connects, supports, and regulates around 160,000 chartered accountant members in over 147 countries. ICAEW members work in all types of private and public organisations, including public practice firms, and are trained to provide clarity and rigour and apply the highest professional, technical, and ethical standards.

ICAEW is a recognised professional body (RPB) licensing insolvency practitioners. Its related functions are carried out through its regulatory arm, the Professional Standards Department (PSD). PSD's work is supervised and overseen independently by the ICAEW Regulatory Board (IRB). IRB has 12 members with lay parity and a lay chair, who has a casting vote in case of any split vote on any issue. PSD will making its own response to the consultation.

This response is made by ICAEW's Reputation & Influence Department following consultation with various groups of stakeholders, including our Insolvency Committee, made up of practising insolvency practitioners (IPs) with diverse practice areas and geographic focus, our Technical Strategy Board, and our National Technical Advisory Committee.

KEY POINTS

PART 1 - SUMMARY

1. As the Minister states in his foreword to the consultation, 'the UK is rightly regarded as having a first-class insolvency regime, which is respected and admired internationally'. We agree, but there is a risk that some of the proposed changes will damage the regime rather than improve it.
2. The proposed reforms on firm regulation (Q12-16), bonding (Q23-41) and register of IPs (Q17) are welcome, should benefit the system and therefore should be taken forward at the earliest opportunity. We comment further on those proposals in Answers to Specific Questions towards the end of this response.
3. Moving towards nationalisation of the UK's regime by having a single state regulator would be damaging and alternatives should be considered (Q1-11). (See Part 3 of Key Points below).
4. We do not support the proposal for a broad compensation scheme (Q18-22). An insolvency case, by its very nature, results in widespread stress and discontent for a large number of people who are affected; a broad scheme to compensate those impacted therefore risks creating many misconceived or vexatious claims that will be time consuming and expensive to deal with. Other concerns arise, including that an IP owes duties to the creditors as a whole rather than to individual creditors. See Answers to Specific Questions for further comment on this issue.
5. However, even if all the reforms were to be implemented as proposed by the consultation, they would not address many of the root causes of adverse perceptions or rectify several known shortcomings of the regime. The consultation paper concludes too readily that perceptions result from failings of the RPBs rather than from law and regulation or other causes. We suggest that consideration should be given to more targeted reforms.
6. For instance, there are potential gaps and overlaps in the personal insolvency sector where responsibility is shared between the Insolvency Service, RPBs and the Financial Conduct Authority (FCA). Replacing the RPBs with a single RPB, or the Insolvency Service, would not alter this and government will need to consider whether responsibility for consumer volume IVAs should be moved to FCA. FCA is already responsible for regulating consumer debt advice and other consumer debt solutions. This could result in a more coherent regime and avoid gaps or overlaps between the Insolvency Service and the FCA, the principal regulators in this policy area.
7. Other adverse perceptions about business sector insolvencies arise in specific scenarios. We consider this issue further in Part 2 of Key Points and the various scenarios in the Appendix.
8. While reforms outlined above would improve the regime, we that believe that a more extensive review is required to provide confidence that the regime is as good as it can be and likely to remain so for the foreseeable future. 2022 marks the 40th anniversary of the publication of the Report of the Review Committee on Insolvency Law and Practice, chaired by Kenneth Cork (the Cork Review). We believe that Government should instigate a modern-day equivalent to the Cork Review to ensure insolvency law and practice are suitable for the demands and requirements of the 21st century UK economy. See Part 2 of Key Points below.

PART 2 – MAINTAINING A FIRST-CLASS INSOLVENCY REGIME

The strengths of the UK's regime

9. The Minister states in his foreword to the consultation that the UK 'is rightly regarded as having a first-class insolvency regime, which is respected and admired internationally'. We agree. For instance, relative to many jurisdictions, the regime sets out rights of different classes of creditor clearly, is applied impartially, produces predictable results which allow investors and creditors to assess their risks, results in prompt distributions to creditors and is cost effective. It is also highly regulated through voluminous legislation and common law (of the Courts). Overseas businesses frequently seek to make use of the UK's regime for insolvency or restructurings when that choice is available to them.

10. The consultation also acknowledges that the 'vast majority' of IPs perform to a high standard and, again, we agree. One of the greatest strengths of the UK's regime is that it is driven by specially qualified and skilled insolvency practitioners in the private sector who have strong commercial skills. They are a profession, subject to examination regardless of choice of RPB on relevant legal and financial matters, bound by a code of ethics and subject to professional rules regarding professional training and development and to regulatory oversight.

11. IPs perform the role allocated to them in legislation and are officers of – and owe duties to – the Court in applicable insolvency procedures. They can – and do – seek guidance from the Court and creditors may refer to the Court if the need arises. For instance, the administrator of Debenhams sought directions in connection with their duties towards on employment matters at a time when government guidance on the application of the furlough regime was incomplete. This is different from most other jurisdictions where practitioners perform a more legalistic, less commercial, role and rely on immediate access to Courts for approvals.

12. The UK's Courts are rightly renowned for providing robust and impartial judgements. The Official Receiver (Insolvency Service) also has a role to play in defined cases.

13. The insolvency regime is a delicate eco-system, but it works. It is therefore important that any reforms are carefully targeted to address specific shortcomings, or there is a risk that they will damage the entire ecosystem rather than improve the regime's effectiveness or reputation.

14. Some of the proposals in the consultation are well targeted, but the proposal for a single state regulator would have ramifications far beyond the harms it seeks to address (which have not, in our view, been well defined or substantiated). Neither should it be supposed that a single structural change like this will, in fact, improve perceptions about the regime (where those perceptions arise from multiple causes).

> 'No claim to legitimacy that a regulator makes will ever be recognised as clear-cut or beyond argument and, to render life more difficult, no set of regulatory conditions or even public expectations of regulation is liable to remain static.' (*Understanding Regulation, Robert Baldwin, Martin Cave and Martin Lodge, Oxford University Press, Second Edition)*

Shortcomings of the regime

Known shortcomings requiring government action

15. As noted in the consultation, the current regime regulates individual IPs rather than the firms they work in. Potential difficulties of this approach have become more apparent with the development of volume consumer IVA providers. Unregulated firms may employ regulated IPs, but those employees may not be able to achieve the degree of influence over the conduct of the firm that is desirable for compliance purposes. Regulators may therefore find it

difficult to access all necessary information from the firm. We are therefore pleased that Government is seeking to address this.

16. Also as noted in the consultation, the bond regime has numerous shortcomings, and we similarly welcome Government attempts to address these. We doubt that even a reformed bond regime will be the most effective way to cover the risks it is intended to cover and agree that more extensive reforms should be considered.

17. Other areas where regulatory change would be beneficial include:

- conflicting statutory requirements where redundancies need to be made (see Rep 87/15);
- FCA rules that reduce the pool of skilled and qualified persons available to provide debt advice (eg, see Rep 10/18);
- overly restrictive rules on holding creditor meetings and other areas where the insolvency rules might be improved (see Rep 61/21); and
- discrepancies between standards applied to the Official Receiver (OR) and IPs (eg, the OR is not subject to equivalent reporting/transparency or bonding requirements).

Perceptions and possible shortcomings

18. The consultation notes some adverse public perceptions about the regime, drawing in part on the APPG report on Resolving Insolvency of September 2021.

19. The Government proposals are intended to address some of these. However, even if taken forward, they would not provide a complete answer. Having a single regulator would not address the issues; the single regulator would merely inherit the position currently faced by the RPBs, including subsequent adverse perceptions.

20. We have summarised in the Appendix the main scenarios or matters that we think give rise to relevant adverse perceptions, namely:

- Certain conflicts arising from pre-insolvency advice
- Appointment of an administrator as subsequent liquidator
- Rescue of businesses rather than companies
- Powers of debenture holders
- Use of bank panels
- Pre-pack administrations
- Fees

21. We have also suggested several reforms that we think would help improve outcomes and which should, therefore, also improve perceptions. We hope that Government will consider taking these suggestions forward, subject to views of other stakeholders as necessary. We do not see that this would be dependent upon the other reforms, such as a single regulator being taken forward.

Need for a modern-day Cork review

22. While we believe that the UK's insolvency regime is a good one and would be improved through some of the reforms proposed by Government and ourselves, the question remains as to whether reforms are sufficient to meet Government's ambition for excellence.

23. We do not believe that they will. The Minister suggests in his foreword that the 'proposed reforms are bold and forward looking'. However, the nature of the reforms proposed are somewhat limited in scope, failing to address several known issues within insolvency practice.

24. 2022 marks the 40th anniversary of the publication of the Report of the Review Committee on Insolvency Law and Practice, chaired by Kenneth Cork (the Cork Review), which led to the Insolvency Act 1986. That review and subsequent legislation led to a revolution in the UK's insolvency regulatory regime and set a model for insolvency that has been widely followed internationally ever since.

25. We believe, therefore, that Government should instigate a modern-day equivalent to the Cork review to consider, for example:

- any matters arising from this consultation that are not taken forward in the short term (including any pertaining to matters raised in the Appendix);
- whether the scope of regulation should be increased to cover pre-insolvency services (see also our answer to Q12);
- whether the purpose of the insolvency regime has changed since Cork, eg, whether the current priorities of creditors should be changed;
- the costs versus benefits of insolvency regulation from the perspective of creditors and other stakeholders, including costs and purposes of certain reporting requirements;
- whether the reforms made in a piecemeal way recently, including the moratorium, fee regime, partial qualification, and HMRC preference, have achieved their objectives and improved outcomes;
- whether the law and regulation related to insolvency is now too long and complex and could be rationalised; and
- the role of Government departments in the regime (eg, HMRC, which is typically the largest creditor and the Official Receiver which is not subject to the same standards as private sector IPs).

26. A modern-day Cork Review, chaired independently of government, could provide a holistic and fundamental consideration of the issues and practices facing insolvency in the 21st century. We would urge government to consider establishing such a review.

PART 3 - SINGLE GOVERNMENT REGULATOR (Q1-11)

General principle of the single regulator

27. Feedback from our consultation exercise showed support for the principle of a single RPB regulator and strong opposition to state regulation. We comment on the concerns about state regulation further below.

28. As regards a single RPB regulator, that support assumes that the change would not result in material adverse consequences, such as higher costs, a reduction in efficiency and effectiveness and an increase in disruption and uncertainty which did not result in proportionate benefits for creditors and the wider functioning of the economy.

29. We would therefore urge government to reconsider the options open to it. That should include reconsidering the practicalities involved to ensure that the perceived benefits will outweigh the risks. We comment further on the options in Answers to Specific Questions (Q1), including on possible challenges in creating a single regulator for the whole of the UK, whether a state regulator, which we strongly oppose, or an RPB.

30. The consultation makes some international comparisons, citing jurisdictions that have state regulation. We agree that there are many possibilities. For instance, New Zealand (which has a much smaller economy) operates, in effect, with a single RPB and a government oversight regulator. However, in reality, the comparisons serve little purpose, because an insolvency

regime cannot be looked at in isolation from related laws and culture of a jurisdiction. State regulation is not the right answer for the UK.

31. The proposals for either a state regulator or a single RPB appear largely to be driven by perception rather than evidence that the RPBs are not 'independent' and that a new body would subsequently, according to the consultation paper, result in the right perception of 'independence'. We think this involves misperceptions about the RPBs and we comment more fully on that in the next section. If perception of independence is crucial, however, the proposals for a state regulator would be a non-starter as much more concrete concerns regarding conflicts of interest and subsequent independence arise in that context.

32. There may also be perceptions that the RPBs are not using their disciplinary powers as they should, although this is not substantiated. Again, there is little evidence to suggest that a state regulator would do better, but the point is currently academic because we do not believe that the current proposals regarding its disciplinary proceedings are sufficiently robust to take forward.

Independence of RPBs

33. The consultation characterises the RPBs, including ICAEW, as 'self-regulators' and suggests that there is a resultant 'perception of the lack of impartiality and independence of RPBs because of their dual role as a membership body and a regulator', but this is not borne out by evidence. We note that the New Zealand regulator describes their model as 'co-regulation' which we think more accurately describes the position in the UK too. The ICAEW's findings on cases of misconduct are monitored and published by the Insolvency Service (see for example its 2020 report), which includes sanctions for relatively minor failings to substantial fines for the most serious failings. It should be noted that these are sanctions against IPs as individuals under the insolvency regime (which does not yet regulate firms).

34. Poor perceptions of the regime can naturally lead to poor perceptions of the RPBs by nothing more than association, ie, that a failing of a regulated person necessarily involves a failing of the regulator. This is not necessarily the case. It is essential that Government does not itself fall into that trap, because, as outlined earlier, it will need to address the root causes or adverse perceptions will persist.

35. The consultation document is cursory in considering what is meant by 'self-regulation', 'membership body' and 'regulator'. For the avoidance of doubt:

- ICAEW is a regulator in the sense that it authorises IPs to practice. They thereby become bound by its rules, which include requirements on professional standards, insurance, and sanctions. If ICAEW did not do this, another RPB or the Insolvency Service would need to do so.
- ICAEW is not a regulator in the sense that it writes the insolvency rules. These are contained in statute, over 400 pages of secondary legislation, court cases and Statements of Insolvency Practice (SIPs) issued by the Joint Insolvency Committee (JIC). By contrast, the Insolvency Service wishes to assume rule making powers itself, and so become the very sort of self-regulator that is perceived to be problematic. See Answers to Specific Questions (Q6) for further information on JIC and SIPs.
- There are just over 800 ICAEW licensees. ICAEW licensed IPs include affiliates of ICAEW as well as chartered accountants, members of ICAEW, members of other RPBs or other professional bodies. They may even not be members of any professional body at all. ICAEW membership is broadly based, with about 160,000 members, with the vast majority of members outside of insolvency and operating in practice, business, the voluntary and public sectors. Any perception that ICAEW would

therefore act in the interests of IPs against the public interest, which includes interests of other members, is misplaced for this reason if no other.

36. Far from acting in self-interest in this context, we aim to act in the public interest.

37. Acting in the public interest is at the heart of what we do. For instance, we and our volunteer experts have devoted much time to helping government improve the regime over many years, such as noting the need for FCA and Insolvency Service co-ordination as regards treatment of consumer debt – Rep 119/21.

38. As noted in our paper on public interest, ICAEW was formed in the nineteenth century, before there was a regulated profession, in the context of the aftermath of unsuccessful joint stock companies for this very reason:

> 'it is of the utmost importance that the trustee whom they [the creditors] are authorised to call in aid should, if an accountant, be a person of integrity, and belong to some recognised body in whom the creditors can place confidence....' (*Liverpool Mercury, 1870, quoted in Walker, Towards the Great Desideratum: The Unification of the Accounting Bodies in England 1870-1880)*

39. The reputation of ICAEW and all its members is damaged when any one of its members is guilty of misconduct. Our self-interest in this regard is the same as the public interest. It is a great strength of the regime that an RPB such as ICAEW has both the motivation and resource to promote the profession and to discipline its licensees and members when misconduct happens.

Government as the single regulator

40. The consultation's preferred option is that the Insolvency Service becomes the single regulator.

41. We believe that, if taken forward, this would damage the reputation of the UK's insolvency regime internationally, as well as the credibility of Government's efforts to improve regulation making in the UK. Our concerns centre on the following issues (which we consider in more detail below):

- loss of knowledge and transitionary risk;
- economies of scale;
- conflicts or perceived conflicts;
- impact on the profession;
- accountability, insights and transparency;
- skills and resource; and
- enforcement and rule of law.

42. The proposal is in part driven by a desire to increase public trust in the regime. In addition to the tangible concerns about state regulation and related issues regarding conflict of interest, there is no reason to suggest the change of itself will promote trust. On the contrary, we believe that trust is best served by having an RPB regime that is transparent, efficient, commercially aware and accountable as is currently the case.

Loss of knowledge and transitionary risk

43. We agree with the Impact Assessment that the loss of knowledge and transitionary risk is a significant risk. We are particularly concerned at the timing of such a transition. The Impact Assessment suggests that a transition period could be between two to four years. The combination of the lessons from previous economic cycles, which suggest that business failures occur not in the depths of a recession but on the road to recovery following an

economic downturn, as well as the withdrawal of government Covid-19 support to businesses and high inflation eroding real incomes and consumption, means that we may be on the cusp of a major wave of insolvencies. The timing of system reform, in the context of potential increased demand and subsequent stress on the ecosystem, is deeply problematic.

Economies of scale

44. The Impact Assessment states consolidating into a Single Regulator will provide economies of scale. It cites a report by the Office of Fair Trading from 2010, stating that the relatively large number of regulators resulted in a duplication of regulatory efforts. However, since that report, over a decade ago, the number of RPBs, as the Impact Assessment itself acknowledges, has reduced from eight in 2015 to four. Two RPBs – the IPA and ICAEW – cover 90 per cent of the regulation of all Insolvency Practitioners, of which there are about 1,600.
45. Given these characteristics of a relatively small-scale ecosystem, with consolidation of the number of RPBs having already taken place, it is difficult to see how and where further substantial economies of scale could be achieved, especially given the difficulties in knowledge and transitionary risk and potential increase in insolvency cases outlined above.

Conflicts

46. The consultation does not elaborate on how the new office of the Insolvency Service will be independent of Government. Several conflicts, or potential conflicts, arise.
47. The OR, currently part of the Insolvency Service, handles bankruptcy and liquidation cases and is therefore in direct competition with private sector IPs. It is not currently subject to the same standards, which is a concern in itself, but it cannot be right that the Insolvency Service should become the single regulator, thereby regulating itself, or exempt itself from regulation.
48. The Insolvency Service is also responsible for the Redundancy Payments Service (RPS). The RPS is a creditor in almost any insolvency where there are unpaid employees. It pays employees' claims, subject to statutory limits, and stands in the shoes of the employees as a preferential or unsecured creditor, depending on the specific claims. There is an obvious conflict in a creditor being directly involved in regulating IPs.
49. Across Government, many potential conflicts arise, for instance:
    - HMRC is typically the largest creditor in insolvencies. Its influence has increased following recent reforms. This includes the reintroduction of Crown Preference to the detriment of the enterprise culture that the insolvency regime aims to promote (see Rep 53/19);
    - Government appoints boards or employees of the Insolvency Service, the FCA and those who conduct Director Disqualification Proceedings; and
    - it may contract with insolvent companies or encounter public pressure to 'do something' to alleviate the impact of large-scale redundancies arising from an insolvency.
50. At present, IPs can rely upon an independent RPB such as ICAEW to support them in fulfilling their statutory duties to act in the interests of all creditors, according to the set priorities. While we trust that the Insolvency Service would wish to act in an impartial manner as a regulator, it is clear from the above that it might face pressure not to do so or be perceived as not doing so. It is best that there is an independent body so that the Insolvency Service is not put in the position of having to arbitrate between different government interests as regulator.

51. Insolvency Service used to licence IPs, being one of the original eight bodies, but ceased to do so in 2016. We think it was right to stop. It cannot be right that it now resumes such a role and increases its scope to the exclusion of all others.

52. The Insolvency Service is responsible for pursuing claims of misconduct against directors of insolvent companies. IPs provide reports to the Insolvency Service for this purpose. This separation of function is in the public interest. The Insolvency Service may not pursue all potential claims, for instance, due to resource constraints, and its accountability for such decisions should not be reduced or blurred. This is particularly relevant at a time when there is heightened disquiet about a minority of directors evading responsibility for fraudulent Covid-related loans and furloughing.

53. The Insolvency Service may also face conflicting pressures regarding regulatory enforcement, for instance to pursue cases in response to political pressure rather than objective prospects of success.

54. The concerns would be exacerbated if the Insolvency Service was given increased powers to set standards / rules as is proposed, because it may face pressure to set rules to further interests of other government departments at the expense of other creditor groups or for other reasons of political expediency. Currently other stakeholders involved in JIC would act as a check on the Insolvency Service if necessary. The suggestion that the Insolvency Service would assume responsibility for the Insolvency Code of Ethics is also a concern in this context, given that management of conflicts involves ethical considerations.

55. If the proposals are fully pursued, the state will make the rules, establish the procedures, and issue the guidance which regulate the whole insolvency process. The state appoints the Insolvency Regulator, who will be an individual in the same office as the Insolvency Service and paid by the state. The state, through the regulator, licences and regulates the Insolvency Practitioner who will be required to comply with an insolvency manual issued by the state in its role as regulator. This regulator may also undertake practice assessments and inspections of the practitioner. The state is also the preferred creditor and has a direct interest in the decisions made by the IP. Government, in its role as regulator, will also have the power to bring disciplinary proceedings against the IP, eg, if it does not like the decisions made.

56. IPs may themselves thus become, in effect, servants of the state. This is essentially nationalisation of the profession and does not best serve the interests of all creditors, nor the effective and efficient reallocation of capital into the UK economy following a business failure. We do not believe that this approach will increase public confidence in the regulation of insolvency practitioners, nor improve the perception of independence and self-regulation.

Impact on the profession

57. The current regime depends upon a healthy and competitive pool of professionals to provide insolvency services. The RPBs have been instrumental in creating and maintaining such a profession and we see no reason to suppose that Government would be as effective.

58. The Official Receiver competes with IPs in providing some services and generates profits from doing so (see Annual Report 2020-2021). If the remit of the state is increased there is a risk that more cases would be retained, increasing government income, and reducing the economic viability of the private sector profession. To reiterate the point made in paragraph 53, there is a risk that this proposal represents the start of a process that could, deliberately or otherwise, lead to nationalisation of insolvency processes in the UK.

59. We are also concerned that the Insolvency Service's approach on enforcement has not been sufficiently developed. If it does not apply rules of natural justice, this would deter individuals from entering the profession for fear of unjust outcomes. While large fines and other

draconian sanctions may deter misconduct and please those who demand such an approach, they may also deter entry into the profession or have other undesired consequences. These are well known dilemmas for regulators, and modern-day regulators are considering how best to become improvement regulators, but it is not clear from the consultation how the Insolvency Service would seek to navigate them.

Accountability, insights, and transparency

60. A key feature of good regulation is that regulators are held accountable, ultimately to the public through Parliament. The current framework clearly holds RPBs to account through regular monitoring by the Insolvency Service, publication of outcomes and powers of sanction.

61. If the Insolvency Service is to assume the role of the RPBs, it needs to be subject to equivalent standards, such as measurements of effectiveness and accountability. It is not clear what reports the Insolvency Service would produce, beyond the limited reports it produces under the current regime, to instil confidence, or what bodies would assess it in the way that RPBs are assessed. They would, presumably, need to be resourced in the same way as the Insolvency Service, with appropriately skilled monitoring staff to do so, but this is not something contemplated in the proposals. Such an approach would have significant cost implications which have failed to be included in the consultation.

62. Government's recent statement on reform of the UK's regulatory framework emphasise the importance of regulators listening to those they regulate and other stakeholders. It might be harder for the Insolvency Service to do this without the help of RPBs and the insights they gain from those they regulate. IPs may be reluctant to speak freely on matters such as proposed new legislation to a government body acting as regulator. This would not be in the long-term interest of an Insolvency Service, the effectiveness of the insolvency process within the economy or the public.

63. The Official Receiver is subject to significantly different reporting requirements compared to IPs, so that there is already less transparency about its work than that of the private sector. By way of illustration, an IP is required to file progress reports at Companies House, the contents of which are prescribed and include information on recoveries and fees, but the OR is not. For example, this routine example of IP filings which include annual progress reports since 2018. By contrast on a hugely significant insolvency such as Carillion plc, the file at Companies House has had no financial information since 2018.

Skills and resource

64. The proposal is made on the assumption that the Insolvency Service would do a better job than the RPBs. The consultation is unclear as to the nature of such an assumption. The success of an organisation is based upon a combination of leadership, culture, capabilities, and capacity. The consultation is largely silent on these matters.

65. It is crucial that the Single Regulator should have access to appropriate skills and capability to fulfil the policy objectives. The Impact Assessment states that for the purpose of this exercise and the proposed Single Regulator 'no RPB staff will move across to the new regulator'. It is difficult to envisage how suitable knowledge and experience can be retained within the insolvency regulatory ecosystem if this is applied in practice. The Impact Assessment also acknowledges 'there will be a smaller pool of experienced staff with regulatory experience on which any Single Regulator can draw upon for staffing'. It is proposed that the risk could be mitigated 'by putting funding in place to ensure any shortfall of regulators'. However, it is difficult to reconcile this proposal with the earlier statement that no staff will transfer to the Single Regulator, as well as the suggestion within the Impact Assessment that the proposal will lower costs.

66. The Impact Assessment asserts that costs could be lowered for the state single regulator because upper-skilled occupations in the private sector on average earned more than similar occupations in the public sector. However, it is unrealistic to expect the policy objective could be achieved by assuming a transfer of knowledge and experience in a very technical area in high demand in the commercial market and at a time of high inflation by lowering wages. Permanent damage and loss of skills and resource will be inflicted within the ecosystem if such an aspect of nationalisation was permitted to take place.
67. The consultation document suggest that it already has requisite skills, but we note that it is currently only responsible for bankruptcies and liquidations. Some of the other insolvency processes, particularly administrations, give rise to different, specific issues.
68. The Insolvency Service proposes outsourcing certain of its activities, such as routine monitoring, to other bodies. It is unclear what the criteria for such outsourcing would be, who those bodies might be, why they would agree to perform such a role or would do so otherwise than for a return on staff time and investment.

Enforcement and rule of law

69. The consultation document seems to imply that the RPBs have failed to sanction cases of misconduct appropriately, but it is not clear that the Insolvency Service would, or could, do better. Indeed, we believe that the disciplinary process it proposes does not meet basic requirements of natural justice, such as an independent hearing, and that it would need to establish a tribunal to address this. Accusations of misconduct are a serious matter and can result in substantial fines and disqualification impacting an IPs livelihood, so it is important that judicial processes apply. The Insolvency Service suggests that this would be 'disproportionate' because of the small numbers of IPs, but every individual deserves justice and due process of law. This appreciation of the rule of law is one of the bedrocks of UK society and the way in which its economy is run.
70. This issue alone should cause Government to rethink this proposal and consult further if it is still minded to proceed. Judicial processes can be resource intensive and expensive, particularly if the regulator loses the case as illustrated by the Kid's Company case brought by the Insolvency Service / Official Receiver, which left the taxpayer with costs of over £6 million. Further clarity is required on how this would be funded – a regulator must be able to pursue cases of suspected misconduct appropriately, proportionately and in full accordance with the rule of law.
71. Our concerns about state regulation and rule of law are not limited to matters of enforcement. If the Insolvency Service is to be given more extensive powers to make rules or standards in place of JIC as proposed, it could be exposed to pressure to change rules for reasons of political expediency rather than the long-term interests of the UK's insolvency regime. It would also be acting as judge of compliance, or otherwise, with its own rules. We cannot see any basis on which the proposal would result in the 'appropriate separation of duties' promised in the consultation.

ANSWERS TO SPECIFIC QUESTIONS

72. Note – We are answering only selected questions. We do not wish to comment extensively now on matters that will only be relevant if proposals are taken forward that we do not agree with. In some cases, our regulatory arm, independent from ICAEW, is more likely to have relevant evidence or insights. Some questions could best be addressed through dialogue, and consideration of evidence that is not readily available to us (eg, bond claim records and

premiums). We would be happy to provide further input later in the policy process if that would be helpful.

Part A – Proposals for reform of insolvency regulation

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

73. We do not agree with the proposal and believe that having a state regulator would damage the standing of the UK's regime internationally. See Part 3 - Key Points above.

74. We are not clear how the proposal would work in practice in Northern Ireland or Scotland – this applies also to the alternative of a single RPB:

    - One of the current RPBs is Chartered Accountants Ireland. We note that The Insolvency Service Northern Ireland has overall responsibility on behalf of the Department for the Economy within the Northern Ireland Executive for insolvencies in Northern Ireland. It is not clear how a single regulator for the whole of the UK would operate in that context or whether that would result in the simple and clear regime that is intended.
    - Another of the RPBs is ICAS. Aspects of insolvency law in Scotland differ from those in England and Wales and personal insolvency is devolved. ICAS already delegates part of its responsibilities to ICAEW. Government will need to consider whether a single state regulator could perform the function as well and as efficiently as the status quo.

75. Creating a new RPB is another option. It has been dismissed by the Insolvency Service on the grounds that there are too few insolvency practitioners to merit it on cost grounds and that the need for it to be self-funding would result in a heavy burden for those regulated by it. We share the concern about cost of establishment, but largely because we do not think that the evidence for shortcomings in the current regime justifies this significant expense – when these issues can be effectively dealt with by other means. If the Government thinks otherwise, then the expense should not deter it. The profession currently operates on a self-funded basis; it is unclear why Government thinks a single independent regulator would not be able to do so, particularly if it believes there are synergies from reducing the number of RPBs.

76. The consultation considers whether a body other than an RPB might be designated for the single regulator role, such as the FRC / ARGA or FCA and concludes that they should not. We agree with the Impact Assessment that ARGA is in the process of being established and that adding insolvency into its responsibilities would be 'highly disruptive' and move its focus away from improving audit quality, corporate governance and reporting. While we agree that FCA should not be designated as an RPB, we believe there is a case for Government to consider moving responsibility for consumer IVAs to the FCA.

77. Another option is to retain the multiple RPBs and seek to address concerns expressed about this in a more targeted way.

78. Whatever approach is adopted, it is important that the perceived benefits outweigh the risks. All the options, including retaining the current position, are better than having a single state regulator.

79. On balance, we recommend that designating an existing RPB might be the least disruptive and most cost-effective option.

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?

80. No.

Question 3. 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

81. No. We do not believe that a single state regulator is desirable whatever objectives it is set, and we do not believe that it would be held accountable in a meaningful way for meeting its objectives.

82. The proposed objectives would weaken the regulatory framework. To give just one example, it is proposed that the objectives include a system that 'secures fair treatment for those impacted by insolvency'. But priorities between classes of creditor are set by statute and those lower down the rankings are less likely to think it fair than those above, such as secured creditors, which have greater priority. If the purpose of the insolvency regime is to be changed, there should be a full and open debate about what the desired outcomes may be. We suggest above that this should be undertaken in a more fundamental, holistic, and independent way through the establishment of a Cork Review for the 21st Century.

83. It is not clear to us what the next steps will be regarding these proposals, but we suggest that Government should arrange a review and a further information gathering exercise before it puts proposals to Parliament.

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.

84. We are concerned that the Insolvency Service would be given the function of setting technical standards (see Q6 below). Generally, the functions should be no less demanding or comprehensive than those currently undertaken by the RPBs.

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

85. See answer to Q4.

Question 6. Do you agree that the single regulator should have responsibility for setting standards for the insolvency profession? Please explain your answer.

86. The consultation does not explain fully what it means by 'standards'. A government regulator for this sector should certainly not be able to set rules that could change outcomes such as security interests or creditor recoveries.

87. The performance of the services concerned involves exercise of professional judgment. Government should not seek to replace judgment with prescription – there are already 400 pages of rules.

88. SIPs are currently made by JIC, and we believe that this is appropriate. As noted in the consultation, the JIC includes creditor representatives, the Insolvency Service, the Insolvency Service Northern Ireland, and an independent Chair, currently from HMRC, with the industry body R3 attending as observer. Its membership is publicly disclosed. It is an example of a collaborative approach between stakeholders and exhibits a key characteristic of good regulation making.

89. If the Insolvency Service is to replace JIC in this regard, its standard or rule making powers will need to be limited and defined to ensure that it does not encroach on matters that ought properly to be decided upon by Parliament. It would also need to consult and pay due regard to stakeholders currently involved in JIC and be held to account for doing so. This would in effect, mean replicating JIC, but if the role of RPBs has been abolished, this might become a much more arduous task.

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.

90. No. The main concern appears to be that RPBs are responsible both for investigating complaints and taking related disciplinary proceedings. But this is exactly what the Insolvency Service itself proposes doing (but without such robust controls (see Q8 below).

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.

91. The proposals do not meet the most basic standards of natural justice. Disciplinary proceedings should be conducted by an independent tribunal. The proposals fall short of the standards applied by ICAEW and should be reconsidered. The additional costs should be included in any government assessment of whether to take this proposal forward.

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

92. No. We do not believe that there should be a single state regulator - See answer to Q3.

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.

93. We do not understand why Insolvency Service wishes to take on the functions of RPBs and then delegate some of them back to other bodies, which presumably might include RPBs, if they still have relevant staff and desire to do the work.

94. The cost of any such delegation will need to be quantified and included in the overall costs of the proposal so that the government can reconsider its proposal.

95. We are not convinced that education and training should be a responsibility of Government.

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.

96. No. See answer to Q10.

Part B – *Statutory regulation of firms*

Question 12. 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.

97. Yes. This would address a shortcoming in the regime. The need for this reform is most obviously illustrated by experience in the volume IVA sector as noted in the consultation paper, but the logic applies more broadly, and we think the new regime should be applied across the sector.

98. Government should ensure that the nature and limitations of the reforms are clear. Our understanding is that they will improve the ability of regulators to monitor and sanction firms for regulatory breaches but will not render firms liable to creditors or other stakeholders, with the appointment of IPs continuing to be individual appointments.

99. This is a significant change and various issues will need to be considered further as the plans are developed. It will, for instance, be necessary to avoid unnecessary duplication of effort or cost where firms concerned are already regulated, for example firms of IPs that are ICAEW members and / or regulated by FCA.

100. We believe that the Insolvency Service should itself be regulated as a firm (in respect of the functions carried out by the OR) so that the regime is applied consistently across all providers. This would preclude the Insolvency Service from being the regulator.

101. The proposal is to regulate 'firms which offer Insolvency Practitioners to act as an Insolvency Practitioner within the meaning of section 388 of the Insolvency Act 1986'. The implications of this should be considered further. For instance, it might drive unregulated business, such as pre-insolvency advice, away from the regulated sector to the unregulated sector, thereby driving down quality for those affected. Some adverse perceptions about the regime have arisen in the context of pre-insolvency advice. Government should therefore consider whether the scope of regulation should be increased.

102. Possible avoidance mechanisms should also be considered.

103. The proposal appears to contemplate a risk-based approach toward regulation and suggests that monitoring would be targeted at firms that have potential to cause most damage. The implication is that resource would be targeted at the largest firms.

104. We agree that a risk-based approach is appropriate but are not convinced that size of firm should be the sole driving factor. Large firms tend to handle the largest cases, and these are naturally the ones that get most public attention, but evidence does not support a correlation between size of firm and higher risk of error or fraud. The fact that the Insolvency Service does not propose increasing the maximum amount of cover for bonds might suggest that underlying concerns lie at the smaller end of the market. The reputation of the profession is damaged by every case of abuse, whether by a sole practitioner or an IP employed in one of the largest firms.

105. Whatever approach is adopted, it should be no less rigorous than that currently applied by the RPBs to their member firms. The regulator should be appropriately resourced to do so, and the impact assessment should reflect this.

Question 17. 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.

106. Yes, in the interests of transparency.

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.

107. We fully accept that IPs should be accountable for their actions and the consequences that flow from that.

108. However, we are opposed to the sort of broad ranging and loosely defined scheme that appears to be contemplated in this consultation. The proposal appears to be that a pool of money should be created that can then be applied by an actor such as the Insolvency

Service or RPB towards deserving causes based upon 'inconvenience…and stress' caused by 'error or omission, whether inadvertently or knowingly'.

109. To the extent that this proposal is driven by experience in the consumer market, such as IVAs or bankruptcy, it should be considered alongside other consumer issues (including whether responsibility for consumer insolvency procedures be moved to the FCA which has a consumer focus).

110. An insolvency is by its very nature a catastrophic event for those impacted by it and typically results in loss and widespread and understandable upset.

111. In the case of claims against IPs for stress, inconvenience and upset, the IP's costs of dealing with the claims would probably outweigh any compensation award, leading to IPs being incentivised to settle even vexatious or nuisance claims rather than reach the 'right outcome' intended by any legislation. This would be likely to spawn a claims industry and a deluge of claims on large scale insolvencies affecting consumers, driven by claims management companies and others.

112. IPs often need to make difficult judgments in short timeframes and balance different competing interests to meet their statutory duties. For instance, an IP may decide not to use a call centre beyond the first week of their appointment or might dismiss staff earlier than impacted customers or staff might have wished. These are difficult choices to make which naturally arouse anger and upset from those affected. If the Insolvency Service contemplates someone who feels aggrieved in these sorts of examples should have a claim, it should make this clear and explain why. If not, it should set out clearly where the line would be drawn.

113. The underlying cause of losses is the fact of insolvency, not an IP's conduct of the insolvency process. In many cases unsecured creditors receive nothing or insignificant amounts from an insolvent estate, for obvious reasons. The idea (which appears to be contemplated) that a creditor might receive, say, £250 compensation due to some supposed shortcoming of an IP when that creditor would have received, say, 1p from the estate had the IP performed perfectly does not seem reasonable to us. The concept of compensation should therefore be tied both to financial loss suffered and the degree to which the IP failing is based upon incompetence or negligence caused that loss.

114. That leads to another challenge for operation of a compensation scheme in a fair manner. Determining liability is essentially a judicial function, requiring evidence to be evaluated and can be time consuming and potentially costly. The person considering whether an IP has been negligent would need to be familiar with all the relevant law and normal market practice and may be called upon to consider complex issues.

115. The Courts are equipped to do this, and we believe continue to be the right forum for claims to be brought by creditors against IPs. We appreciate that court processes can be intimidating for some and expensive. While amounts involved for individual unsecured creditors may be relatively insignificant, major commercial claims can run into many millions of pounds and it is important for the reputation of the UK regime that robust procedures apply.

116. We agree with the Insolvency Service that it would not be appropriate to establish an Ombudsman for the purpose of evaluating claims. However, if the Insolvency Service becomes the single regulator, it would not be able to determine these matters in a fair manner unless it sets up appropriate disciplinary processes.

117. If a scheme is introduced, there should not be double jeopardy, so an IP should not be liable both to compensate a creditor under the scheme and through a court action for the same loss.

118. IPs owe their duties to creditors, or creditors of a class as a whole. Any compensation owed to one creditor should rightfully be paid to the insolvent estate and distributed to all creditors in accordance with the statutory priorities. The resultant amount paid to each individual creditor might, again, be little or nothing. In short, it is difficult to see on what reasonable basis a compensation scheme of this kind could be established or what purpose it would serve. The Insolvency Service refers to its own compensation scheme, but it is a government department performing a public service – it is, quite simply, different.

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.

119. We agree that, if a scheme were to be introduced, the costs of compensation should be borne by the IP / firm that is required to pay it, if the proposals are taken forward, but we would need to see more developed proposals and costings before we could comment in detail.

Part C - *Proposals for reform of bonding arrangements*

120. (Q1) We agree that the bonding arrangements should be improved, broadly speaking along the lines proposed and as noted in our response to the call for evidence in 2016 (Rep 192/16).

121. (Q29) Increasing the amount to take account of inflation has a logic. However, the current situation faced by the economy, with inflation expected to be higher than it has been for a generation, needs to be modelled as to how such a context would work in practice. In addition, any fixed amount is arbitrary – it would suffice for many cases but be inadequate for others – see further under Q39 below.

122. (Q33) In principle we would support reform of the regime to allow for, say, annual bonds in place of SPS and GPS as it would reduce administrative burdens.

Question 36. Where an Insolvency Practitioner is appointed as special manager, does a surety bond provide sufficient security? If not, please explain why.

123. It appears that the Insolvency Service has power to request such security as it considers in the relevant circumstances. This seems an appropriate power and the Insolvency Service will need to consider what is sufficient in each case.

Question 38. Do you agree that the proposed changes to the current requirements for bonding should be made now pending more significant changes to the regulatory regime?

124. Yes, more extensive reform should not be rushed – an independent review of the regime is needed. In the meantime, known faults that can easily be addressed should be addressed.

Question 39. Considering the changes proposed to the bonding regime above, would the introduction of a single regulator present opportunities for more fundamental reform of the bonding regime? If so, please give reasons for your answers including any suggestions you may have on a proposed reform.

125. It has been open to the Insolvency Service to consider alternatives to the bonding regime at any time. It did not need to wait for the opportunity of it making its own proposal to be the single regulator to take this forward. Equally, it does not now need to tie in reform of bonding

to its proposed assumption of a single regulator role. That said, we agree that alternatives should be considered.

126. There are many reasons to consider replacing the regime (eg, see *Tribe, J. P. (2014). Insolvency bonds: practice and reform. Insolvency Intelligence, 27(2), 17-24)*. We have summarised below concerns about the existing regime by an IP from a small practice, which we think give a good indication that minor changes will not provide a good long-term solution:

- bonding is dealt with through brokers for insurance syndicates; the state does not operate a bonding system;
- bonds only cover limited risks (eg, fraud), not negligence;
- the specific bond is meant to cover gross assets but at the time of assessment those assets may be overstated or subject to a fixed charge etc;
- a bond can be increased but not reduced (even if the assets were overstated) and must be renewed on insolvencies lasting more than five years;
- there is limited transparency regarding costs of bonding and claims made or, therefore, whether the regime is cost effective, or costs allocated fairly;
- it can be difficult and time consuming for an IP to claim under the bond (ie, where the IP takes on a case where there was relevant misfeasance by the previous IP); and
- while bonding is a mandatory requirement, the costs cannot be charged to the insolvent estate as a priority charge, meaning that the IP bears the risk that there may be insufficient assets to cover the costs.

Question 41. Do you think that a levy funded scheme should replace the existing bonding regime, and cover not only acts of fraud or dishonesty by an Insolvency Practitioner but also a broader compensation regime? Please explain your answer.

127. No. We do not believe that a broader compensation scheme should be introduced (see Q18 above). There is perhaps scope for the bonding regime to be replaced by other forms of insurance and / or a compensation scheme along the lines of the Solicitors Regulatory Authority scheme, but this would require detailed consideration.

APPENDIX

128. This is a summary of the main areas of the regime that we think give rise to many of the adverse perceptions about the UK's insolvency regime (as referred to in Part 2 of Key Points above).

129. It seeks to identify what is the root cause leading to adverse perceptions and includes commentary on possible ways forward (in italics at the end of each section). It would be necessary to consult with all relevant stakeholders (including creditors) to reach concrete conclusions and we believe that such an exercise would best be done as part of a wider review of the regime. We have suggested in our response that a more comprehensive and independent review of the insolvency regime, in a similar way to the Cork Review of 1977-1982, should be undertaken.

Pre-insolvency advice – conflict arising from advising more than one entity

130. An advisor (eg, an accountant or IP) may currently advise both a company in financial difficulty and its lenders (eg, a bank) on the financial position of the company and possible outcomes (eg, refinancing, alternative insolvency procedures), subject to any constraints in the code of ethics or regulation.

131. The bank may have rights to appoint an advisor to advise it and require that the report is provided to both parties, or that one report is shared, and another may be provided to the bank which is not shared.

132. These are commercial arrangements and may be required by the bank as a condition of its willingness to extend loans. Such arrangements can be efficient, because work may be required to establish facts, such as assets and liabilities that both parties need to know and information on the options available may be a matter of fact of common interest to both.

133. However, such arrangements can also lead to difficulties, misunderstandings or even conflicts of interest (if the advisor is in fact acting for both parties).

134. While the bank may strictly speaking be the advisor's client, the company may not understand this. It may also regard the bank as a trusted advisor and fail to appreciate that the bank's interests may not be the same as its own or that the advisor, if an IP, may subsequently be appointed as office holder in a liquidation or other insolvency procedure and receive fees for doing so.

135. The company may well be best advised to seek independent financial, as well as legal, advice. However, that would increase costs at a time when many companies will least be able to afford it. Indeed, if cash is very constrained, an obligation for the bank and the company to have separate financial advisers would be likely to reduce the time available to find a solution to the company's problems and lead to sub-optimal outcomes, for example shut down in insolvency rather than a pre-packaged insolvency sale of the business designed to preserve jobs and value.

136. The advice the company receives may well be better than none. We do not therefore believe that the practice should be banned. However, we believe steps could be taken to help avoid misunderstandings and improve public perception.

137. *To reduce risks of misunderstandings, we suggest that advisors acting for one party (eg, a bank) but who provide reports or advice to others as part of their mandate should be required to make that clear in a standard form of disclosure, which should include commentary on the possible advantages of seeking independent financial advice and highlight the potential conflicts that could arise if the company does not do so. Further restrictions on a pre-appointment advisor taking a subsequent appointment could be considered, such as*

requiring the pre-appointment role to be contractually limited to one consistent with acting in the interests of creditors as a whole.

Administrator subsequently becomes liquidator – no review of its role as administrator)

138. The vast majority of companies placed into administration ultimately end up being dissolved with or without a liquidator being appointed.
139. Under current regulation, the administrator may become the liquidator; indeed, this is very common practice.
140. There are good reasons for permitting this, most obviously that the IP is familiar with the affairs of the company and duplication of effort and consequent costs are avoided.
141. The prospective appointment is also approved by the creditors, when the administrators' proposals are put forward, which reduces the need for further administrative processes.
142. However, there are potential disadvantages, which can lead to poor perceptions where the creditors' voice appears lost or not heard and these concerns escalate where shareholders believe that their position is being ignored. The problem is particularly acute where the administrator acts, perhaps correctly, on the basis that the appointing debenture holder has the key economic interest and there is no return to unsecured creditors. It is exacerbated if there are creditor perceptions that some act or omission of the administrator was unfavourable to unsecured creditors, an almost self-fulfilling situation if the IP advised the bank, was appointed by it, and is perceived to be 'the bank's person'.
143. A creditor may complain to the practitioner's RPB, and this may or may not ultimately result in sanction.
144. However, there is no automatic independent review of the conduct of the administration that can be initiated by a creditor in the above circumstances and to be effective there would need to be a different person appointed as liquidator to carry out this assessment and, if necessary, take such action as might be appropriate.
145. In our view, it should be for the creditors to decide whether a review of the administrator's actions by a separate office holder is merited in each case, ie, whether or not a liquidator should be appointed, particularly as, in many cases, the creditors would need to provide funding for the liquidator to carry out the review. We do not, therefore, believe that the practice should be banned.
146. However, we believe the current arrangements where the exit options are approved so early in the process (within 10 weeks of the administrators' appointment) should be reconsidered. Creditors may currently apply to court for the exit option to be changed but this is a relatively onerous and potentially expensive process.
147. To address concerns that creditors do not have enough control over appointment of the administrator as liquidator, we suggest that the process for approval of exit options and creditor input later in the process should be reviewed, with a view to making it easier for (requisite number) of creditors to insist on a different liquidator.

Not enough companies are rescued – only assets sold

148. It is widely believed that the insolvency regime should operate to save a company; indeed, the law was recently changed to create a moratorium for this purpose. However, while we understand the desire to save a company where possible and we recognise that this is the focus of some other jurisdictions' insolvency processes, we think preserving the business and employees' jobs is the principal aspect and whether this is done by saving the company or by a going concern sale of the business and assets is not necessarily of fundamental importance. We believe that the fundamental purpose of restructuring / rescue should be to

preserve a business, such as jobs, assets, goodwill etc. A company is simply a vehicle for the business. If an insolvent company can sell its business to another company that can continue the business, that is a positive result, especially if employees and contracts will transfer to the new owner. The fact that the insolvent company may leave unpaid creditors behind is a natural consequence of the company failing to be able to meet its obligations.

149. We recommend that government provide more information and education on this, rather than simply reinforcing negative perceptions resulting from phoenix companies.

Power of debenture holders to veto company proposed administrators

150. We understand that some commentators believe that the right of debenture holders to veto the appointment of administrators proposed by a company gives them too much power. While we can see that they would have negative perceptions about the regime, those providing credit to companies might be reluctant to do so without such powers. This is therefore a matter of policy for Government and Parliament.

151. On the one hand, the debenture holder often has the key economic interest in an insolvency and therefore it is reasonable for it to be able to veto the company's choice of insolvency practitioner. No one wants the directors to be able to choose an insolvency practitioner of their own liking who may not be perceived to be sufficiently independent of the directors, or who has not had the opportunity to work with the debenture holder ahead of the appointment to prepare the insolvency strategy (including perhaps a pre-pack sale to save the business). But in the relatively few cases when the debenture holder is fully secured in any insolvency scenario, the justification for the debenture holder holding a veto is weaker. Furthermore, in the cases where the company has a significant potential litigation claim against the debenture holder that the insolvency practitioner will need to consider, it may be preferable for the directors to have the ultimate say as to who will be appointed (although the ICAEW Code of Ethics provides some safeguards in this scenario).

152. Ways of adjusting the balance of powers might be considered in a wider regulatory review.

Use of bank panels and potential conflicts

153. It is common practice for banks to have panels of advisors such as law firms, consultants, and accounting firms to assist in matters as they arise. This is widely considered to be a best practice approach to procurement and the Official Receiver has also recently created its own panel of firms. Typically, among other benefits, they secure pricing concessions which will also carry through to a bank's customers and other stakeholders.

154. The concern is that firms on a bank's panel may be hesitant to act if needed against that institution and may commit to restrictions to that effect.

155. Where an IP is appointed by the bank a conflict could arise, because, for instance, the IP's duties might require it to act against the bank to recover assets, but the panel terms may prevent this.

156. Under current regulation, if an IP is aware that the insolvent company might have a claim against the bank before appointment, then the IP should decline the appointment.

157. However, if a conflict is not immediately apparent and only arises after appointment, then the IP needs to consider how to manage that conflict, including to resign. This would typically result in additional costs than would have been the case had the conflict not arisen.

158. It would be open to government to ban the practice (eg, ban banks from including such provisions in their panel arrangements or enforcing them), but we believe that this would be an excessive response, given the potential advantages of panels outlined above, difficulties

that would arise in framing proportionate restrictions and risks of avoidance (through informal arrangements etc). Alternatives should therefore be considered.

159. Additional disclosure requirements to promote understanding of the potential consequences of the market – eg, consider whether IPs should be required to disclose the existence of the panel arrangements to creditors in any panel appointment.

Pre-pack administrations

160. There have been adverse perceptions of the pre-pack administration process for many years. These largely stem from the fact that relevant transactions need to be carried out in a way that preserves value in the insolvent business, ie, quickly and without publicity until the transaction completes. It can, therefore, be difficult for creditors to be sure that the highest possible value has been obtained at the time of sale and concerns are exacerbated where the purchaser is connected to the insolvent business (eg, same directors). Huge progress has been made in recent years to increase transparency and communication to creditors after a pre-pack administration sale.

161. ICAEW worked with the Insolvency Service and others to create the pre-pack pool to provide an independent opinion on the reasonableness of the IPs decision, to mitigate concerns. This did not work (some would say inevitably) because, absent legislative requirement, its use was voluntary and did not alter IPs' statutory duties. Many purchasers proved unwilling to pay for something that did not tangibly serve their interests. We also proposed to the Insolvency Service a way of using the pre-pack pool that might have improved the disclosures required after relevant transactions are completed, but that was not taken forward.

162. Government subsequently legislated (in secondary legislation under a time limited statutory power) to require opinions to be obtained in connected party pre-packs. Time will tell whether this will change public perceptions, but the approach has its own weaknesses, including that those giving opinions are not subject to minimum standards of conduct or publicly accountable for their work, in marked contrast to IPs who remain legally responsible for taking relevant decisions (irrespective of views expressed in any opinion) and are subject to numerous public disclosure requirements (see Rep 104/20 on the draft legislation). In practice, the continued use of the pre-pack pool (on a voluntary basis) for these opinions may alleviate some of these concerns, but we believe that an independent analysis of the cost and effectiveness of the legislation should be carried out when sufficient data is available to measure this.

163. The Joint Insolvency Committee (JIC) has also tried to address criticisms about this insolvency process by amending the relevant Standard of Insolvency Practice (SIP) (SIP16) in respect of marketing requirements and post-transaction reporting. However, there are limits to what it can legitimately do in this respect, because value can be destroyed if, for instance, confidentiality is not maintained. Action that would have the practical effect of making pre-packs untenable (eg, requiring public disclosure of pending transactions) is equivalent to banning them, and that should be the preserve of Parliament, not the JIC, RPBs (or Insolvency Service).

164. The use of pre-pack transactions is a natural consequence of the wider regime of enabling directors to trade to secure a better outcome than a liquidation in regime which, as noted above, is not unduly court driven. Indeed, the Courts have made clear that commercial decision making for the IP to sell assets immediately rest with the IP. We accept that, regrettably, there has been some abuse of the process and it is always a difficult thing for a dislocated stakeholder to come to terms with, but we continue to maintain it is in the interests of the UK for rapid transactions to be available to IPs and stakeholders.

165. The effectiveness of these recent reform measures should be assessed in an independent review if negative perceptions persist.

Fees

166. There are adverse perceptions about high fees charged by IPs; there have been various attempts at regulatory reform to address these perceptions (eg, see Rep 47/14).
167. Government considered moving away from the current market approach by mandating fixed or scale fees but, rightly in our view, did not pursue this; the perils of seeking to replace markets with regulation have been clear for all to see in recent times.
168. Levels of fees may vary in a healthy market. In the legal market, for instance, rates vary wildly (eg, around £60 for legal aid duty solicitors, set by regulation, to well over £1,000 an hour for high value senior specialist work). Laws of supply and demand apply along with factors such as personal preferences for type of work, work-life balance, risk, specialisms requiring defined skills and so on. It is difficult to equate absolute rates charged with any universal measure of 'fairness' and the perception that some are paid too much will be impossible to dispel.
169. We believe that use of panels by larger buyers of services can be helpful (as noted above) and that buyers of services should require firms to tender ahead of appointment and include fees as one of the important points to be considered (this being increasingly prevalent practice in some areas).
170. Government should help ensure that the market works as efficiently as possible. Most importantly, this requires enough skilled professionals to be attracted to the profession.