

The Future of Insolvency Regulation - response

You can e-mail your response to IPRegulation.Consultation@insolvency.gov.uk or send it by post to: IP Regulation Consultation Team, Insolvency Service, Floor 16, 1 Westfield Avenue, Stratford, London E20 1HZ. Please send responses by 25 March 2022.

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Please select which best describes you or your organisation:

Respondent type (please tick)

<input type="checkbox"/>	Insolvency Practitioner replying as an individual
<input type="checkbox"/>	Firm offering insolvency services
<input type="checkbox"/>	Recognised Professional Body
<input type="checkbox"/>	Trade Body
<input type="checkbox"/>	Creditor Organisation

<input type="checkbox"/>	Creditor affected by financial failure
<input type="checkbox"/>	Individual subject to insolvency proceedings
<input type="checkbox"/>	Company subject to insolvency proceedings
<input type="checkbox"/>	Government Department (please specify)
X	Other organisation (please specify)
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List of consultation questions

Proposals for reform of insolvency regulation

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

While this is not directly asked by the question, we agree that the time is now right to move to a single regulator model, for the reasons given in the consultation paper.

We consider that it would not be appropriate for one of the existing RPBs to take on this role, and, for the reasons set out in the paper, the regulator should also not be one of the alternative existing regulators, such as the FCA. The Government, in the form of the Insolvency Service, seems to be the best option in terms of existing bodies. We are of the view that establishing a new regulator would be excessive and probably more expensive. The Insolvency Service already has existing expertise and machinery in this area and has been carrying out the role of regulator of regulators. It would therefore seem to be well placed to carry out this role, provided that it is sufficiently resourced and appropriate arrangements for separation of powers are in place.

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?

We agree it would be likely to improve consistency and transparency and therefore provide increased confidence in the regulatory regime.

We do, however, consider that it is important that any new regulatory regime takes account of differences in relation to the constituent parts of the UK. We are therefore

pleased to note that there is an intention for the Government to work closely with the devolved administrations in order to ensure a smooth transition to a new regulatory model.

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

There should be consistency between the proposed objectives and the statutory duties applicable to insolvency practitioners.

We note that the proposed objectives have omitted existing references to the system being “proportionate” and “promoting” the public interest (albeit that there is a requirement for a system that “protects the public interest”). We wonder whether these omissions were intentional and what the reasons are for such omissions.

We would strongly support consultation with industry stakeholders when formulating the more specific non-statutory regulatory duties or aims, within the overarching framework.

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.

We have some concern regarding the proposal that the regulator should have powers to set the requirements for authorisation to act as an insolvency practitioner. These are currently set out in statute and we consider that this should remain the case and that the regulator should not have the power to set requirements in this area (instead of this being done by legislation). We have an equivalent concern regarding this point in relation to the regulation of firms.

We think that more clarity is required as regards what is meant by the “setting” of technical, educational and professional standards, insofar as, for example, education is a pre-requisite for authorisation and whether it relates to matters such as CPD. We do not believe this should be a matter solely for the regulator.

We also have comments below regarding the delegation of certain functions to particular bodies.

Beyond that, the functions reflect the current regulatory functions carried out by RPBs and the JIC and so seem reasonable.

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

No.

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

We accept that there have been difficulties with the current system and so would generally agree with this, provided it is subject to appropriate processes, allowing for appropriate professional and other input. We can see the merit in consolidation but would not favour a statute-based approach. We agree that a principles-based approach would be more suitable.

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.

We agree that this will probably improve consistency and increase public confidence. However, we do note that an individual may consequently be subject to more than one regulatory regime with regard to different aspects of their professional activities, i.e. the single regulator and a professional body (e.g. one of the accountancy bodies).

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.

The proposal seems reasonable. We agree that a separate tribunal is not justified in view of the size of the profession. The Appeals Officer is probably an appropriate intermediate step, but we consider that there should be ultimate resort to the court.

We do, however, consider that the right to a face-to-face hearing at the regulator review stage (following a disagreement) needs to be clearly defined and proper consideration and justification should be given to what would constitute a severe sanction and, e.g., what is a "significant" financial penalty.

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

No.

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.

We have some concerns over whether it should be possible to delegate consideration of applications and authorisation of insolvency practitioners/firms and routine monitoring of insolvency practitioners/firms. These are the functions that the single regulator should be carrying out itself and delegation could also undermine the desired

improvements in consistency. To the extent that education and training fall within the domain of the single regulator (see our earlier comment), there is a strong argument that it should be possible to delegate these matters.

More clarity is required regarding whether delegation would only be possible to certain specified bodies (e.g. the current RPBs) or whether it could also be to other parties and also the extent to which the single regulator would have discretion regarding this.

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.

No.

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.

Yes, firms should be regulated for the reasons given in the consultation paper.

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.

We agree with the principle of regulation of all firms. We can see some merit in additional regulatory requirements but have some doubts about how such a regime could be effectively constructed and how firms could be stopped from circumventing that regime.

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.

Please see our previous comment. In addition, we consider that although some form of additional requirements could be justified, these would need to be proportionate. We are not in a position to suggest what the criteria should be for firms to fall under any additional requirements regime. We also think it would be helpful in formulating policy in this area to have more information regarding the current market and the size or type of firm that the regime is intended to capture.

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

If an additional requirements regime is to be introduced, this seems like a sensible step. A fit and proper person test would be suitable and in line with other comparable professions.

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?

It would be clearer and more straightforward if the senior responsible person was an Insolvency Practitioner. However, we wonder whether it is wise to be prescriptive and there may be circumstances in which it may be appropriate for another person to have this role.

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.

Yes, we believe it would provide greater transparency and confidence (including amongst members of the public), as well as increased accessibility.

The annual assessment seems reasonable.

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.

We agree that an existing ombudsman service would not be appropriate here and a new ombudsman is not justified based on the numbers involved. While we see some merit in a statutory scheme as an alternative, in devising any such scheme, account would have to be taken of the unique nature of insolvency and the role of insolvency practitioners, including the different relationships between insolvency practitioners and potential claimants. There would also be a need to ensure the avoidance of crossover with existing statutory remedies and professional indemnity insurance. Furthermore, there would have to be sufficient safeguards against vexatious litigants and those who are merely unhappy with the outcome of the insolvency, rather than the IP having done anything wrong. It would also be important that any scheme related to actual loss or damage rather than, say, technical failures which did not cause actual loss or damage.

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.

We are not in a position to suggest a specific amount here.

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.

We believe that the funding model should avoid charging those who have complied with the rules, as far as possible. As such, a levy would not be appropriate. An approach relying on insurance may be the best option.

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

None that we are aware of.

We agree that the Government should continue to develop the funding model further with stakeholders and interested parties. We do think it is important that the scheme should be cost neutral for existing IPs, and while the introduction of regulation of firms is desirable, the cost should also be reasonable.

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

The suggestions seem reasonable in principle.

Another approach would be a litigation style model where the IP or firm would be required to pay the costs when complaints are upheld or where additional monitoring is required.

Proposals for reform of bonding arrangements

As we are not in practice, we cannot speak from practical experience on this part of the consultation, but offer comments based on principle.

23. Should the current minimum statutory requirements of a bond be extended as proposed to include the following (if you disagree, please explain your answer including any alternative proposal or any additional factors to be included):

- a. An allowance for reasonable associated costs of a bond claim:
- b. A period of run off cover that allows for claims to be submitted for a period after the Insolvency Practitioner has left office;

- c. Interest to be claimable against a bond to be calculated on the amount of the loss from the date it was incurred (if so, which interest rate benchmark should the rate be tied to?);
- d. GPS cover to be available for all of an office-holder's appointments, including those where no SPS cover has been obtained.

The suggested terms all seem reasonable. But we wonder whether making these standard terms may have an impact on the willingness of providers to make cover available and/or on the cost of cover.

24. Would extending the statutory minimum requirements of bonds remove the need for Secretary of State approval of bond wording? What would be the possible impacts of this change?

It would seem reasonable to dispense with Secretary of State approval in these circumstances, but the minimum requirements would need to be kept under review.

25. Should a minimum period of run-off cover be provided for in statute and should the period be 2 years? If not 2 years, what should it be? Do you see any disadvantages to applying a minimum period for run-off cover?

A minimum period of run off would seem reasonable. We have no strong views regarding the specific period.

26. Where a maximum indemnity period is applied by a bond provider:

1. should the maximum period an insolvency estate is covered be at least 6 years from the date of appointment?
2. should the Insolvency Practitioner be able to extend cover past the maximum period if they are still appointed on the case, with agreements from the bond provider?

We have no strong views on the maximum period but agree that the IP should be able to extend cover past that period if they are still appointed on the case.

27. Should cancellation of cover due to non-payment of premium only be allowed where application for payment has been made and reasonable notice has been given to the Insolvency Practitioner and their regulator? If yes, what would be considered reasonable notice?

It seems sensible to have some external control over this. We do not have strong views on the period of notice.

28. Where a regulator has been notified that cover may be revoked due to non-payment of a premium, should the regulator be responsible for ensuring creditors of affected insolvency estates remain protected?

Possibly. But this could potentially impose a significant burden on the regulator and it is not entirely clear how ensuring creditors affected by insolvency estates remain protected could be best achieved.

29. The Government proposes to increase GPS cover to £750,000. Is this sufficient? If not please explain why.

We wonder why the original figure of £250,000 was chosen and how it was formulated. We understand that increasing this in line with inflation is a straightforward way to proceed and may have some validity. However, it may be queried whether the original justification or grounds for setting the previous figure remain true, especially given the substantial changes in insolvency matters since it was introduced. Perhaps greater consideration should be given to whether £750,000 is an appropriate figure now and why that is so, given that whatever figure is chosen will be too much in some cases and too little in others.

30. The minimum insolvency estate specific cover is currently £5,000. Government proposes this should be increased to £20,000. Would this level provide sufficient cover for small insolvency cases?

We cannot comment on the specific figures here. We think there should be a clearer explanation as to why a figure of £20,000 is proposed, and what the justification is for raising it from £5,000 to that amount. The approach and the amount selected should be evidence-based, e.g., consider what is the average value of small insolvency cases where an IP is appointed.

31. Should the GPS be reformed to cover interest, investigation, parallel and bond claim costs of the successor Insolvency Practitioner?

We do not have strong views on this, although we note that including these items could be considered to change the nature of the bond in certain respects. However, if this reform was to take place, then it seems to us that there may be notable effects on premiums, which may not be considered proportionate.

32. Should the specific cover obtained per insolvency estate be set at a higher level than the asset value to factor in interest, parallel and investigation costs and fees of a successor practitioner in bringing a claim? If so what percentage above the asset value is an appropriate amount, and why?

Again, we do not have strong views on this. However, as we note for the previous question, it may have an effect on premiums, and this may not be proportionate.

33. Should the option of a Global Bond, where the distinction between GPS and insolvency estate specific cover (SPS) is removed, be provided for? If so, who would benefit from such a product and can you foresee any disadvantages?

We can see some merit in this approach, as it may simplify matters. However, care would be required to make sure that cover was sufficient to encompass all cases.

34. Would adding a requirement for Insolvency Practitioners to declare the level of cover specific to that estate as part of the initial report to creditors be helpful information for creditors? If so, should any changes to the level of cover also be reported?

This seems reasonable and useful for creditors. It is also something that should not be particularly onerous and will increase transparency.

35. Where a regulator takes action which may foreseeably result in revocation of an Insolvency Practitioner's authorisation, should the regulator have a duty to ensure that the Insolvency Practitioner's bond cover is maintained at a sufficient level, until such point as the action has concluded and either the practitioner is deemed fit to continue practising, their authorisation revoked and/or a successor practitioner appointed to their cases?

We can see some sense in this proposal. We wonder whether there may be merit in also allowing for the recovery of premiums from the IP personally, if the estate proves insufficient.

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

The rules for special managers should be the same whoever is acting, irrespective of whether they are an IP or not. This ought to apply specifically for security.

37. Are the current rules requiring security for special managers fit for purpose (taking into account that they apply to all persons appointed special manager, including those who are not Insolvency Practitioners)? If not, what changes should be made?

See answer to question 36 above.

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?

Ordinarily, we would prefer for all changes to be made at the same time rather than in piecemeal fashion; however, if improvements in this area could be made now it may be desirable to proceed. This is particularly true because it is unclear when it may be possible to make the other changes discussed in this consultation, given that they will require primary legislation.

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.

This depends to an extent on what the desired role of the single regulator is to be. If their remit is to extend to aspects of the bonding regime, then there will, of course, be opportunities for the single regulator to bring about further reforms. The single regulator could take account of any interim changes to the bonding regime undertaken when carrying out their own review at a later date.

40. Is the current balance in the UK between protection of creditors' interests and cost to the insolvency profession the right one? If not, how might this be addressed

If premiums are disproportionate in some cases, then this suggests the balance is not right, although we do not have information to know why they are disproportionate and/or whether this is justified. If the balance is not the right one, this might be addressed by moving away from an insurance-based system; however, we recognise that there would be significant difficulties in doing this.

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.

This could be explored with an open mind, but other options should also be considered. Detailed evidence about the relative costs of different approaches and their impact would be necessary before adopting a particular course.