

Response to Call for Evidence on Regulation of Insolvency Practitioners: Review of Current Regulatory Landscape (July 2019)

This response is provided by a working group of the Centre for Commercial Law at the University of Aberdeen. The working group consists of Dr Alisdair MacPherson and Mrs Donna McKenzie Skene.

We appreciate that while the primary purpose of the Call for Evidence is to obtain illustrative examples of different aspects of the regulatory process, and that, as academic commentators, we are not in a position to provide concrete examples, there are however some areas where we believe we can usefully provide comment. This response does not, therefore, seek to provide an answer to every question, but offers some general comments on certain aspects of the issues raised in the Call for Evidence.

Questions 1 and 2. While we cannot comment directly or give specific examples, Mrs Donna McKenzie Skene has some previous experience of the regulation of insolvency practitioners by the Law Society of Scotland and that experience leads us to believe that RPBs do generally deal with insolvency practitioner misconduct swiftly and impartially (although we accept that the Law Society of Scotland is no longer an RPB).

Questions 3 and 4. While we cannot comment directly on the available sanctions across all of the RPBs, we do consider that it is important that there is, and is seen to be, consistency in monitoring and enforcement outcomes, however this is achieved.

Question 8. We consider that the current system of regulation as it operates in Scotland does provide for the effective scrutiny of insolvency practitioner fees and strikes the correct balance in the fee-setting process between regulatory intervention and autonomy.

Question 10. Based on anecdotal evidence, we do not have full confidence that people in financial difficulty are always offered the best option for their circumstances if they have consulted a provider specialising in offering one option only.

Question 11. While we again cannot comment directly in relation to RPBs, we are aware that other bodies such as R3, although not itself an RPB, take considerable steps to promote the public interest and protect the public from harm.

Questions 12 to 14. While we do not consider that we can apply a rating as requested, objectively we consider that the regulatory objectives are in the main fit for purpose and that based on anecdotal evidence, the RPBs appear to function in a way that delivers the regulatory objectives. We are also aware from anecdotal evidence, however, that there is a level of concern regarding providers specialising in offering one option only to persons suffering financial difficulty. Our only comment on the existing regulatory objectives is that they might usefully include specific reference to the debtor as well as creditors in the second objective.

Question 15. While we do not consider that we can apply a rating as requested, based on anecdotal evidence, it appears that there is a reasonable level of oversight of the RPBs in terms of the functions which the Insolvency Service carries out as regulator.

Question 16. With hindsight, it would appear that the reserve power is not in fact sufficiently flexible in so far as it does not appear to allow for all possible options for future action, such as allowing the role of single regulator to be taken on by the government. We do not have strong views as to the best option for a single regulator if introduced, but we do think that this should be the subject of further detailed consultation. We do, however, see the attraction of introducing a single regulator for reasons of consistency and confidence. We can see the merits of having an existing body or the government carry out this function in terms of there being existing infrastructure and therefore, presumably,

reduced costs (and see comments below about funding), but we can also see there may be objections if an existing body (especially one of the RPBs) were to become the single regulator. As noted, therefore, we think this would have to be the subject of further consultation.

Question 17. We think that the introduction of firm regulation would be a welcome development irrespective of whether or not a single regulator is introduced. With regard to the other proposed options short of introduction of a single regulator, we consider that these may go some way to providing greater confidence in the system, but could also add to the complexity and fragmentary nature of the regime and would need more detailed consultation. We would therefore consider the introduction of a single regulator to be the cleanest option, but we appreciate that there may be difficulties which make this impractical.

Question 18. The Insolvency Service has been carrying out the role of regulator of regulators and therefore has considerable relevant experience which would allow it to carry out this role. Furthermore, since the Secretary of State ceased to be a granter of licences, issues regarding conflict of interest have been largely resolved, although we note that there could still be possible conflicts with some other aspects of the roles carried out by the Insolvency Service. There does not therefore seem to be an insurmountable objection to the role being carried by the Insolvency Service and in fact it could have certain advantages.

Question 19. We consider that the current levy system should continue, but we do not consider that the existing burden should be increased – if there is a funding shortfall as a result of any new arrangements, which would not necessarily be the case as a single regulator model might overall be cheaper than the current system, it is not inappropriate that this should be met by the public purse considering the public interest in robust and effective regulation of the insolvency profession.