



THE FUTURE OF INSOLVENCY REGULATION

CONSULTATION RESPONSE

PREPARED AND SUBMITTED BY

Ion Fletcher
Director of Policy (Finance)
E: ionfletcher@bpf.org.uk

INTRODUCTION AND EXECUTIVE SUMMARY

The British Property Federation (BPF) represents the real estate sector, an industry which contributed more than £116bn to the economy in 2020 and supported more than 2.4 million jobs. We promote the interests of those with a stake in the UK built environment, and our membership comprises a broad range of owners, managers and developers of real estate as well as those who support them. Their investments help drive the UK's economic success; provide essential infrastructure and create great places where people can live, work and relax.

We welcome the opportunity to comment on the Government's proposals regarding the future of insolvency regulation in the UK.

The past decade has seen a significant volume of insolvency and restructuring activity in the retail, leisure and hospitality sectors as social and economic changes buffet these sectors. The BPF strongly supports the UK's rescue culture, but we have seen mechanisms such as CVAs and Restructuring Plans widely abused: we refer especially to "landlord CVAs", where there are only one or two compromised classes of creditors, but other, largely unaffected creditors approve the CVA.

While these – in our view, unfair – outcomes are driven by the CVA rules themselves and how these have been generally interpreted by insolvency practitioners (IPs) and the courts (as opposed to how the regulatory framework operates), property owners' trust in the regulation of insolvency and IPs has taken a serious hit as a result. This lack of trust has been compounded by difficulties our members have faced in making complaints regarding the conduct of individual IPs and the delays in actioning those complaints.

We therefore agree with the Government that it is time to reform the way insolvency is regulated and we support the proposal to establish a single independent government regulator with powers to authorise, regulate and discipline IPs, as well as set regulatory standards. We also support the creation of a single public register of IPs and IP firms.

Our replies to selected consultation questions are below.

Please do not hesitate to get in touch if you would like to discuss any of this response in further detail.

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

We are supportive

As we have indicated in our responses to previous consultations on this issue, we have several concerns with the way that insolvency is currently regulated.

Firstly, our members do not believe that the outcomes delivered by having multiple RPBs are or can be consistent. Perhaps almost as importantly, a system with multiple regulators does not give creditors confidence that it will deliver consistent outcomes.

Though we have supported the move towards common regulatory standards we do not believe that this has produced a sufficiently consistent approach. The Common Sanctions Guidance for instance only includes a suggested starting point for a financial sanction. For creditors to have confidence that complaints will be dealt with consistently, the same sanctions must always apply to the same poor practice and the RPBs have too much room to diverge. Several of our members have commented that they have experienced inconsistency of approach, in that some RPBs are more stringent than others in their application of the common sanctions. They have commented that this lack of consistency makes the prospect of appropriate regulatory intervention something of a lottery. It also discourages making a regulatory approach in the first place.

Secondly, due to there being numerous RPBs in competition with one another, there is at least the perception that RPBs have a perverse incentive to be accommodating to insolvency practitioners in their disciplinary actions to attract them into membership. We note that we have not seen any clear evidence to suggest any RPB is more lenient to make their membership more attractive. However, regardless of whether this is or is not the case, the system of multiple regulators is perceived to not be as impartial as it could be. This, again, provides the impression that regulation is haphazard and subjective, as opposed to objective and transparent. This perception not only discredits the image of the regulatory process, and as a consequence, the practitioners themselves, but also means that consumers do not consider it fit for purpose. Our members will accordingly think twice about reporting abuses as they have no confidence that these will in fact be considered as they should be.

The fact that there are multiple regulators also means that our members expect them to diverge in their practices, regardless of whether this is the case. Creditors are confused by the process, consequently are less likely to engage with the regulatory process. They do not have as much faith in the system of insolvency regulation as they could if there was only a single, independent regulator.

Thirdly, we do not believe the current sanctions are adequate. Members of ours have testified that they often do not progress complaints as they do not feel the sanctions that can be applied make doing so worthwhile. Moreover, we have heard from those in legal profession that when advising clients, they often advise against making a complaint on the basis that due to the issues mentioned above, this is unlikely to be a worthwhile use of time or expense.

Fourthly, the current regulatory system has been very slow to change to the needs and expectations of creditors. We are pleased that work with organisations on the Joint Insolvency Committee led to the introduction of a new Statement of Insolvency Practice (SIP) 3.2 to help tackle some of the poor practice we had seen in this area. However, due to the need for multiple (and in our view duplicative) rounds of consultation needed for potential changes, the process of putting together SIP 3.2 took far longer than it ought to have. This meant that many CVAs took place without the benefits to creditors that the new SIP 3.2 introduced.

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?

Yes

Replacing the current system of insolvency self-regulation with an independent government regulator would provide creditors with confidence that there is comprehensive oversight of insolvency activity and that poor behaviour is being dealt with more consistently than is currently the case. Independence from the practitioners themselves is considered to be a key feature here, both in terms of the substance and the perception of the regulatory regime. It would also remove the perceived conflict of interest noted above whereby the current group of RPBs, which derive their income from those who they may be required to sanction, are perceived to be in competition with each other. We also anticipate it would result in necessary changes to regulatory standards happening more quickly by removing a (currently duplicative) layer of consultation requirements.

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.

Yes

We have noted before that we feel the current statutory objectives are fit for purpose, but that the regulatory framework surrounding them is not capable of delivering them. While we don't see any pressing need to change the principles from what they currently are, the proposed new principles appear to us very similar to the existing ones (at least in as far concerns creditors) and accordingly would support them.

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.

Yes

From our members' perspective, the most important functions for the regulator are:

- the investigation of complaints against IPs/firms
- the discipline and sanctioning of IPs/firms
- the setting of technical and professional standards for IPs and firms;

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

No

We would not propose any significant additional functions for the regulator.

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

Yes

As noted above, our experience of standard-setting in the insolvency profession is that it takes too long. We of course understand and support the need for broad consultation on new standards, but the current system, under which first the JIC consults among itself, then individual RPBs consult among their members, then further consultation happens at JIC level, does not move quickly enough to ensure that new standards are brought to bear quickly enough to respond to market developments, with negative outcomes for creditors.

We also consider that, whilst consultation of the profession should remain a key part of standard setting, to ensure the appearance and fact of objective rules, the independent regulator should make its own decisions about the standards to be set and how it will approach the task of regulating.

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.

Yes

The inconsistency our members currently report arises from different RPBs, with different approaches to the investigation of complaints and to the inspection of the those that they supervise and regulate. This is a natural and almost inevitable consequence of having different organisations carry out similar tasks and is to be expected.

By definition, having a single organisation carrying out these activities will improve consistency. While there is of course the risk that different people within an organisation take different approaches, it is far less likely than under the current system. It is also far simpler to take action to fix any inconsistency as the power to do so lies in one place.

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.

The process seems reasonable to us, with sufficient separation of duties built in and the ability to appeal against disciplinary decisions.

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

No

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

Ideally, no.

We understand the Government's desire for flexibility in this area, but the main reason we support the creation of a single regulator is that the current regulatory landscape is too fragmented. If the single regulator ends up delegating its functions to multiple other parties, there is a risk that we just end up creating a differently fragmented regulatory landscape that may in time give rise to similar concerns as those we are currently highlighting.

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.

No

As noted above, we have concerns about the potential implications of regulatory functions being delegated outside the direct purview of the single regulator.

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.

Yes

Many of the retail, leisure and hospitality CVAs carried out in recent years have been performed by multi-disciplinary professional services firms. While it is particular individuals that are named as IP for a particular piece of insolvency work, they benefit from the weight, support and brand of the firm behind them. It's therefore right that firms should be held accountable as well as individuals.

The Solicitors Regulation Authority is a good example of a regulator tasked with regulating both individuals and firms. In the experience of our solicitor members, the ability to regulate the firm as well as the individual encourages a culture of compliance within organisations. In our view, regulating firms as well as individuals is therefore crucial to drive systemic compliance.,

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

We agree that all firms should be authorised and should meet minimum regulatory standards, but agree that the more onerous of these should be directed at those with a larger share of this type of work. If a one size fits all approach is taken, it will either be light touch and therefore more likely to be ineffective, or too onerous for those with smaller amounts of business in this sector, which would push more work to the larger players.

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

As per the question above, this should be based upon the proportion or quantity of work a firm undertakes in this sector.

QUESTION 15 Do you think that the 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.

Yes. Whether or not this is a specific full time role for any individual or simply a responsibility for someone who has other roles in addition will likely depend upon the level of work carried out in this area. However, in the wider experience of our members, many of whom work in large organisations, effective compliance requires effective leadership and this in turn requires an officer to be tasked with the requisite responsibility. It also signals the importance of the underlying rules if a senior officer is so appointed.

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

We would not be overly prescriptive. Regulatory compliance does not need to be led or decided by people who do or have practiced in the area. We would suggest that any such person ought to have standing and experience (i.e., be "senior") and that the role within the organisation ought to be a senior one, reporting directly to top level management.

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.

Yes

A single public register will make it easier for creditors to check the status of a particular IP or firm and identify any previous disciplinary action or sanctions. We would also hope that public listing of disciplinary action would disincentivise poor practice among IPs.