



## CALL FOR EVIDENCE REGULATION OF INSOLVENCY PRACTITIONERS: REVIEW OF CURRENT REGULATORY LANDSCAPE

Issued 4 October 2019

ICAEW welcomes the opportunity to comment on the Call for evidence - Regulation of insolvency practitioners : Review of current regulatory landscape published by Insolvency Service on 12 July 2019, a copy of which is available from this [link](#).

Our response to the call for evidence comprises 3 parts:

**Part 1** is a position paper setting out in detail why we do not believe that it is necessary or desirable for the Secretary of State to introduce a single regulator for insolvency.

**Part 2** is our detailed response to the questions raised in the call for evidence.

**Part 3** contains letters from the chair of ICAEW's Regulatory Board, Michael Caplan and the chairs of the Investigation Committee, Paul Brooks and the Insolvency Licensing Committee, Catherine Boyd.

ICAEW Professional Standards is the regulatory arm of ICAEW. Over the past 25 years, ICAEW has undertaken responsibilities as a regulator under statute in the areas of audit, insolvency, investment business and most recently Legal Services and Local Audit. In discharging our regulatory duties we are subject to oversight by the FRC's Conduct Committee, the Irish Auditing and Accounting Supervisory Authority (IAASA), the Insolvency Service, the FCA and the Legal Services Board.

ICAEW is the largest single insolvency regulator in the UK. We license approximately 800 of the UK's 1,550 insolvency practitioners as a recognised professional body (RPB).

ICAEW is a world-leading professional body established under a Royal Charter to serve the public interest. In pursuit of its vision of a world of strong economies, ICAEW works with governments, regulators and businesses and it leads, connects, supports and regulates more than 150,000 chartered accountant members in over 160 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.

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## **PART 1**

### **REGULATION OF INSOLVENCY PRACTITIONERS – POSITION PAPER**

#### **REVIEW OF CURRENT REGULATORY LANDSCAPE**

##### **INTRODUCTION**

1. In addition to answering all of the consultation questions, we have prepared this paper to set out in detail why we do not believe that it is necessary or desirable for the Secretary of State to introduce a single regulator for insolvency in the UK and why we would encourage the Secretary of State to retain the current framework but use the opportunity presented by this review to make further improvements to the regulatory framework which would make insolvency regulation more efficient and effective.
2. We believe that it is important that the Secretary of State takes into account the significant changes in the regulatory landscape since 2015, the change which the remaining RPBs have made to provide greater assurance to our oversight regulators and the public about the independence of our regulatory functions and the changes to the business models of some of those regulated by the recognised professional bodies (RPBs) which require a new approach to regulation more than a new regulator.
3. We intend to deal in this paper with the following areas:
  - Part 1: Rationale for introducing a new single regulator
  - Part 2: Concerns about a transition to a new single regulator
  - Part 3: Suggestions for improvements to the regulatory framework
  - Part 4: Conclusion

##### **PART 1: RATIONALE FOR INTRODUCING A NEW SINGLE REGULATOR**

4. We consider that the introduction of a new single regulator could only be justified if:
  - a. There were too many regulators creating difficulties for effective monitoring and making inconsistent decisions
  - b. The remaining RPBs had failed to comply with the Regulatory Objectives to the extent that the Secretary of State had had to impose any of the sanctions introduced by the Small Business Enterprise and Employment Act 2015 (“SBEE”) and this had failed to produce improvements
  - c. There were real concerns regarding the independence of the remaining RPBs’ regulatory functions and / or the effectiveness of the governance around those functions

- d. Regulation of insolvency practitioners by an a new single regulator would be cheaper, more effective and more robust than the current system

5. We believe for all of the reasons set out below that none of those factors exist.

### **Too many regulators**

6. When the new provisions were introduced in 2015 into the Insolvency Act 1986 (“the Act”) by SBEE the regulatory landscape was fragmented between a large number of professional bodies including; ACCA, CAI, ICAS, IPA, SRA, Law Society of Scotland and ICAEW. Since that time, the SRA and the Law Society of Scotland have ceased their regulatory role and the Insolvency Service GB ceased direct authorisation of insolvency practitioners. ACCA has outsourced a large part of its regulatory work to the IPA and has recently indicated its intention to give up its authorisation as a RPB at the end of 2019. ICAEW has also agreed to assist ICAS in 2019 in carrying out its IP monitoring work pending the outcome of this consultation. If ICAS was to withdraw as a result of a decision to maintain the current regulatory framework, this would lead to a consolidation of virtually all the regulation of GB IPs to just two professional bodies; ICAEW and the IPA, CAI having a small licensed population.
7. Further consolidation will allow the oversight to be much more focused. The recent consolidation has also opened up the possibility of greater working together between ICAEW and the IPA to ensure more seamless regulation and greater consistency in outcomes. While both bodies already adhere to the Commons Sanctions Guidance which was introduced by the Insolvency Service and both use the same Independent Reviewer of Complaints where complainants request reviews of rejection of complaints by our committees, discussions have taken place between senior representatives of ICAEW and the IPA in recent months, exploring other areas where there could be further coordination and working together. Ideas discussed have included the possibility of creating one insolvency licensing committee which would review the monitoring reports produced by both bodies’ monitoring teams and which would determine all applications to grant and withdraw licences. Other areas of focus have included whether it might be possible to work on joint investigations where complaints have been made against multiple administrators or liquidators where at least one is registered with the IPA and one with ICAEW and whether a joint tribunal could be created for the hearing of those complaints rather than the IPs being subject to separate tribunals.

### **Compliance with the Regulatory Objectives**

8. The SBEE introduced into the Act a series of Regulatory Objectives for the RPBs which the RPBs were expected to satisfy and against which their performance would be measured. SBEE also introduced a range of sanctions, including financial penalties and public censure, which could be imposed on a RPB for failing to satisfy its obligations under the Regulatory Objectives. The ability to take action against the RPBs was seen as an improvement to the pre-existing framework where the only action which could be taken against a failing RPB was to withdraw its authorisation – a nuclear option – which would likely be avoided given the disruption this would cause. It should be noted that none of the RPBs have been sanctioned in any way for failure to adhere to the Regulatory Objectives. This should not be surprising as the RPBs take their appointment seriously and are keen to show that they can regulate in the public interest. In these circumstances, it is difficult to see why the Secretary of State would create a new single regulator and would not instead work with the remaining RPBs to bring about changes which would improve the regulation of insolvency work in the UK.

9. It is also important to note that there is now in place a very constructive working relationship between the Insolvency Service IP Oversight team and the RPBs which is helping to identify improvements which can be made to our monitoring and complaint-handling work through regular engagement.

## **Independence of regulatory functions / effective governance**

### **Creation of the ICAEW Regulatory Board**

10. In late 2013, ICAEW commissioned a 'root and branch' review of the governance around its regulatory functions. The review was carried out by Sir Christopher Kelly whose prior work included the review into governance issues at the Cooperative Society. The review was prompted by the need for ICAEW to comply with the Internal Governance Rules of the Legal Services Board in order to apply to become a regulator of probate. Sir Christopher made a number of recommendations which have been implemented since 2014 to improve the quality of governance and to provide greater assurance to our oversight regulators, to the government and to the public about the fairness of our regulatory and disciplinary processes.
11. The most significant change was the creation of the ICAEW Regulatory Board ("IRB") in January 2016 to supervise and oversee the work of PSD, replacing the Professional Standards Board ("PSB"). The IRB has 12 members with lay parity and a lay chair, currently Michael Caplan QC, who has a casting vote in case of any split vote on any issue. The chartered accountant members are drawn from different disciplines and from different backgrounds to include those who work in business and those in private practice. There is one insolvency practitioner currently on the board. This contrasts sharply with the PSB which had 10 chartered accountant members (including members of ICAEW Council) and only 2 lay members. Michael Caplan QC was selected to be the first chair of the IRB by an independent selection panel chaired by Dame Janet Gaymer and Michael then took the lead role in recruiting the remaining 11 members of the initial IRB. Michael was asked at the end of 2018 to extend his role as Chair for another 3 year term. All other members had their terms renewed for different periods (to stagger the rotation off the board). Bios of all of the current IRB members can be seen on our [regulatory web pages](#).
12. The ICAEW Regulatory Board's terms of reference provide that ICAEW Council has delegated to it the supervision of all regulated work including insolvency. In addition to recommending radical changes to ICAEW's disciplinary bye-laws, and revamping the Sanctions Guidance used by regulatory and disciplinary committees and tribunals, the IRB has started a quality assurance programme on the work of the regulatory committees and has already completed its QA reviews of the Investigation Committee. It will be carrying out a similar review of the work carried out by the Insolvency Licensing Committee.
13. Further information about ICAEW's governance and the IRB are included in an appendix to our response to the questions in the call for evidence.
14. Further changes are being made in 2019 / 2020 to amend ICAEW's Supplemental Charter to provide for the IRB to have sole control over changes to ICAEW's disciplinary bye-laws and regulations. This will then reflect the reality as all changes which the IRB has requested since it was created in 2016 have been implemented. It is also considering a change of name and image and a greater public profile to be proactive in assuring the general public about the role that it plays in ensuring that ICAEW acts in the public interest and independently in all of its regulatory work.

### **Greater independence in our decision-making processes**

15. Significant changes have not been limited to the creation of the IRB. Further changes to bye-laws have been made to provide greater assurance to the public about the fairness of ICAEW's regulatory and disciplinary processes. In 2015, the constitution of our Disciplinary Tribunals was changed from chartered accountant majority (2:1) with chartered accountant chair to lay majority. The constitution of Tribunals was changed further in 2018 to provide that each Tribunal be chaired by a Queens Counsel with significant quasi-judicial experience. The constitution of ICAEW disciplinary tribunals is now the same as FRC tribunals.
16. In addition, all of our disciplinary and regulatory committees now have at least lay parity, if not lay majorities, with committees including the Investigation Committee and the Insolvency Licensing Committee having lay chairs. While all committees still include chartered accountants in order to assist the lay members with the understanding of the more technical issues raised in QAD reviews or in complaints, they have no other role at the Institute and provide their time voluntarily. It is also clear to anyone who observes our committees – and they are observed regularly by representatives from our oversight regulators including the Insolvency Service – that the chartered accountant members are usually the first to find that there is a case to answer and they are also usually the committee members pushing for the most severe sanction. They do so because they give their time voluntarily, they are proud of their profession and the Institute, and they do not take kindly to anyone whose conduct threatens to bring the profession or the Institute into disrepute.
17. Our regulatory and disciplinary committees have also been more proactive in supervising the work carried out by staff on their behalf under delegated powers. So, for example, representatives from each regulatory committee, including the Insolvency Licensing Committee, visit PSD's offices in Milton Keynes for an annual audit of work carried out under delegated powers. The ILC reviewers will check all licences which have been granted in accordance with the criteria set by the ILC as well as sampling some monitoring visits where reports were not seen by the ILC (because the visits had good grades) to check that they are happy with the grades which were given.
18. In addition to the checks by the regulatory committees, representatives from the Investigation Committee carry out inspections on all complaints which were closed by staff without the matters reaching the Committee and other aspects of our delegated work. Lay members of these Committees are involved in each visit. Copies of all of the committees' delegated powers' reviews are provide to the IRB for its review. When you total up how many delegated powers' reviews are conducted on PSD work and add that to the number of external inspections of the department's work, you could be mistaken for thinking we have an 'inspection overload'!

### **Independence / governance reviews by other oversight regulators**

19. In addition to insolvency, ICAEW regulates audit, the provision of investment business advice and probate and is an authorised AML supervisor and its work in each of these areas is subject to supervision by a number of oversight regulators. There has been an increased focus in recent years by all of our oversight regulators on ensuring that our regulatory activities are carried out independently and that those activities are not unduly influenced by ICAEW's representative functions.
20. If the Secretary of State were minded to introduce a new independent single regulator for insolvency as a result of this consultation due to concerns about whether professional bodies can be relied on to regulate independently, then comfort should be taken from the various reviews which have been undertaken by our other regulators since 2015.



21. In 2016, as a result of the introduction of the EU Statutory Audit Directive, the Financial Reporting Council (“FRC”) was appointed as the Competent Authority for audit. The FRC was encouraged by the government to delegate all of the delegable functions of a competent authority to the professional bodies who acted as Recognised Supervisory Bodies (“RSB”) and the FRC did this by agreeing Delegation Agreements in September 2016 with all of the RSBs, including ICAEW. One of the obligations of each RSB under the Delegation Agreements was to arrange its affairs so as to avoid any conflicts of interests between its representative and regulatory functions. ICAEW still continues to carry out all of its delegated tasks as an audit regulator under the Delegation Agreement and no concerns have been raised by the FRC regarding the separation of our regulatory functions through two inspections in 2017 and 2018. Indeed, the reports published by the FRC confirm that ICAEW is in compliance with all of its obligations under the Delegation Agreement and continues its role as the largest audit regulator in the UK holding the registrations of nearly all of the largest accountancy firms in the UK.
22. The FRC has also been carrying out a focused governance review of all of the RSBs it supervises during the last 12 months and the current draft report for the completion of stage one of the review raises no significant concerns with the governance arrangements in place around our regulatory functions.
23. After being authorised by the Legal Services Board (“LSB”) to regulate probate in 2014, we made a further application to be authorised to regulate all of the remaining legal services in 2017. This would have led to ICAEW being the only body authorised to regulate all of the reserved legal services. While, ultimately in September 2018, the Lord Chancellor rejected the LSB’s recommendation that ICAEW be authorised to regulate all of the reserved legal services, comfort should be taken by the Secretary of State that the LSB - the independent body established under the Legal Services Act to determine applications from regulators to extend their remit – considered ICAEW’s governance arrangements to be suitably robust to comply with its governance rules and to extend its remit in the regulation of legal services.
24. The Office for the supervision of the Professional Body AML Supervisors (“OPBAS”) was created in 2017 by HM Treasury to monitor the quality and effectiveness of the AML supervision work carried out by the 22 professional body supervisors (“PBSs”). During its first full year of operation in 2018, OPBAS carried out an inspection of all PBSs looking, in particular, at the separation of each body’s regulatory functions from its representative functions as well as the extent and quality of their monitoring work and the extent and effectiveness of their intelligence-gathering and sharing activities.
25. While OPBAS has requested ICAEW to recruit further resource to boost its intelligence-gathering capabilities, it confirmed that it was satisfied, from the review carried out during its inspection, with the separation between the regulatory and representative functions and with the extent and quality of our monitoring work.

### **Financial independence**

26. One of the most important elements in our strong belief in the independence of our regulatory functions is that the fact that there is a separation of revenue streams within the Institute so that all regulatory work is funded by regulatory fees charged to firms and members without any contribution being required from membership subscriptions. The self-funding principle followed by PSD is very important to dispel any notion that those on the representative side of the Institute have any leverage over PSD’s work through the threat to withdraw or reduce funding. In addition to regulatory fees, including annual licence fees charged to insolvency practitioners, PSD’s only other sources of income are the fines and costs recovered from cases brought

under the disciplinary scheme and income generated by QAD by its outsourced monitoring contracts.

27. In June every year a budget is drawn up by the PSD Finance Director for the expected costs of PSD's operations during the following calendar year for review by the IRB. The Finance Director makes recommendations to the IRB as to what increases he believes the IRB should make to the various regulatory fee tariffs in order to raise sufficient funds to pay for all expected costs.
28. In addition to ensuring that sufficient cash-flow is in place, PSD has also contributed to the significant cash reserves currently held by the Institute through surpluses produced in previous years and these reserves are available to be drawn by the PSD Finance Director to cater for any unforeseen costs which arise during a financial year. ICAEW is projected to have significant cash reserves by the end of 2019. This provides the assurance that funding is in place to allow us to carry out even the largest, most expensive investigations and to pay for the costs of holding lengthy tribunals. Without such extensive reserves, there would be the temptation for lawyers acting for members and firms to fight complaints aggressively in the hope that we would fold due to concerns about funding. That is not the case at ICAEW.

### **Single regulator would reduce the costs of regulation, be more effective and robust in protecting the public interest**

#### **A new single regulator would reduce the costs of regulation**

29. You'll see from the estimates included in our evidence, that we think it could cost up to £8 million to set up a new regulator.
30. A new single regulator would be regulating a total population of only 1550 insolvency practitioners, [of which around 1000 take appointments] with a limit to the amount of revenue which can be raised through annual licence renewals without setting fees so high that it caused a sharp reduction in the number of IPs in practice. A reduction in numbers will reduce competition in certain areas of the country, potentially undermining quality and driving up costs.
31. An increase in the cost of obtaining a licence for an insolvency practitioner will inevitably be passed on to the creditors in insolvencies which cannot be an outcome government would want to see.
32. At the moment, ICAEW is only able to break even in our regulation of insolvency after paying for the costs of complying with all of tasks we undertake to comply with the Regulatory Objectives out of revenue we receive from the licence renewal fees because we are able to share key resources across all our regulated activities and by combining various elements of our regulatory work. For example, in relation to advice required on legal issues arising in relation to insolvency complaints, our insolvency investigation managers benefit from being able to use any of the pool of legal advisors within the whole Professional Conduct Department which reduces the cost of necessary legal input. Similarly, we manage to reduce the per-visit cost of carrying out insolvency reviews for many firms by combining an insolvency visit with a Practice Assurance visit where the cost of administering our Practice Assurance Scheme is charged separately to our member firms. Without these synergies in our operations, we would struggle to employ the quality of the insolvency specialists who support our fulfilment of the Regulatory Objectives.
33. A new single regulator will not be able to offset the costs of carrying out the same level of work as it will be focused solely on insolvency work. In order to maintain the same level of regulation, with the same quality people, a new single regulator would either have to increase significantly the annual renewal fees for insolvency licences – which may lead to many licences

being given up, impacting on the level of competition among insolvency practitioners in certain areas (which appears to be contrary to the intention of the Regulatory Objectives). Or, alternatively, the new single regulator will need to be subsidised by the government.

#### **A new single regulator would be more effective**

34. One of the ways in which we believe that ICAEW is an effective regulator is through the number of contact points we have with our licensed insolvency practitioners and with their firms. In addition to carrying out our insolvency monitoring visits, the firms where our IPs work are also inspected for other regulated work they carry out and may also have a Practice Assurance visit (if this cannot be combined with an insolvency monitoring visit) where information is picked up regarding the robustness of their client take-on processes, how conscientious the firms are in their holding of client money in accordance with our Clients' Money Regulations and how compliant those firms are with the Anti Money Laundering Regulations. All of these regular contact points help us build up a detailed picture of the culture and risk profile of a firm which can help flag up early warnings of potential problems. Any new single regulator will have limited touch points with the IPs and will lose this enhanced knowledge of the way their firms are operating which would be a significant loss.
35. Another reason why we believe that we regulate effectively is through our employment of very experienced professionals to fulfil our Regulatory Objectives. Many of our senior staff have worked for a significant period of time at ICAEW and have built up great experience in dealing with all sorts of issues which arise in the regulation of IPs. Becoming an insolvency investigation case manager requires a very different skillset to working in an insolvency team in private practice. It takes, on average 9-12 months, for even an experienced hire to develop the skill-set required and to take on a full caseload. The same can be said of our insolvency reviewers. If a decision were to be taken to create a new single regulator, this could lead to an instant loss of all of the experience which has been built up by those who have been regulating the profession to date as many of our experienced managers may not wish to transfer to a new regulator even if that route was open to them. Many may prefer to move back into private practice particularly if the location of a new single regulator was different to where they are based at the moment. It would be a great shame, and damaging to the quality of regulation, to lose most, if not all, of that expertise.
36. We also believe that the knowledge that the quality of our work will be inspected by the Insolvency Service and the knowledge that any failures in our work will be set out in public reports, helps us to maintain the high quality level in our work. Indeed, standards are set for the general quality of our monitoring visits by all of our oversight regulators. The benefits of the current system where the work of the RPBs is subject to scrutiny should not be underestimated in considering whether to create a new single regulator particularly if it is not intended to create a monitoring body to review the quality of work carried out by the new single regulator.

#### **A new single regulator would be more robust in protecting the public interest**

37. Any new single regulator would need to be sufficiently resourced to be able to conduct the largest investigations and to prosecute complaints against IPs who are partners in the largest accountancy firms who have the resources to defend their partners against misconduct complaints. As the licensing body for most IPs at major firms, we spend a lot of time trying to deal with procedural challenges, robust defence, disclosure claims etc. filed by some of the largest UK law firms. Some of our investigations involve the review of thousands of documents (over 120,000 potentially relevant documents in our largest investigation) and will require us to incur significant costs in obtaining Counsel's advice and in instructing experts to draft lengthy expert witness reports. External costs to take a case through to tribunal can exceed £200,000



and the cost of instructing Counsel and experts for a 3-4 week tribunal can easily cost a further £300,000-£500,000. Those costs can only be recovered if the complaints are found to be proved (and there is a cost risk of paying out costs if all of the complaints are rejected). It is, of course, crucial that decisions on whether to prosecute complaints are not fettered by concerns about funding and a commitment to fund the most expensive prosecutions of complaints will need to underpin any new single regulator. No decisions which we make on whether to prosecute complaints are influenced by concerns about funding given the Institute's healthy financial position. The significant cash reserves held by the Institute have been contributed to by Professional Standards over the years from its regulatory and disciplinary fine income.

38. We believe we have demonstrated our robustness as a regulator in the actions we have taken in one particular case in 2018. As the Insolvency Service Oversight team knows from its monitoring, we intervened in an application to the High Court to protect the interests of unsecured creditors in a matter where the IPs were partners in one of the largest accountancy firms. We contested the application despite taking the risk of a significant adverse costs order (over £1 million was subsequently charged to the insolvent estate by way of legal costs) and were successful in persuading the Court to appoint an additional liquidator to carry out further investigations before any further distributions were made. This most recent action followed the investigation of other alleged misconduct by EY and one of its partners in connection with the administration of Wind Hellas which resulted in the largest fine imposed to date by the ICAEW Investigation Committee in 2015. To be robust and seen to be robust, a new single regulator will have to meet these challenges and bear those significant cost risks.

## **PART 2: CONCERNS ABOUT THE TRANSITION TO A NEW SINGLE REGULATOR**

39. If a decision is made at the end of this consultation process to create a new single regulator, great care will need to be taken to avoid a chaotic interregnum between any announcement of this intention and the start of operations of the new regulator. From the moment any announcement is made to create a new regulator, it will be extremely difficult for the remaining RPBs to retain their experienced staff who will start to consider other opportunities. This will, in turn, create significant resourcing issues for RPBs, like ICAEW, as it will be very difficult, if not impossible, to recruit replacements given the intention to move the regulatory role to another body. Given the range of sanctions which the Secretary of State can bring against a failing RPB, ICAEW, like the other RPBs, will have no other option but to give up its authorisation as a RPB if staffing levels fall below those needed to fulfil the Regulatory Objectives. If all of the remaining RPBs lose staff and cannot replace, the RPBs may all have to withdraw from their regulatory roles before the new single regulator is able to operate.

## **PART 3 SUGGESTIONS FOR IMPROVEMENTS TO THE CURRENT REGULATORY FRAMEWORK**

40. In our evidence we have suggested a number of improvements to regulatory framework, as follows:

- a) A move to a form of licensing for the firm as well as for the individual IP in the volume IVA/PTD sector;
- b) Addressing the anomaly created by the insolvency exclusion for consumer credit authorisation which effectively prohibits most IPs from providing personal debt advice;
- c) Dealing with the conflict between insolvency law and employment law which results in adverse publicity in many larger corporate failures.

41. We discuss these matters in more detail in our evidence.

## CONCLUSION

42. We believe that the evidence we are submitting sets out a strong argument for why the Secretary of State should refrain from making any changes to the current regulatory framework and why the focus should instead be on making the other changes outlined above which would allow the remaining RPBs to discharge more efficiently and effectively their Regulatory Objectives.
43. If, instead of creating a new single regulator, the Secretary of State prefers instead to consolidate the remaining RPBs into one, ICAEW would be willing and capable of taking on that role given levels of performance and our financial resources. But we are of the view that there is no compelling reason to exercise that power and the current system should remain in place.

## PART 2

### ***Q1. Do you think Recognised Professional Bodies (RPBs) investigate complaints about insolvency practitioners in a way that is fair, and delivers consistent outcomes for all parties? Please share examples of good and bad practice.***

We believe that ICAEW investigates all complaints including those about insolvency practitioners in a way that is fair and delivers consistent outcomes for all parties.

It may be of assistance to explain ICAEW's governance arrangements to support our answer above as it is the framework which underpins ICAEW's processes that are instrumental in delivering the outcomes referred to in the question. This includes the process for approving changes to our bye laws and regulations, how board and committee members are recruited, and the quality assurance of our processes. In our view, it will be helpful for the review team to fully understand these arrangements. Therefore, we have included as an **appendix** to this paper details of ICAEW's Regulatory Board and an explanation of ICAEW's governance.

The ICAEW Regulatory Board (IRB) was established in January 2016 to enhance the distinction between ICAEW's representative and regulatory roles. The creation of the IRB was one of the recommendations of an independent review of ICAEW's regulatory governance chaired by **Sir Christopher Kelly**. The IRB is responsible for overseeing professional standards activities and the statutory regulatory role of ICAEW. In discharging its responsibilities, the IRB's primary consideration is the public interest.

The IRB comprises up to twelve members including the chair and is formed of a parity of lay and non-lay members. If there is equality of votes, the chair has a casting vote. The current chair is Michael Caplan QC, who is a lay member.

### **Explanation of complaints process**

The Professional Conduct team of 29 case managers and senior managers plus 5 lawyers deal with complaints against ICAEW firms, members, affiliates and students in a wide variety of situations. The vast majority are related to client service and cover both regulated and unregulated work. Insolvency complaints are assessed and investigated by an experienced specialist insolvency team of 5 case managers and a senior manager.

The way this work is carried out is explained at on ICAEW's website:

<https://www.icaew.com/-/media/corporate/files/about-icaew/what-we-do/protecting-the-public/complaints-process/how-we-investigate-complaints-booklet.ashx>

and <https://www.icaew.com/about-icaew/regulation-and-the-public-interest/complaints-process/make-a-complaint>

Additionally, in insolvency cases we will routinely contact the subject of a complaint while we are still assessing the issues (and have not yet established a potential liability to disciplinary action) if we believe the IP will have documentation that the complainant is unable to provide or has failed to provide.

### **Quality assurance of the Professional Standards Committees**

#### **Quality assurance role of the IRB**

Under its terms of reference the IRB has responsibility for the general oversight of the performance of the Professional Standards committees.

The IRB's terms of reference also include a commitment to the training of the committee members, appraisal of committee members and where necessary performance management and effectiveness review, and reviewing the structure and membership of the committees of which the IRB has oversight and their training and competence.

Part of the quality assurance process is an evaluation to assess the performance of the individual committees, their members and chairs. IRB members, both accountant and lay attend committee

meetings and report back their findings on the committee's performance which forms part of a wider review discussed at a meeting of the IRB.

The first committee to be the subject of an evaluation was the Investigation Committee in 2018.

The IRB reached the conclusion as a result of this quality assurance exercise was that the committees operated effectively. No recommendations were made to suggest changes how the committees operated was made as a result of either review. The IRB recognised however that the workload of the Investigation Committee was heavy and later considered proposals to relieve some of that workload (see our response to q2 below). The IRB also endorsed a proposal for the next chair of the Audit Registration Committee to be a lay member rather than an accountant member.

It is worth noting that the review into the Investigation Committee has included looking at areas that are relevant to all Professional Standards committees including the ILC. These include:

- Recruitment processes
- Contractual arrangements for committee members
- Induction for new committee members
- Training of committee members
- Feedback on the support provided by Professional Standards staff
- Development of statistical information to aid the IRB in its review.

As the IRB considers these matters to be acceptable in the context of the Investigation Committee, we believe that reliance can be placed on these same matters in relation to the ILC. In any event, the IRB will be reviewing the ILC during 2020.

### **Delegated powers reviews**

The ILC conducts two reviews –the files of the Quality Assurance Department and the files of the Regulatory Practice Group on an annual basis. The most recent reviews took place on 18 and 19 October 2018, and were conducted by four experienced members of the committee; one accountant and one lay member conducted the review of the QAD and one accountant and one lay member conducted the review of the RPG.

The reviews took place at the Milton Keynes office and the Committee members had access to the entirety of QAD and RPS files from the previous 12 months, from which they independently selected those which they wanted to review. The reviews concluded that the powers delegated by the Insolvency Licensing Committee were dealt with appropriately. The reviews were considered by the entire Insolvency Licensing Committee at its meeting on 16 January 2019.

The Investigation Committee conducts this review of the PCD on an annual basis. The review team consists of two members who were part of the team in the previous year and one new member, selected by the (lay) chair from those volunteering. The longest serving member leads the review and then rotates off the team, to make space for a new member the following year.

The committee members have access to the entirety of PCD files from which they make an independent selection.

The review of cases closed in 2018 took place on 5 September 2019 and specifically considered a sample of insolvency cases. They were reviewed by an insolvency experienced member of the IC. A sample of cases dealt with by the new fixed penalty process were also reviewed. At the wrap up meeting the three reviewers expressed great satisfaction with what they had seen. We await their draft report.

### **Oversight**

#### **IPRS oversight**

The Insolvency Service regularly review the way ICAEW carries out its functions as an RPB. Historically that was every 2-3 years but more recently there have been more frequent visits. The enforcement function was reviewed in September 2018 and, given the significant impact of one very large case where we have challenged the processes of a big 4 firm, again in April 2019. The report from the Service was published on 27 September.

As part of the most recent review, members of the IPRS team observed a meeting of the Investigation Committee on 4 June 2019.

In addition to the formal reviews there is regular ad hoc contact between the Investigation team in PCD and IPRS staff at the Service in relation to specific cases to keep the Service informed. A regular fortnightly catch up phone call had been arranged but the majority of issues are dealt with between ourselves and the Service as they arise.

## **Oversight by other regulators**

### **The Financial Reporting Council (FRC)**

Staff from the Professional Oversight team of FRC carry out annual visits to ICAEW to review how we carry out our functions as an RSB and a RQB. The most recent visit was carried out by two members of FRC staff in June 2019 and focussed on a high level review of enforcement

The FRC currently oversees audit through powers ascribed them under the Companies Act 2006 (CA06) and SATCAR, and accountancy through a contract with the accountancy bodies in the early 2000's.

All regulatory tasks associated with the conduct of audit are delegated to the FRC under the CA06 which in turn is empowered to delegate them (with certain exceptions) to the Recognised Supervisory Bodies (RSBs), of which ICAEW is one. The tasks are set out in Schedule 10 to CA06 as amended by SATCAR<sup>1</sup>. The exceptions relate to auditors of Public Interest Entities as defined under the act which are listed companies and banking and insurance entities. With the exception of licensing, all regulatory tasks relating to PIE auditors are carried out by the FRC as oversight body. Currently 30 firms fall under the FRC jurisdiction and around 4,000 are regulated by the RSBs.

The supervisory arrangements between the FRC and the RSBs are set out in a delegation agreement. This sets out;

- a) The basis of the relationship
- b) The nature of the tasks and the expected quality of delivery
- c) The power of the FRC to recall the tasks if not performed correctly or for other necessity
- d) A requirement to allow the FRC to carry out visits and inspections of the conduct of the tasks
- e) Annual reporting requirements in the form of an annual audit regulatory plan and key statistics in a calendar year relating to the tasks.
- f) Ad hoc reporting requirements in regard to certain regulatory matters

of the audit regulatory framework within ICAEW as an RSB is performed by the Audit Registration Committee (ARC) which oversees reports by exception arising from the regulatory tasks and applies enforcement measures as appropriate. If there are significant shortfalls in the standards by individuals these may also be referred to the disciplinary arm of ICAEW or to the miscreant's own regulatory body. FRC personnel as part of their oversight observe the conduct of the ARC in one or more of their meetings each year.

Accountancy issues are generally left to the supervision of the professional bodies, but there are powers to refer matters of public interest to the FRC, which may also decide to take control of them unilaterally should it feel appropriate. The contracting arrangements on The oversight this are not entirely clear so the exercise is closely monitored by both the FRC and the bodies.

## **Oversight - LSB**

The Legal Services Board (LSB) currently oversees the regulation of the reserved legal service of probate. Their powers are given by the Legal Services Act 2007 (LSA07). Unlike the FRC their role is purely one of supervision and therefore the regulatory tasks are given directly by law to the

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<sup>1</sup> Statutory Auditors and Third Country Auditors Regulations 2016 – SI639



approved regulators (ARs) (of which ICAEW is one). ARs may also be Licensing Authorities (LAs) that permit reserved activities to be undertaken in multi-disciplinary practices, and ICAEW also has this accreditation.

The Legal Services Board monitors the performance of the ARs under its supervision through powers afforded under section 55 of LAS07 and holds the ARs to account through intermittent reviews and monitoring meetings that focus on areas where better performance can be achieved. The LSB, the ARs and the firms they regulate are all bound to have proper regard to the eight statutory objectives set out in section 1 of LSA07 and these objectives underpin the key tasks and actions within the rest of the act.

The oversight of the legal services framework within ICAEW as an LA/AR is performed by the Probate Committee (PC) which oversees reports by exception arising from the regulatory tasks and applies enforcement measures as appropriate. If there are significant shortfalls in the standards by individuals these may also be referred to the disciplinary arm of ICAEW or to the miscreant's own regulatory body. LSB personnel as part of their oversight have had an open invitation to observe the conduct of the PC and are expected to exercise that later in 2019.

### **The Office for Professional Body Anti-Money Laundering Supervision**

The Office for Professional Body Anti-Money Laundering Supervision (OPBAS) was set up by the government to strengthen the UK's anti-money laundering (AML) supervisory regime and ensure the professional body AML supervisors provide consistently high standards of AML supervision. The OPBAS Regulations 2018 came into effect on 18 January 2018 and give OPBAS duties and powers to ensure the professional body AML supervisors meet the standards required by the Money Laundering Regulations 2017. OPBAS is housed within the FCA and will facilitate collaboration and information sharing between the professional body AML supervisors, statutory supervisors, and law enforcement agencies. OPBAS has published a sourcebook for professional body AML supervisors about how they can meet their obligations in relation to AML supervision.

During 2018, OPBAS conducted supervisory assessments of each of the 22 PBSs listed in Schedule 1 of the MLRs. These assessments looked at the 8 key areas set out in the OPBAS Sourcebook for professional body anti-money laundering supervisors (the Sourcebook): Governance, Risk-Based Approach, Supervision, Information Sharing between Supervisors and Public Authorities, Information and Guidance for Members, Staff Competence and Training, Enforcement and Record keeping and Quality Assurance. These are based on the requirements in the MLRs.

As a result of these assessments, OPBAS has asked all PBSs to develop a suitable strategy to address their findings through individual plans. They monitor how these strategies are implemented over 2019 and regularly contact PBSs to ensure they meet the deadlines. OPBAS plans to implement a risk based approach to supervision through 2020, reflecting their findings from the 2018 assessments.

### ***Q2 What level of confidence do you have that RPBs will deal with insolvency practitioner misconduct swiftly and impartially, using the full range of available sanctions set out in the Common Sanctions Guidance?***

We believe that ICAEW deals with all misconduct as swiftly as it is able and impartially, and in the context of insolvency practitioners using the full range of available sanctions set out in the Common Sanctions guidance.

The length of investigations is dictated by three things; the complexity of the issues and volume of documentation (some cases require the review of 100,000+ documents and raise difficult questions of law requiring regular input from Counsel and experts); the number of complaints being dealt with during any one period and the number of case managers available to deal with the complaints and the need to respect the legal rights of respondents.

While we have increased the number of case managers employed in our insolvency investigation team substantially over the last five years to match the increase in complaints, we have to balance

the number of managers employed with the potential impact on the licence fees we would need to charge IPs if staff numbers increased further.

The length of time taken to complete major investigations is - in part - driven by the legal processes dictated by the Human Rights Act and other judicial procedural law, which enshrine principles such as the right to make representations and the right to have a reasonable time to consider and respond.

Focussing on the time taken, rather than conducting a proper investigation can lead to unintended consequences, including judicial review applications to court where those subject to enforcement processes consider that their rights have been violated.

We have, in any event, in recent years implemented a number of initiatives which can reduce the time it takes to progress certain more straightforward cases. These are described below:

### **Fixed penalties**

A change was made to ICAEW's DBLs recently to introduce a new process enabling Professional Conduct staff, under powers delegated by the Investigation Committee to offer fixed penalties for certain types of less serious, compliance-type complaints in lieu of matters being dealt with by the full Investigation Committee in meeting.

The designation of complaints suitable for this process is the responsibility of the IRB. The complaints currently designated as suitable for the fixed penalty process are typically minor complaints where the breach of the relevant bye-law or regulation has been accepted by the member/member firm and/or where the breach has been rectified. The respondent retains the right to reject the offer of a fixed penalty and to have the matter reviewed by the Investigation Committee. A list of the designated complaints is available on the [ICAEW website](#). The designation of complaints suitable for the fixed penalty process will be kept under review by the IRB.

The fixed penalty process avoids the need for less serious complaints to be considered in meeting by the Investigation Committee and therefore matters are dealt with more swiftly, efficiently and for less cost. This has benefits for both the respondent and ICAEW.

### **Case management**

Changes have been made to the Disciplinary Committee Regulations to provide a robust system of case management which dictates the early exchange of allegations and evidence and allows for early determination of the issues between the parties. The changes to the Regulations also provide for the timetabling of any further exchange of evidence and the final hearing by introducing a case management hearing which is obligatory in all cases, save where all complaints are admitted. The changes will have a number of positive effects, foremost amongst them encouraging the member to engage earlier in the process, resulting in fewer contested hearings, adjournments and stress caused to the member. Early engagement will also identify cases where evidence is available to answer the complaint, and allow the Investigation Committee to review any potential weaknesses in its own case at an earlier stage. Lastly, it will mean that in cases where there is a medical reason for the member's behaviour or subsequent failure to engage it can be identified early and the member can be referred to the fitness procedure, which is set up to deal with these particular issues.

This change comes into effect on 1 October 2019.

### **Fast tracking of criminal conviction complaints**

A fast-track disciplinary process is being introduced into the Disciplinary Bye-laws for certain types of serious criminal conviction complaints. This will allow complaints based on serious criminal convictions to be listed immediately for hearing before a Disciplinary Tribunal following investigation. The process will avoid the need to have such matters reviewed first by the Investigation Committee as the IC will always refer these types of complaints to the Disciplinary Committee as it lacks sufficient sanctioning powers. The reform will result in time savings in progressing such cases and ensure that a sanction able to be applied as swiftly as possible for the protection of the public.

As with the fixed penalty process (see above) the IRB designates the complaints suitable for this process. The designation of suitable complaints will be kept under review by the IRB.

These changes will come into effect after Privy Council approval of the Disciplinary Bye Laws which is expected to be granted in October 2019.

### **Settlement powers**

Changes to the Disciplinary Bye Laws have been agreed to introduce the ability to agree an early settlement of a case after consideration of the matter by the Investigation Committee but before the substantive hearing of the Disciplinary Tribunal. This will enable matters to be resolved more quickly and free up resource that would otherwise be committed to taking a matter to a tribunal hearing.

These changes will come into effect after Privy Council approval of the Disciplinary Bye Laws which is expected to be granted in October 2019.

### **New powers for the Practice Assurance Committee**

Effective from 1 July 2019, changes have been introduced to give the Practice Assurance Committee powers to propose penalties to individuals / firms for less serious breaches of the Practice Assurance and other regulations. The penalties will operate in a similar way to regulatory penalties in the regulated areas of audit, investment business, probate and insolvency. It is envisaged that enabling the Practice Assurance Committee to propose penalties with the agreement of the member or firm will result in matters being dealt with more swiftly and for less cost and stress for members, and in operational efficiencies for ICAEW.

These new powers will reduce the workload of the Investigation Committee.

Turning to the second part of the question, our committees do use the full range of sanctions available to them when dealing with poor work or misconduct

ICAEW takes prompt action to withdraw insolvency licences where there is a serious risk to the public interest. Other action such as restricting licences, where appropriate, also happens swiftly.

Ordinarily we allow IPs 15 business days to submit their responses to the closing record for their visit. However where we have serious concerns about their fitness, we curtail this to 14 days, the minimum timeframe set out in our Insolvency Licensing Regulations. In such cases we also expedite production of the IP's report.

The following are examples of where this has happened.

#### **“Mr A”**

QAD visited Mr A on 4 May 2011. The visit highlighted concerns about accounting deficiencies on two cases. Mr A responded to the closing record on 11 May 2011. We issued our report on 31 May and our Insolvency Licensing Committee (ILC) met on 29 June 2011 and withdrew his licence.

#### **“Mr B”**

Mr B self-reported discrepancies in his insolvency estate accounts on 25 August 2015 but was unable to quantify the discrepancy at that stage. We visited him on 4 September 2015. The ILC considered the QAD report on 28 October 2015 and requested weekly updates on the reconciliation work, with a full report at end of November and an undertaking that Mr B wouldn't accept new cases. The reconciliation process was complicated by the fact that the practice operated a client monies system but hadn't segregated the estate funds for each case into separate virtual accounts, so the funds for all his cases were effectively all held in one pot. While the case management system identified how much should be held for each case, the funds weren't segregated within the banking system.

An update on 8 February 2016 confirmed that £5m of estate monies had been misappropriated. The reconciliation exercise identified that a large proportion of these funds had been paid to X Limited (£4m) and Y Group, the holding company (£751,839). After getting that update, QAD visited Mr B on 17 February and issued its report on 19 February. The ILC considered this on 11

March 2016 and withdrew Mr B's insolvency licence, his licence having effectively been restricted since November 2015.

**"Mr C"**

Intelligence was received about Mr C at the end of May 2016. The matter was considered at a meeting of the ILC on 6 June 2016 and the committee withdrew his licence with effect from 28 June 2016.

**"Mr D"**

We visited Mr D on 10 December 2015 on the basis of regulatory intelligence received. We received his response to our closing record on 23 December, issued his report on 12 January and the ILC considered the report and withdrew his licence on 28 January 2016

**"Mr E"**

Mr E's responses to the closing record were received on 30 April 2019. We issued his report on 8 May 2019 and the ILC restricted his licence on 11 June 2019.

The question also refers to dealing with misconduct impartially. ICAEW considers that its processes are impartial. In that regard, we would refer to the information provided in our response to q1 above and the appendix.

In its review of the monitoring and regulation of insolvency practitioners published in September 2018, the Insolvency Service reported:

"The reviews found that all the RPBs have governance structures in place to ensure that membership and regulatory functions are separated. All regulatory and disciplinary committees are independent and are governed by sets of rules and bye-laws. The appointments process for committees has sufficient safeguards in place to ensure that those involved in making appointments are independent."

***Q3. Do you believe the sanctions that the RPBs can currently apply are adequate and sufficient to provide fair and reasonable redress when a complaint is upheld? If not, what sanctions do you believe an RPB should be able to apply?***

We do not understand the reference to redress in your question. The regulatory objectives only refer to:

- a) having a system of regulating persons acting as insolvency practitioners that—
  - (i) secures fair treatment for persons affected by their acts and omissions,

The Common Sanctions Guidance for insolvency sets out the sanctions which can be imposed by all RPBs when disciplining insolvency practitioners.

The ICAEW Guidance on Sanctions can be found at

<https://www.icaew.com/-/media/corporate/files/about-icaew/what-we-do/protecting-the-public/complaints-process/icaew-guidance-on-sanctions-effective-1-april-2019.ashx>

Pages 48-55 cover the common sanctions guidance for insolvency which ICAEW played a leading role in developing.

The Insolvency Service, in its oversight role, has been involved in the development and amendment of the Common Sanctions Guidance since its initial introduction. We are unaware of any recent concerns being raised by the Insolvency Service about the scope of the sanctions guidance, and where the Service has sought changes in the past, those changes have been made. Sanctions policy more generally within the ICAEW is the responsibility of the IRB. The IRB's public interest role and the presence of lay members on the board provides confidence that sanctions policy is not driven by the self-interest of the profession.

The use of the Guidance on Sanctions is kept under regular review by the IRB and subject to update and amendment if necessary. Proposals for change to the common sanction first needing agreement with the other RPBs and the Service.

Given the personal nature of insolvency appointments, an RPB is only able to sanction an individual IP in relation to failings on a case. Where there are systemic or firm wide issues the action an RPB can take against a firm is limited. However, as part of any investigation, where the IP works for an ICAEW member firm, consideration is also given to the processes and procedures operated by that firm. That means that there are occasions where ICAEW has taken action against a firm but that was possible because of the member firm status of the firm, that is the operation of ICAEW's own rules and not the operation of the regulatory framework for insolvency. Not all firms in which insolvency practitioners practise will be member firms. This limitation is caused by the regulatory framework not the actions of the RPBs. We consider this further in our response to Q17 below.

In its review of handling of complaints about insolvency practitioners published in September 2016, the Insolvency Service recommended that the RPBs should enter into discussions with the Insolvency Service to consider the feasibility of a regulatory mechanism whereby compensation can be paid by the insolvency practitioner to the complainant where they have suffered inconvenience, loss, or distress as a result of their actions.

Engagement between the RPBs and IPRS has continued intermittently since the publication of the report.

In its most recent communication with the RPBs in February 2019, the Insolvency Service stated that they had concluded that all of the RPBs have some mechanism (although to varying degrees) to allow for their committees to make orders to recompense a complainant if the actions of the insolvency practitioner have resulted in some kind of loss.

For completeness, ICAEW is able, via the Investigation Committee or Disciplinary Committee to order a waiver of fees (Disciplinary Bye Law 23).

Our Disciplinary Bye Laws also provide for:

- Repayment of commission (DBL 23)
- Remedial orders, such as paying for someone else to do the work (DBL 24)
- A complainant may also recover their expenses up to a maximum of £1,000, if the complaint is proven (DBL 24A)

There is a wide range of tools available to ICAEW's committees and ICAEW's Guidance on Sanctions has a section which deals specifically with sanctions that are not a fine. We are also able to conciliate where a potential liability to disciplinary action has been established.

Payment of compensation or restitution made to client and / or third parties is listed as common mitigating factor in ICAEW's Guidance on Sanctions. But there's no equivalent in list in the Common Sanctions Guidance for insolvency.

#### ***Q4. What evidence is there to demonstrate that RPBs collaborate to ensure there is consistency in monitoring and enforcement outcomes?***

Reviewers in ICAEW's QAD team participate in the monitors' meetings chaired by the Insolvency Service, which are held four times a year. These meetings are a forum to discuss and raise technical and practical issues that affect insolvency practitioners, to share intelligence to identify issues affecting the wider monitoring regime, and to ensure consistency in approach.

In addition, QAD's Regional Director meets the IPA Chief Executive periodically.

QAD staff also liaise with other RPBs where relevant, for example there is mixed IP licensing in a practice and there may be issues of common concern, or regulatory intelligence to share. For example, we are currently liaising with the IPA about an insolvency practice's website, where the practice has both IPA and ICAEW IPs.

A recent example of this is the regular dialogue with staff from the IPA (and the Insolvency Service) during the first six months of 2019 in relation to a volume provider with a number of IPA licence holders and one ICAEW IP, where both RPBs had a number of concerns.

Enforcement cases are fact specific and thus comparisons can be misleading without a full understanding of the specific facts but we do monitor sanctions by other regulators to consider sanctions that may appear unusual.. PCD staff liaise regularly with other bodies on specific cases



and work with them on cases where there is a joint interest in both insolvency and other areas of work.

The same person chairs the Appeal Committee of ICAEW and IPA, which aids consistency.

The RPBs also work together with the Insolvency Service in its oversight role outside of specific interactions in relation to monitoring and enforcement.

As referred to above, all the RPBs and the Insolvency Service collaborated to develop the Common Sanctions Guidance.

All the RPBs supported the creation and continued operation of the Insolvency Complaints Gateway which is funded by a charge paid by all insolvency practitioners.

The RPBs and the Insolvency Service are members of the Joint Insolvency Committee.

The Joint Insolvency Committee promotes consistency across the profession. It acts as a forum for the discussion of insolvency issues and standard setting. It has responsibility for the development and revision of the Code of Ethics applicable to insolvency practitioners, Statements of Insolvency Practice and Insolvency Guidance Papers.

There are four lay members of the Joint Insolvency Committee and a vacancy for a further lay member. The chair of the Joint Insolvency Committee is a lay member.

The Insolvency Service hosts periodic regulatory forums for the RPBs to discuss any matters relevant to the operation of the regulatory framework.

***Q5. Are RPBs doing enough to promote an independent and competitive insolvency practitioner profession that considers the interests of all creditors? Please share examples of good and bad practice.***

We do not understand the reference to “promote” in your question. The regulatory objectives refer to:

- b) encouraging an independent and competitive insolvency-practitioner profession

We believe ICAEW encourages an independent and competitive insolvency profession that considers the interests of all creditors. It should be recognised however that the interests of a particular class or classes of creditors are set out in statute and an insolvency practitioner can only act within the law.

We see five key areas of activity for ICAEW which encourage an independent and competitive profession:

- A robust authorisation process, which only allows access to the profession to suitable individuals.
- An equally robust monitoring process to make checks on insolvency practitioners’ work.
- An enforcement system which investigates complaints made against insolvency practitioners and takes disciplinary action where appropriate.
- The support we provide to insolvency practitioners.
- Offering an entry level qualification as a route to becoming an insolvency practitioner and supporting the JIEB.

**Authorisation**

We do more than process the information provided in the application form when considering whether an applicant is suitable to hold an insolvency licence.

At the point of making the application the individual agrees to comply with our Bye-Laws and Regulations thereby ensuring action can be taken as necessary for any failures on their part.

Prior to approving any application, we contact all other RPB’s to ensure that the IP doesn’t obtain a second licence and if previously licensed with them, to obtain disciplinary and regulatory history, including the most recent monitoring report.

The application now includes an appendix which all individuals are requested to complete, this asks for information on case types and work recently completed. This gives us an indication as to

whether the applicant has experience in all areas or has spent many years on one case type only, which would only be relevant to those applying for partial licensing.

Our own records are reviewed for disciplinary and regulatory history in case the individual also has responsibility for other regulated areas ie audit, tax or DPB.

If any of this additional information highlights any issues, the individual may be granted a licence with terms and/or conditions for example an early monitoring visit or CPD in a certain area. In more unclear circumstances, the application will be referred to the ILC who could refuse the application if it considers the individual is not appropriate to be granted a licence.

To support the government's aim of increasing access to the profession, ICAEW offers both full and partial (personal and corporate) insolvency licences.

## **Monitoring approach**

As well as considering the quality of an IP's work and their fitness to practice as an IP, our monitoring approach considers:

- the fairness and reasonableness of an IP's fees (and QAD have recommended that 8 referrals be made to PCD in respect of fees);
- the content of their website to ensure that it isn't making inappropriate or exaggerated claims. In particular, we will check that the website doesn't overtly promote phoenixism; make inappropriate statements about the ease of selling assets to directors; or make misleading comments about personal insolvency;
- whether the IP's firm meets the criteria for the Official Receiver's rota.

We have also produced three videos which outline the need for businesses in financial difficulty to seek advice at an early stage from an insolvency practitioner, together with a restructuring and insolvency guide aimed at SME directors, 'Why early action is key to avoiding or surviving financial difficulties'. This material can be used by IP firms and they can co-brand the guide. You can see this material [here](#).

All of the above helps to promote an independent and competitive insolvency profession.

## **Enforcement**

We consider all aspects of an IP's work and the impact on all stakeholders in the insolvency process. Whether or not disciplinary action is appropriate is ultimately a decision of our independent Investigation Committee or disciplinary tribunal who apply the test under our Disciplinary Bye Laws.

<https://www.icaew.com/-/media/corporate/files/members/regulations-standards-and-guidance/icaew-disciplinary-bye-laws-october-2018.ashx>

An individual's conduct is set out under Disciplinary Bye Law 4. The key test being whether conduct has fallen significantly short of the standards reasonably expected

We have an experienced team who have worked extensively in practice and they will consider the IPs reasoning for the decisions that they make. When looking at the seriousness of complaints, the impact on all creditors is fully considered for all insolvency procedures and in relation to the debtor in personal insolvency .

## **Support**

ICAEW provides a wide range of support for its IPs. We deliver our messages in different ways, so we can reach as many IPs as possible.

## **Technical and ethical helpline**

We have a technical and ethical helpline which all members and ICAEW- licensed insolvency practitioners can access by calling +44 (0)1908 248 250. The helpline is open 08:30 - 17:00 Monday to Friday and 10:00 - 17:00 on Wednesday.

## **New IP event**

Each March we hold a half day event for those IPs newly licensed by ICAEW – either because they are new completely new IPs, or because they have transferred their licence to ICAEW. The event includes:

- an introduction to ICAEW
- a detailed session on ICAEW's annual Insolvency Compliance Review requirement and how IPs can comply with that requirement; and
- a technical and compliance session.

For those IPs with an appointment-taking licence, attendance at the event is followed up by a phone call with a reviewer, which discusses their caseload and compliance arrangements. This call helps us establish whether the IP requires an early monitoring visit.

The new IP event allows ICAEW to share information about the mistakes made by some of their peers, to try and ensure the new IP doesn't face the same pitfalls.

## **Annual insolvency conference**

ICAEW's annual insolvency conference focuses on thought leadership and 'bigger picture' issues, as well as soft skills training. Our ninth conference, held in June 2019, included the following sessions.

### **Carillion - Officially the largest ever trading liquidation in the UK**

An in-depth analysis of the inside track from two of Carillion's appointed Special Managers (Mike Jervis and David Kelly, Partners at PwC).

### **Certainty, trust and transparency**

Garry Wilson, Managing Partner at Endless LLP discussed the importance of providing certainty in an ever increasing uncertain and unpredictable world while Sarah Albon, Inspector General and CEO of the Insolvency Service focused on trust and transparency in the profession.

## **Brexit**

Ian Williams, Director of RSM Restructuring and Advisory LLC, considered the implications of Brexit on the restructuring and insolvency profession while the chair of the Institute of Economic Affairs' Shadow Monetary Policy Committee, Professor Trevor Williams (University of Derby), discussed the key economic issues arising from Brexit.

### **Work smarter, achieve more, live better**

Simon Goodison, Director, Smarter Not Harder Ltd shared tools, tips and techniques to make a big impact on day to day productivity.

## **Annual roadshow programme**

Our annual roadshow programme complements our conference by providing technical content for IPs and their staff.

We hold five roadshows each autumn, in London, Bristol, Birmingham, Leeds and Manchester. This year unprecedented demand has led to us running two London events. These half day sessions are free for IPs and their staff to attend and include:

- a legal update from an insolvency lawyer
- a compliance update from an insolvency compliance specialist; and
- a session from ICAEW's QAD team on current regulatory issues.

We use these events to feedback current regulatory hot topics, and some of the issues we see on our monitoring visits, so that IPs can learn from the mistakes that others have made.

We also run a standalone roadshow with R3 in East Anglia each year, replicating the roadshow programme.

### Annual webinar programme

Our established webinar programme enables us to provide insolvency CPD in a convenient way to a large number of IPs. The webinar software also allows the participants to ask questions of the speakers. Some webinars are delivered by specialists, others are internally generated.

This is our webinar programme for 2018 and 2019.

Webinar title	Date
Issues from recent monitoring visits	March 2018
Virtual meeting software	June 2018
Are CVAs an effective tool for business rescue?	July 2018
Litigation funding	October 2018
Fees and SIP 9	December 2018
The interaction between employment and insolvency law	March 2019
Trading insolvencies	June 2019
Dealing with vulnerable debtors	September 2019
Litigation funding	December 2019

We hold four or five webinars each year. Other webinar topics over recent years have included, the new CDDA reporting regime implemented in April 2016; dealing with interest rate hedging mis-selling claims and an IP's responsibility for auto enrolment.

In quarter 1 of 2017, we held three additional webinars on the key changes in the Insolvency (England & Wales) Rules 2016.

We record our webinars and they are available for download from our online community Talk Insolvency, so those who couldn't listen live don't miss out.

### Newsletters

Each year we issue three or four newsletters to our IPs. These are delivered electronically and cover topical issues.

### 'Sound Advice'

Earlier in 2019 we published 'Sound Advice'. This highlighted QAD's insolvency monitoring work in 2018 and outlined some of the more common issues from its 2018 insolvency monitoring visits. It also provided tips to help IPs avoid some of the more common pitfalls that QAD's insolvency reviewers see on their monitoring visits. You can access Sound Advice' [here](#).

### Talk Insolvency

Talk Insolvency, [talkinsolvency.com](http://talkinsolvency.com), is ICAEW's online community for insolvency professionals. It has sections for announcements, blogs and discussions. Our QAD team blog on issues that have arisen on visits, technical changes and forthcoming events. Talk Insolvency enables ICAEW to get key messages out to IPs and their staff very quickly. As noted above, our webinars can also be downloaded from Talk Insolvency.

## Checklists

ICAEW's licensing regulations include a requirement that all its IPs carry out an insolvency compliance review (ICR) each year. While the majority of IPs use external specialists to carry out this review for them, and the larger firms have internal teams who carry out their reviews, we publish checklists on our website that an IP can use when carrying out their own review. These include suggested documents for planning and scoping the review, but also detailed technical checklists to assist in carrying out the technical aspects of the review.

You can access these [here](#).

## External speaking opportunities

We also provide speakers for R3 and other events, to help share and disseminate knowledge supporting the general insolvency profession.

For example, in September 2019 our Regional Director participated in an ethics round table at R3's northern conference and our senior manager spoke at a joint ICAEW / R3 event on 30 September and at the IPS user group on 8 October.

During 2019 our insolvency manager will have spoken at the following events:

Date	Organiser	Event	Subject title
14 and 26 February 2019	R3	SPG Technical review	RPB update on insolvency issues including SIP tips and reminders
5 September 2019	SESCA Enterprises Limited, professional training subsidiary of the South Eastern Society of Chartered Accountants	2019 Insolvency conference	Fees including post presentation discussion
10 September 2019	NTI	Restructuring and Insolvency conference	Insolvency Education and Regulation
26 September 2019	ICAEW Chartered Accountants South West	Insolvency course	Funds, fees and key issues from QAD visits

## Monitoring visits

We want our monitoring visits to be constructive and helpful. All of our reviewers have practical experience of insolvency casework and two were previously appointment-taking IPs. That means that we can share practical experiences of ways of working with the IPs we visit.

## Qualifications

For there to be an independent and competitive insolvency profession, new entrants need to be encouraged to join the profession. And the qualification needed to become an insolvency practitioner must be intellectually challenging and a test of the skills and knowledge required to be an insolvency practitioner.



## ICAEW Certificate in Insolvency

The ICAEW Certificate in Insolvency is a flexible learning programme of the UK insolvency regime, primarily developed for professionals based in the UK wanting to progress into a career in insolvency or strengthen their knowledge.

The ICAEW Certificate in Insolvency provides a broad understanding of key insolvency principles and it covers four key areas:

- Legal and Regulatory Framework for Insolvency - English Law
- Concepts and Principles of Insolvency
- Corporate Insolvency
- Personal Insolvency

By offering a junior qualification, ICAEW is seeking to encourage new entrants into the insolvency profession. The profession can only remain competitive if users of the insolvency regime have sufficient choice when considering using the services of an insolvency practitioner. The certificate in insolvency has a wider appeal beyond those seeking a career in the insolvency profession, such that we're educating those who come into contact with distressed businesses such as HMRC and the Department for Education.

## Joint Insolvency Examination Board (JIEB)

For all practical purposes, all insolvency practitioners are required to have passed some or all of the JIEB's examinations to be eligible to be authorised as an insolvency practitioner.

All the RPBs support the JIEB by providing volunteer directors for the company's board. These roles are unremunerated.

ICAEW provides the secretariat support to the Joint Insolvency Examination Board and the examinations are administered using ICAEW's systems which are used for our own qualifications including the ACA. ICAEW has also supported the modernisation of the JIEB and assisted in the introduction of computer based examinations.

ICAEW has also provided a venue and support for the JIEB graduation

## Joint Insolvency Committee

As referred to above, collectively, the RPBs and the Insolvency Service are members of the Joint Insolvency Committee.

The Joint Insolvency Committee promotes consistency across the profession. It acts as a forum for the discussion of insolvency issues and standard setting. It has responsibility for the development and revision of the Code of Ethics applicable to insolvency practitioners, Statements of Insolvency Practice and Insolvency Guidance Papers.

A review of the insolvency code of ethics is nearing its completion. The Insolvency Service in its oversight role has been a member of the working group set up to review the insolvency code of ethics. As part of that review, views were sought on the code by way of a public consultation.

### ***Q6. In what ways have the RPBs used the introduction of regulatory objectives to improve professional standards within the insolvency profession?***

In our view, the standards of ICAEW licensed insolvency practitioners were already high prior to the introduction of the regulatory objectives. Our processes were already consistent with the regulatory objectives when the objectives were introduced, so we have not had cause to make changes to our processes as a result of the introduction of the objectives.

As can be seen from information we provide to the Insolvency Service (and is published by the Service as part of its annual review of insolvency practitioner regulation) there are consistently few licence removals.

Year	2015	2016	2017	2018
Licence removals	0	3	0	2

And the majority of visit outcomes reported to the ILC are positive.

Year	2015	2016	2017	2018
Visits reported to ILC	196	127	122	130
Satisfactory outcome	152	103	92	91

The information above about visit outcomes is also reported to the Insolvency Service and published as part of the annual review.

As we believe our processes to be robust, this in our view demonstrates that standards are consistently high.

## Monitoring

The following two Regulatory Objectives specifically affect our monitoring visits:

- the maximisation of the value and promptness of returns to creditors;
- the requirement to encourage an independent and competitive profession which provides high quality services at fair and reasonable cost, acts transparently, with integrity and considers interests of all creditors in a particular case.

Even before the Regulatory Objectives were introduced, our monitoring visits considered whether a case had been progressed properly and considered the IP's fees, and we would challenge delays and excessive costs. So in some respects the introduction of the regulatory objectives hasn't affected what we do on our visits on a practical level. However what the Regulatory Objectives have done is provide us with a framework and a justification for challenging these areas.

QAD has recommended to the ILC that 8 matters were referred to PCD as complaints about whether an IP's fees are fair and reasonable. Further information in relation to our work around fees has been provided separately to the Insolvency Service.

We've set out the oversight of an IP by the Insolvency Licensing Committee and Regulatory Practice Group in the context of the maximisation of the value and promptness of returns to creditors in our response to q9, but this is an activity undertaken by ICAEW before the introduction of the objectives.

## ***Q7 When dealing with insolvency practitioner conduct, how transparent are RPBs in their decision making?***

We consider our decision making is transparent.

ICAEW's complaints process is explained on our website at:

<https://www.icaew.com/-/media/corporate/files/about-icaew/what-we-do/protecting-the-public/complaints-process/how-we-investigate-complaints-booklet.ashx>

and

<https://www.icaew.com/about-icaew/regulation-and-the-public-interest/complaints-process/make-a-complaint>

All our bye laws and regulations which underpin the decision making processes are available on ICAEW's website ( see our response to q1 above and the appendix).

ICAEW's Guidance on Sanctions which includes the Common Sanctions Guidance for insolvency is available on our website ( see our response to q3 above).

Hearings of tribunals of the Disciplinary Committee and panels of the Appeal Committee are normally open to the public. The details of public hearings will be published on **ICAEW's website** seven days before the hearing. These details include:

- the defendant or appellant's name;
- the terms of the formal complaint; and
- the date, time and place of the hearing.

A tribunal does have the power to proceed in private by excluding the press or public from the whole or any part of a hearing, whether or not the parties ask it to do so. It can do this at any stage of a hearing or during a pre-trial review. When it decides whether to exclude anyone, the tribunal considers whether:

- the interests of justice
- any other special reason or
- the particular circumstances of the case

outweigh the public interest in holding a public hearing. The tribunal must also be satisfied that both parties have been given an opportunity to make representations.

Disciplinary and regulatory findings are published on **ICAEW's website** and remain on the website for 5 years.

From 1 November 2014, all published disciplinary sanctions have also been published on the Insolvency Service's website in an agreed format. The publication includes details of the IP, the nature of the complaint, the finding and any sanction together with reasons for the decision including aggravating and mitigating factors considered as part of that decision.

### **Communication with complainants/IP during the process**

We seek to share all information between both the complainant and the member including copies of all key letters and supporting evidence.

If a decision is taken to close a complaint during the assessment stage as there is no or insufficient evidence to demonstrate potential liability to disciplinary action then we still advise an IP that the complaint was opened and the details of that complaint.

During an investigation again we encourage the sharing of all information and evidence between the member and complainant to ensure a transparent investigation. All decisions are thoroughly explained in correspondence both when why action is being taken or when evidence of misconduct has not been identified. If a complainant disagrees with the conclusion of our investigation, they have the right to have the matter considered by the IC. If a matter requires reporting to the IC, the member receives a draft of the report to the IC and has the opportunity to provide any further representations at that time. The complainant does not see a copy of the report to the IC but they are advised of the recommendation of PCD.

### ***Q8 Does the current system provide for effective scrutiny of IP fees***

Scrutiny of an IP's fees does not just rest with the RPBs.

The law requires that creditors are provided with an estimate of the fees an IP is proposing to charge and creditors have a statutory role in the approval of an IP's fees as well as a right to challenge fees charged. Creditors should exercise those rights to provide initial scrutiny of an IP's fees. We believe that the changes in the insolvency rules which changed decision making procedures and enabled creditors to opt out of the process can only have had a detrimental effect on creditor engagement in the insolvency process. This can only weaken creditor control of IP's fees.

Any reviews undertaken by the RPBs will always be after the event.

In terms of considering on a monitoring visit whether an IP's fees are fair and reasonable, we consider the fee basis agreed and the extent of the work required on an individual case. Where we don't consider the basis to produce fair and reasonable fees, we will challenge this.

Where fees are on a time cost basis we review the time ledger and also consider whether:

- the narrative description of the work done accords with the work we've seen on the file
- the grade of staff doing the work appears appropriate
- the recorded time appears reasonable for the task

- there are identical amounts being charged each week (which might indicate that the time doesn't accurately record the work being done)
- there are charges for staff who don't appear to be involved in the case
- the overall strategy merits the costs incurred
- time has been properly allocated between different categories (eg fixed and floating charges)
- the charge out rate is in line with those disclosed

On larger cases this will be considered on a sample basis.

Where an IP is a sole practitioner without any staff, we also consider the extent to which we believe their charge out rate should be discounted to reflect the fact that they are doing more junior administrative work as well as IP-rate work.

All of this is in addition to assessing whether any pre-appointment fees and office holder's fees have been properly authorised and whether they have been drawn in accordance with the authority.

In addition we look at the expenses and disbursements incurred and will challenge them if they appear excessive, or inaccurately classified (if for example category 2 disbursements have been incorrectly treated as category 1 disbursements, so haven't been properly authorised).

We haven't produced any guidance to our IPs on these issues but have provided feedback to them through roadshow sessions, newsletters and webinars.

We have recently reported to the Insolvency Service on a number of aspects of the Regulatory Objectives. The outcome from this will form the basis of our 2019 QAD roadshow session.

However 'fair and reasonable' is very subjective and there are no benchmarks. While our approach is to look at the costs and disclosures provided as an independent third party, where an IP disagrees there is little tangible information or benchmarking to support our position, although that doesn't prevent us from raising concerns.

## Complaints

We consider complaints in relation to fees but the fair and reasonable question is difficult in an enforcement context. We must consider how to prove a complaint before a disciplinary tribunal and the fair and reasonable test is a subjective one. What is a reasonable period of time for a task or a reasonable charge out rate is very difficult in a disciplinary context question. A higher charge out rate may be justified because the individual is more efficient and thus the hours spent fewer. To assist enforcement perhaps the Insolvency Service could publish guidance on what it would expect. The existing guidance which refers to the natural meaning of the words isn't that helpful.

There are cases that are clearer where time has been charged for tasks not undertaken for example or different charge out rates for the same individual performing the same tasks but on different appointments.

Consideration is also given to the work allocation amongst the insolvency team members, particularly within smaller practices.

## ***Q 9 What are RPBs doing to promote the maximisation and promptness of returns to creditors***

### Monitoring

When reviewing cases on our monitoring visits we consider:

- the steps and time taken to realise individual assets
- whether funds have been distributed within a reasonable timeframe
- whether interim distributions could have been made
- whether other aspects of casework have been dealt with promptly
- whether the case has been closed within a reasonable timeframe

We don't have any fixed guidelines which dictate what would be reasonable but look at the facts of each case, and the reviewers use their experience of casework.

Where the delays are not particularly prolonged, are isolated to a particular case and haven't impacted creditors, then the issue may not be pursued further, but we would expect the IP to explain what they will do differently in future to avoid such issues arising.

If there has been a prolonged delay, and we have identified delays over a number of cases and creditors have been prejudiced, then we may either recommend follow up action, or regulatory action.

Follow up action might involve the IP:

- confirming when a distribution will be made, and providing confirmation in due course that it has been paid
- submitting periodic case progression updates
- submitting a case closure plan and subsequent updates

Regulatory action could involve a referral to our Professional Conduct Department for consideration as to whether there is liability for disciplinary action.

We feedback issues of concern from monitoring visits to our IPs through our roadshows and webinars and newsletters.

### **Oversight by the Insolvency Licensing Committee/Regulatory Practice Group**

When the QAD report is considered by the ILC it can ask for an IP to provide any information and on any timescale it wishes.

The follow up after the ILC, is monitored by RPG and can include basic confirmations in response to questions raised or could be schedules in relation to cases of a certain age or type.

This could include (but is not limited to) case progression updates, confirmation of distributions made or case closure plans.

Once the ILC has reached a decision, this is then monitored by RPG in accordance with the terms ordered.

IP's could be asked to send in monthly or quarterly case updates which highlight the progress made with making distributions to creditors, progressing or closing cases. This process encourages IP's to review their cases on a regular basis to ensure cases are being progressed in a timely manner.

If the IP is failing to submit the updates requested or is not making sufficient progress the matter can be referred back to the ILC who may take an alternative course of action to its previous decision. For example, licence restriction or withdrawal.

An IP has recently been offered a regulatory penalty by the ILC for failure to provide the information requested.

### ***Q10. Is there confidence that people who are in financial difficulty and wish to enter a statutory solution are routinely offered the best option for their circumstances?***

This question raises issues wider than just the regulation of insolvency practitioners. ICAEW is only able to offer evidence on the basis of its own role as an RPB and its experience of the insolvency practitioners we license.

Many individuals seeking debt relief whether statutory or otherwise will not enter a process controlled by an insolvency practitioner. Whilst only insolvency practitioners are able to provide certain statutory solutions (principally individual voluntary arrangements, but also protected trust deeds) other statutory solutions are provided by the state. ICAEW can provide no evidence that those individuals who have made themselves bankrupt or applied for a debt relief order for example are offered the best option for their circumstances. Neither do we know if individuals currently in a debt management plan, originally wished to enter a statutory solution or whether a debt management plan is the best option for their circumstances.



We'd suggest that government undertake further research into the provision of debt advice more generally as part of its call for evidence if there is a sense that there are shortcomings in the quality and provision of debt advice given that debt advice can be obtained from a number of different sources.

We know for example, that in its **Dear CEO letter** dated 5 October 2018 the FCA expressed concerns about the quality of advice provided by certain debt packagers. The FCA's **thematic review** of the debt management sector published in 2019, found that quality of advice had generally improved and that most firms were reaching the required standards for most of their customers. However, despite the improvements seen, the FCA reported inconsistencies in all firms' practices that had caused, or could cause, harm. In all firms, the FCA found some customers that had received poor advice and unsuitable recommendations. In two of the smaller firms reviewed by the FCA, the standards of debt advice and debt management services were reported to be unacceptably and consistently poor.

## Insolvency exclusion

Another aspect is the availability of debt advice. Many IPs are prevented from providing debt advice to individuals in financial difficulty because of the operation of the insolvency exclusion from FCA authorisation

IPs are skilled and experienced in matters of dealing with personal debt and available insolvency procedures. Even those who rarely act as IP for insolvent individuals are likely to be able to provide useful help to individuals at some level, for instance referring them to the third sector or local charities. The regulatory regime should, therefore, facilitate their involvement as much as possible.

The current regime fails to do so. Consumer debt advisors are required to be FCA regulated. This means that IPs may need to obtain FCA authorisation in addition to their licence from an RPB, which involves additional costs and regulatory burdens that may not be justified in commercial terms. The exclusion only applies if the IP is providing advice in the expectation of being appointed in a formal insolvency procedure. But this is too narrow to be effective and is interpreted by the FCA and the Insolvency Service as only being available to an IP who is likely to be appointed as supervisor in an IVA (as set out in Dear IP). For instance, it could prevent an IP from providing advice if the IP thinks that the individual will be able to avoid an insolvency or if the IP would not take a resulting insolvency appointment for economic or other practical reasons. The exclusion does not even enable an IP to advise on the suitability of bankruptcy as a solution unless the IP to expects to be appointed as trustee – a bizarre situation when only the official receiver or an IP can be appointed. What is perhaps more bizarre, is that an IP working in the volume IVA sector, who is providing a single solution, is able to use the exclusion.

There is an exemption available to members of designated professional bodies (under Part XX of the Financial Services and Markets Act) but it is of limited assistance for those who are not existing clients of the IP or their practice.

Regulation is therefore needlessly excluding well qualified advisors from helping in this area and limiting access to debt advice.

## Monitoring

We have provided the Insolvency Service with information separately about the number of monitoring visits where concerns about the quality of the advice provided by the IP have been identified. For the majority of ICAEW licensed IPs, we are confident that they provide appropriate advice (when they are able – see above) to individuals in financial difficulty.

During our monitoring visits we consider whether companies and individuals are in the right debt solution, and that the advice that directors and individuals have been given is correct and appropriate.

When visiting IPs who provide personal debt solutions, we do this by:

- listening to a sample of recorded advice calls, where the practice records their advice calls

- listening to a sample of introducer's advice calls, where relevant, and where the practice provides them
- reviewing the output from the entity's own internal monitoring of advice calls
- looking at the written advice provided to the debtor and ensuring that it's accurate and has covered all relevant solutions
- looking at the information provided by the debtor and their income and expenditure and the steps taken to verify it

ICAEW has recently restricted two IPs' licences where we weren't satisfied that the IP was giving debtors proper and appropriate advice. A third IP's case is due to be considered by the ILC at its next meeting, although the IP has already agreed not to take further IVA appointments.

## Lead generators

Earlier this year ICAEW met with the Insolvency Service to discuss the issue of lead generators and the Insolvency Service's view that IPs should only take appointments from FCA regulated introducers. We support this move. This does not, however, deal with the more fundamental issue that under the current FCA authorisation regime, a lead generator does not need to be FCA authorised if no debt advice is provided. Some concern has been expressed that unauthorised lead generators are providing debt advice when they shouldn't and that the advice provided is of a poor quality. This needs to be addressed.

Following that meeting ICAEW took the lead in issuing a questionnaire to its IPs who specialise in IVAs to seek to understand where their work came from and any practical difficulties that could result from restricting IPs from taking referrals from unregulated advisors. We provided the results of this to the Insolvency Service over the summer.

Where we become aware of shortcomings with a regulated lead generator we would highlight that to the FCA as part of our visit process.

## ***11. Are RPBs doing enough to promote the public interest and protect the public from harm? Please share examples of good and bad practice.***

Promoting the public interest is part of the charters of ICAEW and therefore this metric is high on the methodology and framework operated by ICAEW in the performance of its regulatory roles across all sectors, including Insolvency. The disciplinary bye-laws, separated from the principal bye-laws in 1993 and developed in the regulatory sphere, are particularly strong on the protection of the public from harm. The protections are evident across a number of the regulatory tasks that ICAEW performs as part of the supervision of Insolvency practitioners.

As referenced in our response to q1, in discharging its responsibilities, the IRB's primary consideration, as set out in its terms of reference is the public interest. This builds on the public interest objectives contained in [ICAEW's charter](#). There is a specific page on ICAEW's [website](#) dealing with regulation and the public interest.

ICAEW considers it part of its public interest role to respond to consultations and develop thought leadership papers on subjects of relevance to the profession. So far, in 2019 ICAEW has submitted 100 [consultation responses](#) on various subjects.

One of ICAEW's thought leadership projects which is of particular interest in the context of this call for evidence is the report [Acting in the public interest: a framework for analysis](#).

In addition, ICAEW has issued [guidance](#) on the public interest duty of the profession as a whole, and on what this means for individual members when applying the code of ethics.

Set out below are details of ICAEW's regulatory processes which are designed to protect the public.

## Licensing process

We have provided information about the licensing process in our response to q5.

## Risk assessment for visits

ICAEW operates three visit cycles.

- A six year cycle for visits to individual IPs in some larger, multi-IP, multi-office firms with a dedicated compliance team and a good visit history. We will generally visit at least one IP in such firms each year but will break down the IP population over a six year cycle.
- A three year cycle for IPs in smaller firms
- An annual visit cycle for IPs meeting the IVA volume provider definition

We can, and do, accelerate visits where there is regulatory intelligence that suggests that would be appropriate. For example:

- During 2019 we accelerated our next visit to an IP who was criticised in an adverse court judgement and had a significant financial settlement made against him.
- In 2015 we accelerated our next visit to an IP with a poor regulatory history who was involved in a partnership dispute. His licence was subsequently withdrawn.

While not a risk assessment issue, it's also worth pointing out that the ILC can order targeted follow up visits to IPs and during 2019 we will have carried out six targeted visits. These are effectively accelerated visits, albeit the scope is focused on issues of previous concern.

As noted above, we use information from the phone reviews carried out after our new IP event each year to help prioritise the visits to new appointment takers. Where an IP with an existing licence becomes licensed by ICAEW we will also consider their last monitoring visit report, and the outcome of recent visits to their firm, when deciding the timeframe for their first monitoring visit. If an IP new to ICAEW is in a firm which has a good regulatory history with us, we will generally consider that an early visit isn't necessary, although we also take their caseload into account when deciding on the timing of their first visit.

ICAEW also has a firm-based annual return which can impact on our risk-assessment. Some of the questions are about:

- the structure of the practice and the individuals involved and whether non IPs in the firm are in a position to influence the IP's insolvency work
- the IP's caseload
- the IP's compliance arrangements
- the outcome of their most recent ICR
- whether a bond claim has been made in the period of the return
- whether any staff have been dismissed in connection with insolvency work in the period of the return

The answers to these questions may result in an IP's next visit being accelerated.

From time to time we also receive regulatory intelligence from the Insolvency Service and other bodies / individuals, which can result in an IP's next visit being accelerated.

Internal discussions, for example with our Professional Conduct Department, can also result in an IP's next visit being accelerated, if, for example they have concerns about the volume or nature of complaints against an IP.

We have a risk-based approach to SIP 16 monitoring and a poor SIP 16 could also result in an IP's next visit being accelerated, as well as a potential referral to our Professional Conduct Department.

## **Publicising regulatory and disciplinary action**

ICAEW demonstrates its commitment to high standards and to maintaining those standards through the disciplinary process and by publishing details of the orders made. Although punishment is not, in itself, a purpose, a punishment can act as a deterrent. Not only must the individual be deterred by the imposition of a disciplinary order, but other people must see that a particular wrong-doing will not be tolerated. The Courts have held that, in some circumstances, it would be appropriate to use a sanction to send out a message. In this context, the sanctions order is more about deterrence than punishment.

Disciplinary and regulatory findings are published on [ICAEW's website](#) and remain on the website for five years.

**Q12. “The regulatory objectives are fit for purpose”**

As part of developing our response to the call for evidence, we’ve sought advice from ICAEW’s Insight Team. This is the team which is responsible for delivering research and insight programmes across ICAEW and are experienced market researchers. The team have questioned how q 12 to 15 have been presented. It may be that the responses the review team receive are not be a reliable means of gauging confidence or the RPBs’ effectiveness. That’s why we have chosen not to score our responses to these questions. We’d be happy to discuss this further if it would be helpful to do so.

We are broadly supportive of the objectives, subject to our comments below regarding the fair and reasonable test. Our view is however, that the objectives suffer by their placement in the Act.

In our experience statutory objectives have been helpful to supervisory bodies in developing their regulatory policy and addressing how individual situations and risks should be addressed. It helps further that they are stated clearly up front and then woven into the detail of the overall regulatory framework. The Legal Services Act 2007 for example sets out 8 statutory objectives in section 1, and then throughout the rest of the act refers to these in setting out obligations for the oversight body (the Legal Services Board), the supervisory bodies (Approved Regulators) and the firms themselves in their conduct and that of their key legal officers in the form of a Head of Legal Practice and Head of Finance and Administration. The objectives therefore are top to bottom part of the statutory framework.

In the Financial Services and Markets Act 2000 the Financial Conduct Authority’s duties and objectives, both operational and regulatory, are sited at the beginning of the Act. It is clear from the drafting of the legislation that all that follows in FSMA flows from the objectives.

In the Insolvency Act, the regulatory objectives sit in Part XIII of the Act and were inserted by the Small Business Enterprise and Employment Act 2015. The Insolvency Act 1986 itself was not further amended so that it is drafted in the context of the regulatory objectives. Therefore these new objectives apply to the application of legislation some of which has its roots in 1914 or 1948. Whilst not necessarily advocating a wholesale re-write of the Insolvency Act, for the objectives to be truly effective it would be better if all the legislation was framed in the context of those objectives.

There’s also an obvious tension between the sometimes seemingly unfair actions of an insolvency practitioner which he or she obliged to undertake because of a legal obligation, such as the sale of a bankrupt’s home, and the objective that the regulatory framework should secure fair treatment of persons affected by the acts and omissions of an insolvency practitioner. That fair treatment is obviously fair in the context of an insolvency procedure, but that distinction may not be immediately apparent to someone who faces losing their home.

Another challenge in the context of the objectives is the reference to fair and reasonable.

As noted above, the reference to fair and reasonable is very subjective. As a result, while we can challenge costs which are not in our view fair and reasonable, the IP may well disagree. While that doesn’t prevent us from challenging their fees, the subjective nature of the assessment is unhelpful.

However we don’t think that it would be possible to benchmark costs and say what is appropriate for a certain size of case, as the nature of insolvency cases is that they are all different, with different types of assets.

We have encouraged IPs who charge on a basis of a percentage of the assets they realise to structure their costs in such a way that they charge different percentages for different asset classes, depending on the level and complexity of the work required. And particularly to charge a low percentage when realising cash at bank. However the overall fee structure is also relevant, as if they are purely charging on a percentage basis, we need to recognise that the percentage fee is covering all the other work required, including statutory reporting, which may not have a direct benefit to creditors.

The statutory 15% rate that the Official Receiver (OR) has been able to charge on asset realisations since 21 July 2016 is unhelpful when assessing what is a fair and reasonable fee. We

have had some IP's suggest that if 15% of all asset realisations is an appropriate rate for the OR on all realisations, it must be a fair and reasonable rate for them. In some cases that may be the case, depending on the asset values, but we look at the fee basis for a case in the round, comparing the overall sum that could be charged with an assessment of the level work required.

It has also been unhelpful that it has taken the Insolvency Service a considerable amount of time to deal with withdrawing the memorandum of understanding between the Service and the RPBs. The memorandum of understanding is considered by the Service to be incompatible with the regulatory objectives, but despite a longstanding intention to withdraw the memorandum this has not happened and it currently on hold pending the outcome of this call for evidence.

***Q13. "The RPBs function in a way that delivers the regulatory objectives and this has increased confidence in the system"***

We consider that ICAEW it acts in way which delivers the regulatory objectives. We cannot be certain that this has impacted on confidence in the system. There was no measurement made of confidence in the regulatory framework when the regulatory objectives were introduced. Without any benchmark, it is difficult to see how the review team will be able to assess whether confidence has increased by reference to the answers given to this question.

There are actions which government has taken which in themselves undermine confidence in the regulatory regime:

**Insolvency exclusion**

As we refer to above, the application of the insolvency exclusion means that it is almost impossible for the majority of IPs to provide debt advice without seeking FCA authorisation. This could be seen as a lack of confidence by government in an insolvency practitioner's ability to provide good quality impartial debt advice. The practical result of the interpretation of the insolvency exclusion is that many IPs have taken the decision not to offer debt advice to individuals in financial difficulty.

**Breathing space**

The breathing space proposals compound the issue caused by the operation of the insolvency exclusion, in that only an FCA authorised person is able to recommend entry into the breathing space. As noted above, this will effectively exclude many IPs from recommending a client enter the breathing space. The approach taken by government to effectively exclude IPs, could as with the insolvency exclusion more generally, be seen as a lack of confidence in an IP's ability to identify an appropriate candidate for the breathing space.

**Pre pack pool**

Although ICAEW is a supporter of the pre-pack pool and a member of its steering committee, the creation of the pool could be seen as a challenge to an IP's ability to exercise appropriate judgement. If the government's review of the effectiveness of the pool and other associated measures recommends further inhibitors on an IP's actions, this could also be seen as demonstrating a lack of confidence by government in the insolvency profession.

**Conflict between employment law and insolvency law**

We have raised the issue of the conflict between insolvency law and employment law with the Insolvency Service on numerous occasions. Whilst this conflict remains, insolvency practitioners will continue to be criticised (and sometimes fined) by Employment Tribunals for a failure to consult when redundancies are a possibility. These instances generate negative publicity and criticism of the insolvency profession.

We are aware that the Insolvency Service has been working with R3 to find a solution but without legislative change any such work will only mitigate the consequences, not resolve the underlying issue.

***Q14. "There are matters of significant concern, which are currently affecting confidence in the regime, which are not addressed adequately by the regulatory objectives"***



We are aware of some concerns about the volume IVA/PTD sector in particular.

ICAEW currently license one IP in one firm that meets the volume PTD definition and no IPs in the volume IVA sector. But we are aware that even if ICAEW has a limited presence in this market, a lack of confidence in one sector may roll over into a lack of confidence in the regulatory framework more widely.

Some of the issues are caused by the structure of the businesses which operate in the sector. These are seldom a traditional insolvency practice and the IP is more likely to be an employee than a business owner. The nature of insolvency regulation means that if a problem is found relating to a specific appointment, it is in general the IP<sup>2</sup> rather than his/her employer which is held to task, and an IP who is unhappy at being sanctioned by their RPB can simply be replaced by another.

Additionally, employee IPs may not know enough about the business model to know if services are being provided by connected companies or at a charge which doesn't reflect good value to the estate. The new insolvency code of ethics seeks to re-emphasise that an IP has personal responsibility for decisions made in relation to a particular insolvency appointment even if those decisions are made at a corporate level.

But the primary issue is the business model. And this is not a failing of the regulatory objectives but the nature of the regulatory framework. We discuss further below some ideas on firm based regulation.

Concerns about the quality of debt advice provided by actors outside of the insolvency profession is not a matter that could be addressed by the regulatory objectives.

***Q15. "There is confidence that government oversight sufficiently holds the RPBs to account to deliver the regulatory objectives"***

We can only offer our own experience as evidence. We believe the Insolvency Service does hold us to account in the context of the regulatory objectives.

The Small Business Enterprise and Employment Act 2015 introduced new powers for the Secretary of State, which enable he/she to:

- Issue directions to an RPB in relation to its regulatory arrangements or in respect of a particular regulatory action
- Impose a financial penalty on an RPB
- Publish a statement reprimanding an RPB

Details of directions and financial penalties are also made public under the procedure provided for by the Small Business Enterprise and Employment Act.

It would appear, due to the absence of any publicised actions, that the Insolvency Service has not had cause to use the new powers it was granted by the Small Business Enterprise and Employment Act. This we'd suggest is evidence that the RPBs are delivering the regulatory objectives. If it were otherwise, the Insolvency Service would have had cause to use its powers and this information would be in the public domain.

But as we noted above, we cannot form a view as to the level of confidence there is externally in the government's oversight role. This is something where we would expect government to already have its own evidence on the external perception of the effectiveness or otherwise of the oversight function.

***Q16. Does the reserve power provide sufficient flexibility in the options for a single regulator? If so, which option would most effectively deliver the regulatory objectives?***

We are unconvinced of the need for a single regulator.

But having said that, we'd offer the following comment on the power:

Section 144 of the Small Business Enterprise and Employment Act provides that the designated body may be either—

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<sup>2</sup> As noted above, in certain circumstances ICAEW is able to take action against a firm, but it is unlikely an volume IVA/PTD provider will be a member firm.

- a) a body corporate established by the regulations, or
- b) a body (whether a body corporate or an unincorporated association) already in existence when the regulations are made (an “existing body”).

The power appears to prevent a new body being created, perhaps as a joint venture between regulators as it would not be established by regulations.

The power also appears to prevent an existing branch of government from taking on the role of the single regulator.

Also, the power applies in the context of the current legislative framework, so if there are issues which cannot be addressed under the current framework (firm regulation for example) these will not be capable of being addressed by a new regulator.

***Q17. Should government look to create a different type of regulatory framework that better suits the current insolvency system (for example firm regulation in certain sectors)? If so, what type of framework would best deliver improvements to public confidence?***

There is an argument for the introduction of firm-based regulation where the ownership of an entity does not rest with insolvency practitioners or other professionals who are subject to the rules and disciplinary arrangements of a professional body.

There are some business models, most notably in the volume IVA and PTD market, where the insolvency practitioner is an employee with limited, if any control over the decisions made by senior management. And the ownership of these businesses is not within the control of other professionals. If the insolvency practitioner is sanctioned it does not necessarily follow that the circumstances which led to the sanction will be changed, either because the IP has no power to make the change, or his/her employer is unwilling to do so. An employed IP with an adverse disciplinary finding can also be replaced by another without such a record. This is obviously challenging if the issues are systemic.

We have met separately with IPRS to discuss the models which apply in other areas where ICAEW is a regulator, most notably audit and probate.

As we’re all aware, the regulation of insolvency at present revolves around the licensing of the individual. That individual may be a sole practitioner or part of a firm with other practitioners. In other areas of professional services such as audit and legal services it has been recognised that the firm and its culture may be a challenge to the individual in the performance of their duties and therefore regulation has been developed to bring the firm as well as the individual into account and protect the independence of judgement being exercised by the practitioner in their discharge of their regulatory responsibilities.

Thus audit under the 1989 Companies Act and legal services under the Legal Services Act 2007 brought in firm and individual regulation, also permitting those who were members of a particular professional body to be regulated at firm level by a different body. There is an understanding override, explicit in the LSA07<sup>3</sup>, that where there is a clash between the two regulatory environments that the regulations applicable to the firm prevail.

The mechanism used by ICAEW to secure the buy in of the firm to the regulatory obligations on the individual is to contractually require all the principals of the firm who are not ICAEW members to sign up to ICAEW’s ethical standards and bye-laws as well as the regulations pertaining to the activity regulated. This is done through a process described as “affiliation”. The communal responsibility helps the regulated practitioner and also encourages the development of internal checks by the firms themselves to ensure that their practitioners in the reserved areas are meeting the regulatory expectations.

A further factor involved in firm regulation is the use of regulation to define and monitor the type of ownership and control, ensuring that the firm acts in the public interest and is a service provider a user of the services can have confidence in. In the case of audit where independence is a key factor in the service provision, there is a requirement for firms providing audit services to be more

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<sup>3</sup> Legal Services Act 2007 sections 52 and 54

than 50%<sup>4</sup> controlled by those holding an audit qualification. In the case of legal services the qualification criteria is more light touch but there are tests of “fit and proper”<sup>5</sup> around those who hold significant stakes in the firm including DBS checks.

Intermediate regulation is also secured in legal services through the appointment of Heads of Legal Practice<sup>6</sup> (HOLPs) and Heads of Finance and Administration<sup>7</sup> within firms who are required to have adequate influence at board level and are bound directly into the statutory objectives. These individuals are responsible for the conduct of the regulated service within the firm and are effectively a local policeman. This intermediate regulation means that many potential problems are dealt with on a timely basis minimising the risk to the public without the oversight body or its regulator becoming involved, unless there is a reportable breach.

In audit, although not formalised in CA06, a similar approach is followed by ICAEW through requiring audit firms to nominate an audit compliance partner through whom regulatory messages are conveyed and who should coordinate within the firm the responses and reporting asked of the firm by the regulatory body or indeed the FRC where they have direct authority.

This may appear an obvious point to make, but any system of firm based regulation would require a fundamental re-write of primary regulation unless there was some means of maintaining the personal nature of appointments. Any steps to introduce firm regulation will therefore require detailed and extensive consideration and shouldn't be considered to be a quick fix.

#### ***Q18. Should government have a role within any new or improved regulatory framework?***

It is difficult to see how an oversight function would operate if the power was to be exercised to designate an existing body, as all the oversight function would be doing would be checking whether that body is operating appropriately. We are not aware of a similar structure in any other system of regulation.

If the body was to be established by regulations, Schedule 11 of the Small Business, Enterprise and Employment Act sets out numerous interactions between that body and the Secretary of State. It would appear that should a body be established by regulations, the role for government is already prescribed.

#### ***Q19. How might any future single regulator, or alternative framework, be funded?***

ICAEW funds its regulatory activities using a self-financing principle (sometimes called ‘user pays’) whereby income is targeted to match expected cost. This means that ICAEW's licensed insolvency practitioners fund the operation of the regulatory framework via the licence and affiliate fees they pay. There is no cross-subsidy from the fees paid by ICAEW members. Where insolvency regulation benefits is from the economies of scale that exist because ICAEW is a regulator in other areas – the costs of operating a regulatory and disciplinary system are shared across the regulated areas. For example, in relation to advice required on legal issues arising in relation to insolvency complaints, our insolvency investigation managers benefit from being able to use any of the pool of legal advisors within the whole Professional Conduct Department which reduces the cost of necessary legal input. Similarly, we manage to reduce the per-visit cost of carrying out insolvency reviews for many firms by combining an insolvency visit with a Practice Assurance visit where the cost of administering our Practice Assurance Scheme is charged separately to our member firms.

We would expect that insolvency practitioners would fund any new arrangements under a similar “user pays” approach.

We would estimate that establishing a new body would cost anything from £5.5 million to £8.5 million (see below).

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<sup>4</sup> Companies Act 2006 Schedule 10 paragraph 7(3)

<sup>5</sup> Legal Services Act 2007 Schedule 13 paragraph 6

<sup>6</sup> Legal Services Act 2007 Schedule 11 paragraph 11

<sup>7</sup> Legal Services Act 2007 Schedule 11 paragraph 13

	The establishment and operation	Further costs
Property	X	
Property – central London premium		X
Staff – operational	X	
Staff – support teams	X	
Staff – policy/technical	X	
Staff – recruitment	X	
Staff – central London premium		X
Handover/parallel running year 1	X	
Systems including infrastructure, web	X	
Legal including TUPE	X	
Professional including complaints	X	
IP, process and software development	X	
Funding of gateway	x	
Fighting fund for cases		X
Compensation scheme		X
Reserves (3 months operating)		X
Liability (commitments) for any staff brought in from other organisations		X
Estimate	£3.5M- £4.5M	£2M - £3M
TOTAL	£5.5M - £8.5M	

Another possible comparator, could be the Office of Professional Body Supervision (OPBAS). OPBAS isn't directly comparable as a regulator as it is a supervisor and carries out no direct regulation itself. But it is perhaps the most recently created "new" regulator. OPBAS relies on the FCA's infrastructure but has set up costs of £0.5m and £2m running costs in first year of operation. All these costs are to be recovered from the population regulated by OPBAS.

Something else not factored in to the funding requirements, are the functions currently carried out by volunteers: These include:

- The non lay representatives on regulatory committees and tribunals who are mostly unpaid
- The members of the JIC and its secretariat
- The directors of the Joint Insolvency Examination Board.

It may be that volunteers may be unwilling to continue to provide this support pro bono under a new regulatory arrangement.

## Governance

The ICAEW Regulatory Board (IRB) was established in January 2016 to enhance the distinction between ICAEW's representative and regulatory roles. The creation of the IRB was one of the recommendations of an independent review of ICAEW's regulatory governance chaired by **Sir Christopher Kelly**. The IRB is responsible for overseeing professional standards activities and the statutory regulatory role of ICAEW. In discharging its responsibilities, the IRB's primary consideration is the public interest.

The IRB comprises up to twelve members including the chair and is formed of a parity of lay and non-lay members. If there is equality of votes, the chair has a casting vote. The current chair is Michael Caplan QC, who is a lay member. Details of all other members of the IRB and whether they are lay or chartered accountants, together with brief biographies for the chair and members are publicly available on the ICAEW website at [icaew.com/irb](http://icaew.com/irb). There is one member of the IRB who is an insolvency practitioner.

Lay is defined in the IRB's terms of reference as:

someone who is not and never has been a member, affiliate or employee of the ICAEW or any other accountancy body and such further relevant restrictions as may be appropriate to enhance public confidence in the regulatory process. In making lay appointments, the focus will normally be on consumers of accountancy services and stakeholder organisations rather than those who have more general experience of regulation of other professional services.

Members of the ICAEW Board or Council may not be members of IRB and there will be a period of at least one year between ceasing to be a member of Council or ICAEW Board and taking up membership of IRB. IRB members may not be members of other ICAEW regulatory committees.

The chair of the IRB may not be a member of the ICAEW Board or Council or any other ICAEW Committee.

## Recruitment

### Chair

The chair of the IRB is appointed on the basis of being the person best suited for the job, judged on merit, without regard to whether they have a lay or accountancy background.

Michael Caplan was appointed as chair of IRB in October 2015 by a panel independent of ICAEW chaired by **Dame Janet Gaymer**. The process followed involved engaging an executive search agency to identify potential candidates, shortlisting process and interview leading to appointment.

Michael's initial term was for three years. Given that the IRB is a relatively new board, meeting for the first time in 2016, to aid continuity and the board's continuing maturity, Michael was offered a further three year term. As part of the renewal process, IRB members were asked to assess the chair's performance and Michael completed a self assessment of his own performance as chair.

### Members

Ten out of the eleven members of the IRB were recruited when the board was set up. The eleventh member was recruited in 2017 to fill a vacancy created when one of the original members stepped down from the board.

To source IRB members, advertisements were placed in the national press and ICAEW's own publications.

Appointments to the IRB are made by the Professional Standards Appointments Committee, which is made up of six members, three lay and three chartered accountants. The Professional Standards Appointments Committee also appoints the professional conduct and regulatory committees (including their chair and vice-chair), and the Reviewers of Complaints.



Given that the majority of the IRB members were recruited at the same time, a succession plan is in place to stagger terms and avoid the wholesale departure of all the IRB members. In 2020 two new accountant members of the IRB will be appointed to replace two members whose terms end at the end of 2019.

### **Contractual arrangements**

Each IRB has a contract in place, setting out their obligations as a member of the board. Lay members are paid a meeting fee and have their expenses reimbursed. Accountant members receive no fee but do have their expenses reimbursed.

Separate arrangements are in place for the IRB chair.

### **Bye laws and regulations**

ICAEW's Council has delegated the regulatory and disciplinary functions of ICAEW to the IRB, to separate them from the other activities of ICAEW.

Under its **terms of reference** the IRB has responsibility for:

- the submission to the ICAEW Board of any recommendations for additions, deletions or amendments to the Charter and bye-laws in relation to professional conduct and regulatory matters for recommendation to Council for approval.
- making and amending regulations in the professional conduct area (except those regulations made by the Investigation, Disciplinary and Appeal Committees under powers delegated to them in the Schedule to the Disciplinary Byelaws),
- making and amending regulations in respect of insolvency, exempt regulated investment business, audit, professional indemnity insurance, clients' money, corporate practice, use of the description 'Chartered Accountant', membership (cessation, readmission and resignation of members only), the Review Committee, the Chartered Accountants Compensation Scheme and Practice Assurance and legal services areas

The IRB's terms of reference make it clear that the IRB's primary consideration in carrying out its role, is the public interest. As there is lay parity on the IRB and a casting vote to the lay chair, the accountant members of the board are for all practical purposes in the minority on the board. This prevents the view of the profession having sway in the IRB's decision making. ICAEW is confident that its bye laws and regulations support the public interest rather than the interests of its membership.

The Disciplinary Bye-laws (DBLs) set out the liability to disciplinary action and provide the framework for the investigation of complaints and disciplinary proceedings (including appeals). ICAEW's disciplinary bye laws are publicly available on the ICAEW website at [icaew.com/regulations](https://www.icaew.com/regulations).

Proposals to change the DBLs are prepared by staff within the Professional Standards Department before being considered by the IRB.

It's important to note that changes to the Disciplinary Bye Laws are subject to final approval by the Privy Council and, in the context of complaints concerning member in practice in Ireland and accredited probate firms, IAASA and the LSB. This is a requirement imposed by our Supplemental Charter. This all means that there is an independent review built into any changes to ICAEW's bye laws.

The memorandum of understanding between the Insolvency Service and ICAEW includes an obligation to consult with the Secretary of State should any change be proposed that solely affects insolvency practitioners. There has been no occasion where a proposed bye law change would solely affect insolvency practitioners.

The regulations made by the Investigation, Disciplinary and Appeal Committees under powers delegated to them in the Schedule to the Disciplinary Byelaws are primarily procedural and changes made to these regulations flow from any changes made to the Disciplinary Byelaws.

## Insolvency licensing regulations

Under the IRB's terms of reference, the board has responsibility for making and amending regulations in respect of insolvency (the Insolvency Licensing Regulations). As noted previously, the IRB's primary consideration in fulfilling its role, is the public interest. Proposed changes to the regulations are considered by a board with parity between lay and accountant members where the chair (a lay member) has a casting vote. There is no scope for professional self interest to control the decision making process.

The memorandum of understanding includes an obligation to consult with the Secretary of State should any change be proposed to ICAEW's regulations that solely affect insolvency practitioners. Only the Insolvency Licensing Regulations affect solely insolvency practitioners. ICAEW fulfils its obligations under the memorandum of understanding and consults with the insolvency service should any change be proposed to the Insolvency Licensing Regulations. This means the oversight regulator is aware of the provisions included in ICAEW's regulations and is consulted on any proposed changes. This adds a further level of assurance of the integrity of ICAEW's processes.

## Other regulations

Under the IRB's terms of reference, the board has responsibility for making and amending other regulations which may be relevant to insolvency practitioners in their practice (see above)

As regards other regulations which may impact on insolvency practitioners (but not only insolvency practitioners), the same arrangements to notify the Secretary of State under the Memorandum of Understanding are adhered to. This means the oversight regulator is aware of the provisions included in ICAEW's regulations and is informed of any changes.

In the interests of transparency, records of the decisions made by the IRB are published on the ICAEW website at [icaew.com/irb](https://www.icaew.com/irb). This year, the IRB has published its annual report for 2018. A copy of this report was shared with ICAEW's oversight regulators including the Insolvency Service.

All ICAEW's bye-laws and regulations are publicly available on the ICAEW website at [icaew.com/regulations](https://www.icaew.com/regulations).

## Project Light

The IRB commissioned an external review to assess how the IRB and ICAEW regulatory activity are positioned and portrayed publicly and through channels such as [icaew.com](https://www.icaew.com). The review also looked at how to address any misconceptions about the independent role of the IRB and regulatory decisions at ICAEW.

A working group of IRB members, led by the Vice-Chair of the IRB and PS staff has considered the review in detail. Potential actions were considered with the overarching aim to provide regulatory assurance and transparency in the public interest.

## Objectives of Project Light

- To reflect the position of IRB as a proactive board working to support the regulation of ICAEW firms, students, members and affiliates.
- To create a distinction between regulatory and membership activity communications eg, on [icaew.com](https://www.icaew.com) and in particular the home page.
- To consider the requirements and user experience of all the PS stakeholders.

Initial outcomes from the project include

- the addition of consumer-focussed content to explain the role of IRB, regulatory committees,
- ICAEW's role as a regulator, the role of an ICAEW Chartered Accountant, what it means for a firm to be regulated by ICAEW, how to complain if it goes wrong and the options for redress;
- introducing a regulations button on the [icaew.com](https://www.icaew.com) home page – accessible to anyone not logged into the site.

- developing a brand solution to visually emphasise that regulation and regulatory decisions are made independently of the membership arm of ICAEW.
- a publicly available report on the IRB's activities which is published on the [ICAEW website](#).

Work is now ongoing on phase 2 of the project.

## **Committees and tribunals**

ICAEW's regulatory committees (including the Insolvency Licensing Committee) have a parity of lay and accountant members.

The Investigation Committee has parity of lay and accountant members and a lay chair.

The Disciplinary Tribunals are made up of two lay members and one accountant member, with the tribunal chair being lay. Since 2018, all that all new Disciplinary Tribunal chair vacancies have been filled by the appointment of either a Queen Counsel (QC) or a legally qualified person with judicial experience.

Increasing the level of lay involvement in the regulatory committees was a recommendation of the independent review of ICAEW's regulatory governance referred to above. The appointment of legally qualified chairs to the Disciplinary Tribunals was agreed by the IRB in December 2017.

## **Committee recruitment**

Given the number of committees operated by Professional Standards, recruitment to the committees takes place annually, with successful applicants offered an initial term of three years. The application process for 2019 recruitment was redesigned by the Committee Secretary (see below), before the recruitment window opened in November 2018 for appointments commencing in June 2019. We developed a more targeted campaign for 2018/19 than previously, increasing visibility on the website, utilising Economia and blog posts, adding the posts to the ICAEW recruitment pages, attending ICAEW events and publicising the vacancies via LinkedIn.

For the 2019 vacancies, bespoke application forms were designed specific to the individual committee which allowed candidates to better demonstrate their suitability for and interest in the role, as well as enabling an easier, fairer and more transparent assessment and shortlisting process.

Candidates are interviewed by the chair of the relevant committee and the committee secretary to assess their suitability for Committee membership. After interview the Committee Secretary prepares a detailed report for the Professional Standards Appointments Committee (formerly known as the Regulatory Appointments Panel), recommending candidates for appointment.

The IRB's terms of reference set out the role of the Professional Standards Appointments Committee which is an independent sub committee of ICAEW's Nominating Committee comprising three Council or Chartered Accountant members and three lay members, including the chair of the IRB.

## **Committee training and induction**

Currently, there are three main ways in which training takes place; induction to the Committee, the annual committee training days and more targeted specific committee training. Committee training days have a general focus on ethical issues and any upcoming changes at ICAEW. This year the focus was be on equality and diversity issues, along with the usual updates on forthcoming changes and a legal update.

For 2019, the newly appointed committee members are to be paired with a 'buddy' who will act as the first point of contact for questions about the committee's operation. The new members attend the first meeting as an observer, although with access to the reports to the committee and other committee papers in advance of the meeting. The idea is that they will be able to consider what decisions they would have made, or questions that they would have raised before the meeting, and compare and contrast with what takes place in the meeting. Following the meeting the new members meet for a debrief session with the chair, Committee Secretary and the assigned

‘buddies’ to discuss any issues arising. Debrief sessions will continue after the following two meetings and as necessary thereafter.

#### Committee secretary

Following a restructure of the Professional Standards department in 2014 and the creation of a Committee Secretariat, led by the PSD Committee Secretary, it has operated independently from both the Professional Conduct Department and the Regulatory Practice Group which investigate matters and prepare papers respectively for the Disciplinary Committees and the regulatory committees. The Committee Secretariat consists of the Committee Secretary, an Assistant Committee Secretary and a team of committee administrators.

The duties of the PSD Committee Secretary and her deputy include:

- a) determining whether a matter is ready to be put on an committee agenda
- b) giving advice on legal and procedural points to the committees
- c) preparing the minutes and decision letters on behalf of the committees
- d) overseeing the convening of Tribunals to hear disciplinary cases
- e) advertising for and conduct the initial filter of candidates to take up positions on the committees
- f) dealing with communications and challenges from members and complainants in relation to decisions of the committees
- g) operating the referral process to and from the Reviewer of Complaints
- h) making referrals to the Fitness Committee

In 2018, a separate reporting line from the Committee Secretary to the IRB via its chair was agreed by the IRB.

This reporting line provides a channel for the PSD Committee Secretary to raise any concerns that she has about any instruction she has received from the PSD Executive Director which she considers undermines, or has the potential to undermine, the integrity in the disciplinary and regulatory proceedings administered by the Disciplinary and Regulatory Committees.



4 October 2019

Ms Judith Marsden  
The Insolvency Service Policy Team  
4 Abbey Orchard Street  
London  
SW19 2HT

Dear Ms Marsden

## **CALL FOR EVIDENCE - REGULATION OF INSOLVENCY PRACTITIONERS, REVIEW OF CURRENT REGULATORY LANDSCAPE**

ICAEW's Regulatory Board (IRB) is the independent board responsible for overseeing the statutory regulatory role of ICAEW and its professional standards activities. As lay chair of the IRB, I thought it may assist for me to input to the Call for Evidence.

### **Background**

The role of the IRB is to initiate and develop strategic priorities relevant to ICAEW's professional standards regulation. The IRB does not involve itself with the discipline of ICAEW members or those authorised by ICAEW to undertake regulated activities. The IRB ensures the ICAEW Professional Standards Department (PSD) runs the processes that underpin licensing and disciplinary work effectively and efficiently.

The IRB has the interests of the public at the forefront of everything it does. To support this, board members are expected to act with independence and avoid conflicts of interest.

The IRB has twelve members including the chair and is formed of an equal number of lay members (someone who is not and never has been a member, affiliate or employee of ICAEW or any other accountancy body) and non-lay members (ICAEW Chartered Accountants).

My personal background is that I have been a solicitor for over 40 years. I was a partner in an internationally known law firm for 30 years before retiring; I remain a consultant. I was appointed a Queen's Counsel in 2002. I have sat judicially as a Recorder in the Crown Court for many years and I am also authorised to sit as a deputy High Court Judge.

### **Call for Evidence**

As a board we have an ongoing focus to ensure that ICAEW's statutory regulatory role maintains public trust. The IRB has:

- the ability to make whatever decisions it believes were or are necessary in the public interest. This will sometimes mean that decisions the Board takes will not or may not be in ICAEW members' interest. These include for example changing some of the disciplinary processes and



also revamping the Guidance on Sanctions including significantly increasing starting points for certain sanctions;

- carried out a quality assurance review of the Investigation Committee which deals with all of the disciplinary matters relating to insolvency, as part of the board's on going programme of quality assurance. This review included members of the IRB being present at several meetings of the Committee, reviewing the papers, and observing how the committee goes about its' business. The Chair of the committee also attended an IRB meeting for interview and discussion. The IRB concluded that the Investigation Committee operated effectively and efficiently;
- reviewed copies of inspection reports prepared by other oversight regulators regarding the performance of PSD and copies of delegated powers' reviews prepared by other representations of other committees. None of these reports have raised any issues regarding the judgments made by PSD staff in their monitoring or complaints-handling work.

As a board we have continued engagement with all of ICAEW's oversight regulators. Angela Crossley, Head of Insolvency Practitioner Regulation at the Insolvency Service attended our most recent board meeting on 2 October 2019; we anticipate that representatives of the Financial Reporting Council and Legal Services Board will be present at our next meeting.

Please do not hesitate to contact me if I can assist you further in any way.

Yours sincerely

A handwritten signature in blue ink that reads "Michael Caplan". The signature is written in a cursive, flowing style.

**Michael Caplan, QC**  
**Chair, ICAEW Regulatory Board**



4 October 2019

**Private and confidential**

Ms Judith Marsden  
The Insolvency Service  
Policy Team  
4 Abbey Orchard Street  
Westminster  
London SW1P 2HT

Dear Ms Marsden

**Call for evidence – Regulation of insolvency practitioners, review of current regulatory landscape**

As non-accountant (“lay”) chairs of two of the main ICAEW disciplinary and regulatory committees we, and the committees we chair, play a significant role in ensuring that ICAEW discharges its responsibilities as the largest insolvency regulator in the UK. While ICAEW staff perform the work of investigating complaints against insolvency practitioners, and undertake monitoring visits to them, it is the Insolvency Licensing Committee and the Investigation Committee that exercise regulatory and disciplinary action, using their independent judgement.

In discharging our responsibilities, we are very much aware of the regulatory objectives, as set out in part 13 of the Insolvency Act 1986, to promote fair and consistent outcomes, maximising returns to creditors and protecting and promoting the public interest.

Those same regulatory objectives have also helped shape the make-up of the Investigation and Insolvency Licensing committees. Both are chaired by lay members and, on each committee, lay members have parity with ICAEW members. Members of our committees include insolvency practitioners, as well as lay members (including specialist lawyers), who have a close understanding of insolvency matters. The Investigation Committee has significant expertise in dealing with insolvency complaints, with such matters making up a disproportionate volume of its work – perhaps not surprising given the very nature of the environment in which insolvency practitioners work, with large numbers of disgruntled creditors and other complainants.

We see, first-hand, the commitment of all members of our respective committees to ensuring that those who are regulated by ICAEW maintain the highest quality and professional standards. We observe that our committee members, both accountants and lay members, understand that, if a profession is to flourish, and maintain its reputation, its highest priority must be to work in the public interest.

We would hope that the Insolvency Service would agree with this as a result of observing our respective committee meetings on two occasions in recent months as well as in previous years.



We are aware of the Insolvency Service observation of our respective committee meetings is but one aspect of the Service's oversight of ICAEW.

We are also aware of the Insolvency Service's reviews of ICAEW's complaints handling and monitoring work and the changes ICAEW proposes to make to ensure ICAEW continues to fulfil its role as an effective insolvency regulator in the eyes of the Insolvency Service.

That said we do not just rely on the reviews undertaken by the Insolvency Service. Each year our committees review the work of ICAEW staff in both the Professional Conduct (PCD) and Quality Assurance (QAD) departments. These reviews are also key to us discharging our regulatory and disciplinary responsibilities. The review by the Insolvency Licensing Committee is undertaken by a lay member and an ICAEW member. The Investigation Committee review team consists of three members, at least one of whom must be a lay member (currently two lay members).

These reviews scrutinise a random selection of work carried out by ICAEW staff to ensure that the regulatory objectives are being adhered to in all aspects of ICAEW's work. The report of the findings from these reviews is considered by our respective committees.

The Investigation Committee has recently concluded its considerations of the largest insolvency investigation ever undertaken by ICAEW. We are aware that this case impacted resources in 2018. We were pleased to note the Insolvency Service's findings that matters had improved following its review of ICAEW's complaint handling earlier this year. It is also very noticeable from our perspective that there exists a good working relationship between the senior staff of ICAEW and the Insolvency Service.

Our reviews of the Professional Conduct and Quality Assurance departments are provided to ICAEW's Regulatory Board (IRB). IRB also undertakes a quality assurance review of ICAEW's main disciplinary and regulatory committees. The IRB has reviewed the work of the Investigation Committee, and was entirely satisfied that it is properly discharging its responsibilities. The next cycle of its reviews will include the Insolvency Licensing Committee.

Because our respective committees play a key role in discharging ICAEW's regulatory and disciplinary functions it's vital that we and our fellow committee members receive appropriate training. Over the last few years we've been very pleased with the quality of the training provided to all committee members by ICAEW. These training sessions allow committee members from committees across all of ICAEW's regulatory and disciplinary committees to come together to share experiences and insights. We find these sessions invaluable. In addition, staff from the QAD have provided presentations at Committee meetings; for example in relation to the QADs approach to reviews of volume IVA providers.

While many of the questions posed in the Call for Evidence are best addressed by ICAEW staff there is one question to which we would like to respond directly.

**Q17 – Should the government look to create a different type of regulatory framework that better suits the current insolvency system?**

In discharging our responsibilities over recent years, we have been frustrated on several occasions when dealing with regulatory and disciplinary issues arising from the volume IVA sector of the profession. That is because the current regulatory and disciplinary framework does not provide the right levers for us to pull.

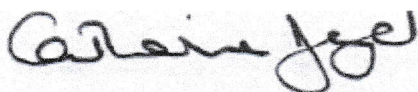
We recognise the personal obligation of individual IPs to satisfy themselves of the appropriateness of processes under which they operate to ensure that debtors are not disadvantaged. However, in taking regulatory or disciplinary action against an employed insolvency practitioner often we are not getting to the heart of the misconduct. It appears that individual IPs in the volume IVA sector may have limited control over their firm's procedures. The executive directors and the firm that employs the insolvency practitioner establish the procedures and appear to be unwilling to change them in the light of advice from the QAD. The directors are not licensed IPs and therefore their conduct cannot be challenged.

We strongly urge the Insolvency Service to improve the current regulatory framework to provide ICAEW and the other insolvency regulators with the tools to get to the root cause of misdeeds. Such action would be welcomed by our respective committees and also go a long way to strengthening the existing framework.


**Conclusion**

As lay chairs of two of ICAEW's main regulatory and disciplinary committees we wanted to input to the Call for Evidence. We believe that having an efficient and robust insolvency regime is critical to the UK economy. Businesses and individuals in financial difficulty need the assurance that they are working with insolvency practitioners that uphold the highest professional standards and give the right advice. We believe the UK's existing regulatory and disciplinary framework is both robust and cost effective but, as we highlight above, there is room for improvement.

Yours sincerely



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**Catherine Boyd**  
Chair, Insolvency Licensing Committee



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**Paul Brooks**  
Chair, Investigation Committee



## **Background**

Paul Brooks, chair, ICAEW Investigation Committee

Paul has been chair of the Investigation Committee for nearly four years. Prior to that, he was chair of the ICAEW's Disciplinary Committee.

He has a background in private company investment, where he has long experience of working with and appointing accountants, including insolvency practitioners.

He is a member of the Adjudication Panel of the Council for Licensed Conveyancers and a magistrate.

Catherine Boyd, chair, Insolvency Licensing Committee

Catherine has been involved in professional regulation for many years. She chairs tribunals for the HCPTS and is a member of the HCPC's Tribunal Advisory Committee. She has previously undertaken similar roles for MPTS, the GCC and for the NCTL. She is a lay member of the General Pharmaceutical Council's Accreditation Panel and an Education Associate for the General Dental Council.

Catherine is a magistrate and school governor.

She is a Fellow of the Chartered Management Institute and Chartered Manager.