



The Law Society

**Consultation on reforms to the regulation of
insolvency practitioners**

The Law Society Response

6 May 2011

supporting
solicitors

The Law Society is the representative body for over 140,000 solicitors in England and Wales. The Society represents and supports solicitors, negotiates on behalf of the profession and lobbies regulators, government and others. The Law Society welcomes the opportunity to comment on the consultation on reforms to the regulation of insolvency practitioners.

Q.1 Do you have any comments or evidence on the costs and benefits set out in the attached Impact Assessment (Annex B)?

No comment

Chapter 2: Overview/Regulatory Framework

Q.2 Is the current structure of IP regulation the right one? How could it be improved?

We believe the current structure of IP regulation is the right structure. It allows professional bodies such as the Law Society to regulate their members in relation to their work as IPs and their work as solicitors. The Solicitors Regulation Authority (SRA) regulates IPs on behalf of the Law Society to ensure there is the appropriate separation from the Law Society's representative functions.

The Legal Ombudsman (LeO) is a new organisation which handles complaints about all lawyers including solicitors. The Legal Ombudsman handles complaints about solicitors who are insolvency practitioners.

Chapter 3: Independent Complaints Body

Q.3 Would the creation of an independent complaints body be the best way to improve confidence in the handling of complaints and/or appeals?

We believe that there is scope to improve the current complaints handling arrangements and this should be considered before the establishment of a new complaints body is considered.

The Legal Ombudsman is an independent body which has only recently been set up. The rules that apply to solicitors ensure that clients are sign-posted to the Legal Ombudsman. We believe that all insolvency practitioners should

- have in place a system for handling complaints
- provide information on their complaints handling system and
- ensure clients are made aware of their right to make a complaint to the relevant regulatory body.

While the Legal Ombudsman does not normally consider complaints that relate solely to the size of the bill they will consider complaints about cost information. The vast majority of complaints about costs arise because of poor cost information. We believe that ensuring that creditors are given the right costs information at the beginning of the process and throughout the process will limit the need for costly court assessment.

Q.4 Should such a body have the power to review the fees and remuneration charged by IPs?

We do not believe that it is necessary to set up a new body to handle complaints about IPs. We believe that complaints should be managed within existing structures. The Legal Ombudsman already has the power to reduce the bill where they believe it is appropriate to do so. While, as noted above, the Legal Ombudsman does not normally consider complaints that relate solely to the size of the bill they will consider complaints about poor costs information. Poor costs information is normally at the root of any complaint about the size of the bill. We believe that encouraging IPs to provide better costs information would eliminate many complaints about cost. We also believe that creditors should receive better sign-posting to the complaints handling organisations to ensure that, where there is poor cost information, creditors can make a complaint. It will also be important to ensure that complaints handling organisations are equipped to deal with such complaints.

Q.5 Should all fee complaints be reviewed in this manner, or should some (such as more complex cases) be reserved to the court? Who would decide the criteria in individual cases?

We believe that some complex fee disputes, especially where there is an underlying dispute about whether there was negligence or the way the work was undertaken, can only be dealt with properly at court.

Q.6 How should the costs of a fee related complaint be paid where i) the IP is found to have overcharged and ii) where they are found not to have overcharged?

The Legal Ombudsman can charge case fees to the professionals against whom the complaints are made and this should apply equally to complaints against IPs. The Legal Ombudsman does not charge clients for handling complaints and we believe that this should remain a free service.

We think it's right that legislation should highlight the Court's discretion to order reasonable costs be paid by the insolvent estate or the IP where the court finds for the complainant.

Where the court finds the IP has not overcharged we believe that there should be discretion to award the complainant's costs against the estate. However, we do not believe this should be the default position. These costs should only be awarded where the complainant has a reasonable case which could not have been settled outside the court system. If complainants know that their costs will be covered there is a risk that creditors will routinely ask for assessments of the bill. This will mean that unsecured creditors receive even less from the insolvent estate, as it will be lost in legal fees.

We agree that the costs of the IP defending a claim, which they win, should normally come from the insolvent estate unless there are indications that such a case might have been avoided by the provision of better cost information.

Q.7 What are your views on the single first tier independent complaints body model? Do you agree with the benefits and disadvantages that we have set out? What are your thoughts on the relative importance of the positives and negatives?

As noted above we do not believe that a new complaints handling body should be set up. We have particular concerns about the proposed first tier independent complaints body model.

It is not clear from the consultation paper how the single first tier complaints body will handle complaints about conduct. If the model is similar to that of the Scottish Legal Complaints Commission, the new body would only consider complaints about the manner in which recognised professional bodies (RPBs) handled complaints about conduct. Given that an oversight regulator is already in existence for RPBs we are unclear why it is necessary for a complaints handling body (whose expertise should be in resolving service complaints) to take on this role.

We believe that conduct complaints should remain a matter for RPBs, who already have the necessary skills to undertake investigations and the powers to take appropriate enforcement action. This is particularly the case for the Law Society, whose regulatory arm operates independently of the Society's representative role.

We believe that the advantages of setting up a new first tier complaints body are limited. Such a body might provide a single route for complaints but, as the paper highlights, there are much cheaper alternatives for doing so. Such a system may also not help clients, who will then need to decide whether they route their complaint to the professional body or the insolvency complaints handler. This is likely to lead to confusion among clients. We do not believe there will be any economies of scale.

This proposal, in effect, means setting up another body carrying out the same activities as the RPBs and their complaints handlers. While we recognise that the involvement of RPBs in complaints handling has led to the suspicion that complaints handling is not independent, it can clearly be shown that in the case of legal profession the complaints handling is independent. Creating a new independent body is unnecessary and costly.

We agree with the disadvantages and believe that the cost of setting up any new body will be significant. This cost will be passed down to creditors through IPs. It is important, therefore to consider this additional cost very carefully. We note the comments on appeals. The appeal against the Legal Ombudsman's decision is via the courts. However, they are a new organisation and it is not clear how many complainants will take this route.

Q.8 What are your views on the independent appeals body model? Do you agree with the benefits and disadvantages that we have set out? What are your thoughts on the relative importance of the positives and negatives?

As noted above we do not believe that a new complaints handling body should be set up. However, we believe this model would be more effective than model 1, as it will limit costs and allow the current RPBs to retain responsibility for investigating conduct and service complaints against their members.

We recognise that one of the benefits of such a body is that there will be an increased consistency in judgements between RPBs. However, we believe that there are other means of achieving consistency, such as via the suggested regulatory objectives.

We note that RPBs would need to ensure that their complaints handling arms were able to consider fee levels. As stated before, the Legal Ombudsman is able to consider complaints about cost information but not complaints that relate solely to the size of the bill. We believe that, in the rare cases where a complaint is solely about the size of the bill and there is no service complaint, this matter should be considered by the courts. These issues will be necessarily complicated, as they will involve valuing the skill and work of an IP, and are therefore best left to the courts.

If such a body is set up we agree that RPBs should remain the first point of contact for complainants.

Q.9 What are your views on the decision making body model? Do you agree with the benefits and disadvantages that we have set out? What are your thoughts on the relative importance of the positives and negatives?

We agree that the cost of setting up a decision making body would be modest compared to setting up a new complaints handling body. However, we are not

convinced it has many advantages over the current model of regulation. The investigative work would still be carried out by the RPBs and the decision body would act, in effect, as an adjudication panel. While this may increase consistency of decision making it is unlikely it will change public perceptions about the independence of regulation.

Q.10 What are your views on the decision making body overlaid with an investigative appeals function model? Do you agree with the benefits and disadvantages that we have set out? What are your thoughts on the relative importance of the positives and negatives?

We believe that this model adds an extra layer of complexity to model 2. There appear to be no benefits to this model over and above those set out for model 2.

Q.11 Should the appeals or decision making body also act as the single point of entry for all complaints?

We do not believe that initial complaints should be directed to an appeals body. This is likely to confuse complainants, who contact one organisation about a complaint only to have it handled by a different organisation. We believe that better sign-posting to the complaints handling bodies is more important than a single portal for complaints.

If a single portal for complaints is put in place, there will need to be clarity for complainants about which complaints relate to insolvency and therefore need to be directed to the single portal and which relate to professional activities and need to be directed to the RPB. There will also need to be good communications and data sharing between RPBs and the complaints handler.

Q.12 Do you think that settling fee complaints through arbitration would bring advantages over the other suggested complaint models? Do you think any other alternative dispute resolution regimes may work better, i.e. conciliation?

We have no particular views on this issue.

Q.13 How many complaints (fee and non-fee related) do you expect to be made annually?

We are not aware of any complaints made against solicitor IPs in the last year. We would therefore question the value of a new body being set up specifically to handle such complaints.

Q.14 What safeguards would be appropriate to protect against frivolous or vexatious complaints? Would requiring the support of 10% of creditors (by value) be appropriate?

Currently the complaints handling system is free to users. This is a position we have supported. However, if RPBs are to offer some form of assessment service it is likely that this will encourage more service users who wish to ensure that their IP has provided value for money. This is likely to prove expensive and we are not convinced requiring support of 10% of creditors would prevent those that do not have a serious complaint about the bill from using this service. If a limit is used, then we would suggest that the thresholds are related to the number of creditors as well as the value. Under the current system the Legal Ombudsman will consider complaints from any complainant.

Q.15 What are your views on the location of the body tasked with carrying out the complaints function? Is the Insolvency Service or the Adjudicator's Office suitable to undertake the role of the appeals body? If you have chosen the creation of a new body please explain your reasons for rejecting the alternative options.

We have no further comments on these issues.

Q.16 Which of the funding models (A – D) would be most appropriate for the complaint body? Can you suggest any alternative funding model? Do you agree with the suggestion to fund the establishment of the body by a levy on each RPB according to its number of IP members?

We believe that the cost of complaints should be borne by those who create them. Therefore we would favour model C. However, we recognise that it is likely that some form of levy will need to be applied. We would suggest that in the first instance this will need to be related to the number of IPs regulated by each RPB. However, in future it could be related to the number of complaints linked to IPs from each RPB.

Chapter 4: Changes to the regulatory framework

Q.17 Do you agree that it would be helpful to set objectives for the regulatory regime? What objectives would you favour?

We are not convinced that there is a current inconsistency in the regulation applied to IPs. All IPs are subject to the same standards. We are therefore unsure as to whether additional regulatory objectives need to be applied to RPBs.

We would note that both the SRA and LeO are already subject to one set of regulatory objectives, as well as the principles of better regulation. We believe it would be helpful if the objectives set out in consultation paper could be more closely aligned to these objectives.

We have some concerns about the last objective. We believe that it is the role of the regulator to set minimum standards not to correct market failure.

Q.18 Do you agree that the IS should no longer act as direct regulator, except as regulator of last resort if no RPB existed? Should any other changes be made to the number of regulatory bodies?

We believe the current structure of IP regulation is the right structure. It allows professional bodies such as the Law Society to regulate their members in relation to their work as IPs and their work as solicitors. We note that the government's aim is to create a single regulator for IPs. We believe that this is inappropriate. While we accept that the current situation of multiple regulators is unusual we believe that creating a single regulator would not be straightforward. It is likely that IPs will want to retain their professional status and therefore will be dual regulated. This may lead to regulatory conflict, unless the new regulator works closely with the professional regulators. We also believe that the current structure has advantages, allowing diversity of entry into the field which might otherwise become dangerously narrow, given that IPs have a statutory monopoly.

Q.19 Do you agree the oversight regulator should be given increased powers to monitor and sanction? If so do you agree these should include the power to fine RPBs, the power to issue a formal reprimand and the power to publicise enforcement action?

In order to answer this question fully we would need to understand what the additional powers are and how the IS will use them. It would also be helpful to know of instances when the IS has considered it has needed these powers, as there is no clear indication from the paper of the issues the IS is facing and therefore the powers it requires.

We do note that the IS only has one, draconian power. If there is a need for additional powers we believe there should be further consultation on the types of powers and their use.

Q.20 Should the cost of oversight be recovered by a combination of fixed and variable charges to the RPBs?

We recognise that there are some fixed costs in regulating RPBs such as back office costs. However, we do not believe the costs of inspections or monitoring are completely fixed costs. The amount of time spent inspecting an RPB or monitoring it

should be related, to some extent, to the amount of activity that RPB undertakes. It should also require less effort in the case of the SRA which operates independently of the Law Society and is already subject to oversight by the Legal Services Board, than it would for an IP regulator where regulatory and representative functions are not separated and there is no external oversight. If exactly the same amount of work is carried out for each RPB, regardless of the number of IPs it regulates, then this would lack proportionality. If the IS proposes to change its charging scheme to a mixture of fixed and variable costs then there will need to be a much more detailed consideration of what are fixed costs and which are variable. We do not believe the current description of fixed costs is appropriate.

Q.21 Do you agree that the oversight regulator should be given greater powers to influence the setting of standards? If so are the suggested powers of veto and a positive power to direct standards, appropriate powers to give? If not what powers would be appropriate?

We agree that the oversight regulator should have greater influence over the setting of standards. We do not believe that a power to unilaterally set standards is the most appropriate way in which to gain this influence. We would prefer to see the oversight body work closely with the RPBs to set standards and use a power of veto where necessary.

Q.22 Is the oversight regulator best placed to ensure the regulatory objectives are being met?

We agree that an oversight body is best placed to ensure that the regulatory objectives are met across the regulatory framework.

Q.23 Do you support the proposal to establish a new standard setting board to replace the JIC? What membership should it comprise?

We are unsure what the advantages of setting up a new Board to replace JIC. We believe that a more simple and cost effective solution would be to reform the current JIC. We agree that the board should include some practitioners, to ensure that the practical aspects of running an insolvency case are considered when setting standards.

We believe that where possible, the board should act by consensus but where this is not possible a majority vote or a threshold limit could be used. The threshold would depend on the make up of the board but should not allow a small number of parties dominate. However, we are not convinced that the oversight regulator should be able to override the majority view of the board.

Q.24 Do you support the proposal to establish a new standard setting board to act as an advisory board to the oversight regulator? What membership should it comprise?

If new standards Board is set up, we would prefer the model described in 4.33.

Q.25 Do you agree with the recommendation to fold the Insolvency Practices Council?

We are not convinced that the oversight arrangements discussed in the paper will fully replace the Insolvency Practices Council's role in protecting the public interest. We believe that there is still a role for the IPC and the Government should re-think its proposal to close the organisation or provide further detail on how the IS will fulfil the public interest element of the IPC.

Chapter 5: Detailed suggestions for changes to insolvency legislation

Q.26 Do you think that increasing the level of the prescribed part would help to constrain IP fees for unsecured creditors? If so how do you propose this should be achieved?

We have no particular comments.

Q.27 Would you welcome greater transparency in the remuneration of IPs? Should the provision of further details be mandatory or upon request?

We believe that greater transparency about fees will lower the number of complaints about the size of the bill. However, the amount of information that is provided should not become onerous. Detailed information such as that on grades of staff should be made available on request. Regular updates on costs would be appropriate. Many of these requirements are already placed on IPs by Statement of Insolvency Practice 9.

Q.28 Do you favour hourly rates being agreed by creditors at the time of the resolution either specifically or subject to a maximum amount?

We do not have any strong views on this.

Q.29 Do you have any evidence that the administration process is being used where a CVL would be more appropriate?

We have no evidence either way.

Q.30 Do you agree with the proposed approach of restricting paragraph 22 appointments and paragraph 14 appointments? If not do you have any alternative suggestions?

We have no comments on this.

Q.31 Should creditors be given an opportunity to review the choice of an IP to act as liquidator, prior to the company converting from administration to CVL?

No comment

Q.32 Does Rule 2.106 need further clarification?

No comment

Q.33 Should IPs be required to provide an estimate of the duration and cost of the insolvency process at the outset? If Yes, should they publish the amount to which these estimates were exceeded?

It is often difficult for IPs to estimate costs at the start of an insolvency with any accuracy. We believe that IPs should provide good cost information throughout the process. However, providing cost information should not become so onerous as to become a major source of cost to the estate.

Q.34 Should any discounted hourly rates negotiated in an administration be applied to a subsequent CVL? If so, should this be mandated, and if so, how?

No comment

Q.35 If an IP is unsuccessful in defending a challenge to his fees, should the costs be borne by the IP?

No comment

Q.36 Is there a need for clearer and more consistent information to be a) provided to creditors and b) filed at Companies House? How could this be achieved?

No comment