The Future of Insolvency Regulation – Consultation
R3 response
March 2022

ABOUT R3

1. R3 is the trade association for the UK's insolvency, restructuring, advisory, and turnaround professionals.

2. Our members work across the spectrum of the profession, from global legal and accountancy practices through to sole practitioners. Our members have direct experience of insolvencies and their impact on individuals and businesses across the UK.

3. The insolvency, restructuring and turnaround profession is a vital part of the UK economy. The profession promotes economic regeneration, resolves financial distress for businesses and individuals, saves jobs, and creates the confidence and public trust which underpin trading, lending and investment.

4. We have focused this response on those questions and themes in the consultation where we can provide answers based on our members' expertise. This response is based on feedback on the proposals received from across our membership over recent weeks, including through a survey of all R3 members.

5. R3 would be delighted to meet Insolvency Service officials to discuss the points raised below in greater detail. If you would like to meet us or if you have any other queries, please contact R3's Head of External Affairs, James Jeffreys, at james.jeffreys@r3.org.uk or on 020 7566 4220.

Overview

6. The UK's insolvency and restructuring profession plays a crucial role in the economy, helping to resolve financial distress, restoring economic value and maximising returns to creditors. In carrying out its role, the profession – and individual insolvency practitioners – are responsible for protecting creditors' interests in insolvencies, engaging fairly with debtors, as well as working to minimise the impact of insolvencies on individuals, employees and other key stakeholders.

7. These responsibilities are set out in statute and supported by an extensive set of regulations, compliance with which is overseen by a well-established framework of Recognised Professional Bodies (RPBs) which are in turn overseen by the Insolvency Service.

8. Helping to foster confidence in the profession and its work should be an effective and trusted regulatory framework which polices and promotes high standards. High standards matter – and they matter to the insolvency and restructuring profession as much as they do for any

other stakeholder. From the profession's perspective, it is vital that an effective regulatory regime underpins, and is seen to underpin, the profession's work. Good regulation is essential.

9. To that end, R3 welcomes any opportunity to consider whether the current regulatory framework can be improved. Indeed, it is vital that we have a system of regulation that promotes confidence in the wider framework and profession. It should protect the public. And it should support a profession which works in circumstances almost unparalleled in their complexity and difficulty across the professional services.

10. While we agree that there are improvements that can be made, in particular around the speed of the disciplinary process, we are not convinced that the issues with the current framework warrant the overhaul proposed by the Government in its consultation.

11. Indeed, while there are aspects of the proposals that R3 and our members would support, as well as aspects that are worthy of further consideration to discern what may be practically possible, there are significant issues with the four main proposals which make the package of reforms as a whole impractical and unfeasible.

12. While we set out specific responses to the consultation questions below and our suggestions for alternative reforms which our members support, our position on the four main reforms set out in the consultation can be summarised as:

A government single regulator

13. A sizable proportion of R3 members (25%) are in favour of an independent single regulator; a larger proportion (31%) are supportive of a single regulatory process framework, where the existing regulators would share a single monitoring, complaints and disciplinary process.[1] The profession is therefore open to reform on this issue.

14. However, the consultation seemingly fails to recognise the extent of the conflict of interest presented by a government single regulator – government would set insolvency legislation, regulate insolvency practitioners, and then, effectively, compete with those same insolvency practitioners for work – while not being subject to the same regulation itself. This would not be an even, or fair, playing field. Indeed, over 79% of members lack confidence that the single regulator can and will be able to maintain its independence while operating from within the Insolvency Service.[2] Such a system would lack actual independence through the mixing of executive and quasi-judicial powers which should properly be separated. It would also suffer the same lack of perceived independence for which the current system is criticised.

15. A reformed regulatory system will fail to meet its objectives unless it embodies appropriate checks and balances to ensure the regulator's independence. We believe that these necessarily include a levelling of the playing field to ensure that the Official Receiver is subject to the same regulatory framework and reporting requirements as the private sector. Consequently, R3 cannot support the proposal for a government single regulator in its current form.

[1] R3 (2022). Member survey on the Future of Insolvency Regulation Consultation.
[2] *Ibid.*

Firm regulation

16. R3 supports the principle of introducing firm regulation but such a significant alteration to the framework requires a separate consultation to work through the many practical implications such a reform would involve.

A public register

17. R3 broadly supports the introduction of a public register but once again much more detailed consideration of this proposal is required. In particular, the lack of any reference to the role of the Joint Insolvency Examination Board (JIEB) exams in the future licensing regime is a significant omission.

An insolvency compensation scheme

18. While R3 understands the Government's rationale behind the potential introduction of a compensation scheme, we have significant concerns about the unintended consequences such a scheme would entail, as well as to whether it is practically appropriate to introduce.

19. This proposal would precipitate a wave of unsubstantiated claims and lead to the creation of a payment protection insurance (PPI)-style claims management industry. This in turn would lead to a substantial increase in compliance, administration, and insurance costs, related to dealing with this new system and the likely number of unsubstantiated claims.

20. These additional costs risk making the insolvency process in the UK more expensive and much slower – ultimately detracting from the profession's duty to maximise returns to creditors and in direct contradiction to the stated policy objectives of the proposed reforms.

The consultation process

21. The way in which this consultation document and process has been structured, and the lack of detail around the proposals, has also made it difficult to consult effectively with our members and to provide substantive responses to each of the areas covered by the consultation.

22. Each area represents a significant change to the regulatory framework and yet has only a few pages of detail as to what the Government proposes to reform specifically. We would urge the Government to publish separate consultations on each area, with the requisite amount of detail. Doing so will enable the profession and other stakeholders to contribute more effectively to this important policy reform process.

The evidence base for the case for reform

23. Most crucially, however, we do not believe that there is sufficient evidence cited in the consultation document to support the extensive overhaul these measures represent. The Government is right that perception is an important consideration, but it cannot be the sole basis on which to reform the regulatory framework. Much is asserted through the consultation, little is supported by evidence or detailed context.

24. Indeed, the consultation acknowledges that the UK is "*rightly regarded as having a first-class insolvency regime, which is respected and admired internationally*" and that the Government

"*recognises the important work that Insolvency Practitioners and the RPBs do, with the vast majority of practitioners performing to a high standard*." It is difficult to match these statements with the scale of the subsequent proposals that set out to overhaul the current framework – a framework that enables the Government to make the aforementioned statements.

25. This inconsistency is also borne out by the actual complaints statistics and the findings from the Insolvency Service's own annual reports on the regulation of the RPBs. Between 2018-20, out of an average total of 131,492 combined personal and corporate insolvencies each year, only an average of 823 (0.6%) complaints were received each year; of which less than half (0.3%) were referred to the RPBs.[3] As we highlight at paragraph 93, according to the Insolvency Service's complaints handling process reports on the RPBs, the number of cases where inconsistencies were found in disciplinary cases was relatively low.

26. The main area highlighted for improvement by the Insolvency Service's most recent annual regulation reports on the Institute of Chartered Accountants in England and Wales (ICAEW) and the Insolvency Practitioners Association (IPA) is the length of time it can take to progress complaints. Even here, the Insolvency Service has noted that "*the ICAEW had made improvements against all of the areas identified in September 2018*" and that "*the progression of complaints has improved, and the number of complaints remaining open for longer than 12 months has reduced.*"[4]

27. And while the Insolvency Service's most recent report was still critical of the length of time taken by the IPA to handle complaints, it noted that "*to ensure timely progression and updates to complainants, the IPA has also now introduced a requirement for all cases to be reviewed every three weeks*."[5]

28. Further, the Insolvency Service's most recent monitoring report on the ICAEW explicitly notes that "*poor conduct by insolvency practitioners [was] appropriately challenged during visits and subsequently reported. This was particularly evident with regard to whether fees charged by the insolvency practitioner were fair and reasonable*."[6]

29. These findings do not appear to indicate the type of critical failures that would warrant the extensive overhaul currently proposed by the Government.

Timing of the reforms

30. The proposed reforms are ill-timed. As the global economy moves from a devastating pandemic to the backdrop of military conflict in Europe, the services of the insolvency profession will be critical to maintaining confidence in the UK as a centre of excellence for global corporate restructuring activity. Creating structural instability within the regulatory arena and the resulting potential for regulatory arbitrage is unwelcome at a time when increased volumes of work are universally anticipated throughout the profession.

[3] Insolvency Service (2019). 2018 Annual Review of Insolvency Practitioner Regulation; Insolvency Service (2020). Annual Review of Insolvency Practitioner Regulation 2019; Insolvency Service (2021). Annual Review of Insolvency Practitioner Regulation 2020.
[4] Insolvency Service (2020). Report on the Institute of Chartered Accountants in England & Wales complaints handling process.
[5] Insolvency Service (2020). IPA Monitoring Report.
[6] Insolvency Service (2020). Report on the Institute of Chartered Accountants in England & Wales: Monitoring and Authorisation of Insolvency Practitioners.

The future

31. It is absolutely critical that the profession and the Government do not take for granted the effectiveness of the existing framework and it is only right and proper that it is kept under review. R3 members are open to reforms that can deliver real improvements, that keep costs down, that drive informed creditor and stakeholder engagement, and that ultimately supports the profession in carrying out its vital role in the UK economy: resolving financial distress, restoring economic value and maximising returns to creditors.

32. Rather than supporting these aims, we are concerned that the reforms as currently proposed risk achieving the opposite. We are keen to work with the Government to secure a regulatory framework that does the former and not the latter.

Proposals for reform of insolvency regulation

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

2. *Do you think this would achieve the objective of strengthening the insolvency regime and give those impacted by insolvency proceedings confidence in the regulatory regime?*

33. In our response to the Government's 2019 'Regulation of insolvency practitioners: review of current regulatory landscape' call for evidence, we said that:

> "*…a single regulator should either be a new, independent body, or an existing regulator. Given the conflicts involved, and its prior performance, the Government should not play a role in the direct regulation of insolvency practitioners.*
>
> *"On one level, opposition to a direct role in regulation for government is because its track record in this regard is poor: the government ceased to act as a regulator of insolvency practitioners in 2016 with good reason, and member feedback on the reputation of pre-2016 'Secretary of State' regulation has been uniformly negative. Pre-2016 government regulation has been described by some members as "regulation of last resort".*
>
> *"Direct government regulation of insolvency practitioners would also create some very serious conflict of interest issues: government would set insolvency legislation, regulate insolvency practitioners, and then, effectively, compete with those same insolvency practitioners for work – while not being subject to the same regulation itself. This would not be an even, or fair, playing field.*
>
> *"Given the above, it would be fundamentally inappropriate and unnecessary for the Government to amend the legislation to allow itself to act as the direct regulator of insolvency practitioners*."[7]

34. From our extensive recent engagement with members on this issue, it is clear that the position as outlined above still stands.

35. The question posed is, however, significantly different to the broader question of whether an *independent* single regulator could be a viable and indeed desirable option. Indeed, in

[7] R3 (2019). Response to Regulation of Insolvency Practitioners – Review of the Current Regulatory Landscape, p.18; p.20.

response to our survey on the consultation, a sizable proportion of R3 members (25%) are in favour of introducing an independent single regulator.[8] We have heard frequently from R3 members during the course of our recent member outreach events that a single regulator would be an appropriate next step for the regulatory framework for insolvency, but that this role should not be carried out by government; only 3% of R3 members were in favour of the Government's proposal for a single regulator operating from within the Insolvency Service.[9] It is worth noting that a further 31% of R3 members are in favour of a single regulatory process framework, where the existing regulators would share a single monitoring, complaints and disciplinary process, indicating the extent to which the profession is open to significant reform.[10]

36. This distinction – between a *government* single regulator and an *independent* one – is the key issue of this consultation.

Ensuring the single regulator's strategic and operational independence

37. Strategic and operational independence is important for regulators in all industries generally and particularly so in the context of insolvency, given the highly complex nature of insolvency work, the level of wider stakeholder and political interest in individual cases and the framework more generally, and given the Government's role in acting as an office holder in insolvency cases through its Official Receiver function. The consultation at least alludes to this issue by proposing that the single regulator would be an independent statutory office holder.

38. In light of these issues, a consistent and fair approach to those being regulated cannot be achieved if regulators are subject to undue political influence. Without this consistency and fairness, those being regulated cannot set their business strategies properly, and cannot carry out their work with confidence that their approach is the right one. This uncertainty ultimately represents higher risk – which results in higher operating costs as well as uncertainty of outcome for those being regulated, but crucially for other stakeholders, too.

39. To this end, the lack of detail in the consultation as to how the Government would ensure the single regulator's genuine strategic and operational independence from the rest of the Insolvency Service, and indeed government more generally, is disappointing.

40. We note that the impact assessment makes a passing reference to the Organisation for Economic Co-operation and Development's (OECD) definition of an independent regulator as a way of measuring the proposed single regulator's own independence.[11] This definition is perfectly reasonable although given the scale of the proposed changes, more consideration should have been given and included in the consultation document as to how this would be achieved in practice. The Government has noted that the perception of the RPBs' role as membership bodies and regulators represents a conflict of interest but has made no effort to address how this new conflict of interest would be addressed through the introduction of its own proposals.

41. The consultation notes how the new regulator would improve stakeholder confidence in the framework by being independent from the profession, but omits any detail as to how it would be independent from government. We note that this is an issue recognised elsewhere in government, with the Economic Secretary to the Treasury John Glen MP, stating in a speech

[8] R3 (2022). Member survey on the Future of Insolvency Regulation Consultation.
[9] *Ibid.*
[10] *Ibid.*
[11] Insolvency Service (2021). Review of Insolvency Practitioner Regulation Impact Assessment, p.10.

to UK Finance last November that "we need a regulatory framework…that avoids politicisation and posturing but gives decision-making to the independent and expert regulators, so that we can regulate better, more quickly, more flexibly".[12]

42. While speaking from a financial services perspective, we agree with the Government's vision for regulation as suggested by the Minister. As the Government notes throughout the consultation document, there are many issues on which the regulatory framework for insolvency can look to the ways in which other regulatory frameworks operate, including financial services. This is another such area.

43. The single regulator's position would be a hugely privileged and powerful one: as we have noted previously, the government would set insolvency legislation, regulate insolvency practitioners, and then, effectively, compete with those same insolvency practitioners for work – while not being subject to the same regulation itself, with little in the way of guarantee that the regulatory approach to individual issues would not be subject to abrupt or unfair change as a result of undue political pressure. R3 members have very little confidence that the Government's single regulator would operate independently, consistently, or fairly, with over 79% of R3 members lacking confidence that the single regulator can and will be able to maintain its independence while operating from within the Insolvency Service.[13]

44. While the consultation refers to the legal nature of the single regulator as an independent statutory office holder and the OECD's benchmark for regulatory independence, without clear and extensive information about how this independence can be ensured, any assertions as to the independence of the single regulator will likely to be considered as just that – assertion. The consultation notes frequently that perception is an important factor to consider and under the current proposals, the single regulator would be perceived – as well as actually – to have an unfair position within the framework.

Official Receiver regulation

45. Of all insolvency cases in any given year, a significant proportion will be handled by the Official Receiver. On several occasions in the last few years, this has included cases which have attracted significant public interest. Given the changes to decision-making procedures introduced by the Insolvency (England and Wales) Rules 2016, it has also become less likely that a case will be passed from the Official Receiver to an insolvency practitioner.

46. It is of significant concern, therefore, that the Official Receiver is still not regulated to the same level as the insolvency profession – if at all. This does a disservice to both debtors and creditors, and to the office of the Official Receiver itself.

47. The Official Receiver is not required to produce the same information for creditors, there is no transparency around Official Receiver performance (generally and in respect of individual insolvency appointments) and the value of fees levied, and there is no transparency around disciplinary proceedings involving Official Receiver staff. Every argument that insolvency practitioners be required to report to creditors, have their performance examined, and have their sanctions publicised applies to the Official Receiver, too. The difference in standards required of the profession and its government counterpart is unfair, indefensible, and unsustainable.

[12] Glen, John (2021). Speech by John Glen MP, Economic Secretary to the Treasury, to the UK Finance Annual Dinner.
[13] R3 (2022). Member survey on the Future of Insolvency Regulation Consultation.

48. To this end, it was disappointing that the consultation made no reference to the regulatory position of the Official Receiver. This reform process is an opportunity to ensure consistency of regulation across the whole of the insolvency profession – both private and public sectors. Creditors and debtors alike deserve to have a system in place that delivers the same level of consistency in approach and opportunities for seeking recourse and redress, irrespective of whether the office holder is the Official Receiver or a private sector insolvency practitioner.

49. Any future single regulator, whether operating from within government or otherwise, must also regulate the work of the Official Receiver – who should also be subject to the same reporting requirements and regulatory obligations as the private sector.

Prospects for improving confidence

50. As R3 has noted previously, the attractions of a single regulator are clear: it should make it easier to enforce consistent regulation, and, with an independent regulator, it would be harder to level accusations of self-interest at the profession.

51. As for whether the introduction of a government single regulator would fulfil the objective of strengthening the insolvency regime and give those impacted by insolvency proceedings confidence in the regulatory regime, while there is little doubt that this reform would help to address concerns around perception, there is no guarantee that the practical aspects of its work would be carried out in a more effective or successful manner. Without adequate resourcing and experienced staff, the proposed single regulator could in fact undermine confidence in the framework.

52. Indeed, a switch to a single regulator is of itself no guarantee that disciplinary procedures will be processed more rapidly, and, without the correct remit and powers, there is no guarantee a single regulator will be able to pick up and deal with issues not addressed by the current regulators. A single regulator could also be prohibitively expensive to set up and run, and would involve a significant degree of disruption.

Funding and staffing a government single regulator

53. With just under 1,600 licence holders,[14] funding available from the profession itself is always likely to be limited, regardless of how many regulators there are. Existing regulators subsidise the cost of insolvency regulation in a number of ways, including income from a wider membership or through events, training or conferences. A single, independent regulator would not – or at least, should not – have these alternative income streams available.

54. Given the complex and nuanced nature of insolvency work, it is absolutely critical that any regulators have sufficiently knowledgeable and experienced staff to effectively regulate the profession – this work cannot be done by individuals without experience of working directly in the profession, and without sufficient professional qualifications. An inadequately staffed single regulator would risk carrying out its work ineffectively, undermining the confidence of the profession and the wider stakeholder community, too. Further, any staffing sourced from the Insolvency Service would serve to heighten concerns about the regulator's independence.

55. As currently proposed, it is difficult to envisage that the single regulator would have the financial capacity – in a framework that the Government intends to be self-funding – to be

[14] Insolvency Service (2021). Annual Review of Insolvency Practitioner Regulation 2020.

able to attract those individuals with this level of experience and relevant qualifications, particularly when such individuals are likely to be in high demand from the private sector.

56. It is difficult to see how this financial capacity could be secured on the basis of licence fees from individual insolvency practitioners and their firms (under the additional proposals for firm regulation) alone. Given that the work of the insolvency profession is a public good, and that the regulation of this work is also in the public interest, there is a strong argument that the regulation of insolvency practitioners be, at least in part, publicly funded. One potential way of supporting this financial capacity would be to apply the regulatory framework to the Official Receiver, including the licensing regime, and then to use any income derived from the cases in which it is an office holder to assist in funding the wider regulatory framework.

Prospects for disruption

57. In addition to the potential issues highlighted above regarding the financial capacity of the single regulator to attract sufficiently experienced staff to enable it to carry out its regulatory function effectively, the transition period – which could be between two-five years – to a single regulator risks causing significant disruption to the effective functioning of the current regulatory framework at a time when insolvency numbers are expected to rise following the financial and economic disruption caused by the COVID-19 pandemic.

58. It is understandable that the Government's proposals will cause significant concern to those individuals employed by the RPBs to carry out their regulatory function, with many now uncertain about their longer-term prospects in their current roles. Set against the context of a likely rise in insolvency numbers, and individual insolvency firms' desire to ensure they are adequately staffed to handle a potential increase in cases, the RPBs are likely to be facing significant difficulty in retaining the staff they need to carry out their regulatory functions as required by law.

59. While R3 is not best placed to comment on the practical operations of the RPBs, we are very concerned that the proposals as currently drafted – which envisage a *potential* and much reduced role for the RPBs – risk undermining the effective operation of the current regulatory framework at a time when that operation will be absolutely critical in ensuring the confidence of creditors, debtors and other stakeholders.

60. Should the RPBs be unable to carry out their regulatory functions during the transition as a result of staff departures, the Insolvency Service is unlikely to be able to replace this capacity on a like-for-like basis while the single regulator is being set up. We urge the Government to consider this issue very seriously.

Devolution implications

61. Any future regulatory framework for insolvency will need to account for the devolution of personal insolvency in Scotland and the devolution of insolvency regulation in Northern Ireland. This will mean that the proposed single regulator would need to work under the legal framework in England & Wales, as well as in Scotland, while to ensure and maintain a pan-UK approach to regulation, it would also need to be granted authority by the Northern Ireland Assembly to act in Northern Ireland.

62. The jurisdictional issues this raises suggests that a single regulator may be impractical, and that any regulatory rearrangement would require additional jurisdictional cooperation to

replace the current system. The consultation paper provides no suggestion about how the jurisdictional issues might be addressed, and consequently no explanation of how insolvency regulation can be improved by the introduction of the proposed new approach. We would suggest this is a major and potentially critical flaw in the proposed model.

A sub-optimal way forward

63. The Government's current proposal for a single regulator operating from within the Insolvency Service would be a sub-optimal basis on which to structure the regulatory framework for insolvency. As we set out below, we urge the Government to revisit a number of alternative suggestions. However, if the Government proceeds with the proposals as currently envisaged, then, in light of the considerations we have outlined above, the Government must also take a number of supplementary steps to ensure that the profession's concerns about the independence and effectiveness of the proposed future framework can be at least partially assuaged:

64. **Independence**: the Government must bring forward suggestions for a range of checks and balances that could be introduced to ensure the genuine independence of the single regulator.

65. One such check and balance could include an 'Oversight Committee', made up of insolvency practitioners from across the profession, which would review: policy proposals, new legislation, the proposed single regulatory handbook proposed in the consultation, along with disciplinary outcomes. This committee would: ensure that the single regulator's work is not subject to undue influence from the Insolvency Service or elsewhere in government; ensure the consistent application of insolvency regulation across the board; and help to identify and prevent unintended consequences as a result of decisions taken by the single regulator and the Insolvency Service.

66. This committee would to some extent replicate the role played by the existing Joint Insolvency Committee (JIC) (an issue we expand on at paragraph 82) and has precedent in the form of the Individual Voluntary Arrangement (IVA) Standing Committee.

67. The strategic and operational independence of the single regulator must be reviewed annually by this Oversight Committee, or any other suitably qualified and independent body, with a statement published each year to this effect.

68. **Application of the framework to the Official Receiver**: the Official Receiver must become subject to the same regulatory and licensing framework as the private sector. This must be supported by a broader levelling of the playing field by requiring the Official Receiver to be subject to the same reporting requirements as the private sector – while also ensuring the same level of transparency around the performance of the Official Receiver and the publication of disciplinary proceedings involving Official Receiver staff.

A better way forward

69. In the consultation document the Government sets out three options for reform of the framework: 1) do nothing, 2) non-legislative change, and 3) a single regulator.

70. We believe that this is an incorrect summary of the options available to the Government. It *is* possible to achieve reforms within the context of existing framework that would address

current weaknesses and improve public confidence. There are two further options that we believe the Government should consider in greater depth with relevant stakeholders.

71. The first would be a single regulatory process framework, where the existing regulators would share a single monitoring, complaints and disciplinary process, which as noted at paragraph 35, is the favoured option for 31% of R3 members.[15] This would help to address concerns about the current regulatory regime without the significant overhaul contemplated by the consultation, and is something which we believe the Government should explore with the RPBs and other stakeholders.

72. While it is incumbent on the Government to engage with the RPBs and other relevant stakeholders to explore how this might work in practice, including how it could be made into a separate legal and operational entity, we believe that, along with changes in law where necessary (to permit the regulation of insolvency firms) it is a viable alternative that could improve consistency and increase public confidence – while at the same time avoiding the significant amount of disruption and associated risks that the Government's current proposals represent.

73. In the context of the power under the Small Business Enterprise and Employment (SBEE) Act 2015 to designate an existing body as the single regulator, the Government notes that this "*would potentially allow one of the existing RPBs to become the single regulator*" and that the Government believes that "*designating an existing RPB as regulator would not be a suitable option*."

74. We agree that all else remaining equal, simply making one of the existing RPBs the single regulator would not be an appropriate way forward. Equally, we again believe that an opportunity has been missed in not considering whether one of the RPBs could take on the single regulator role while also making the necessary changes to that RPB's corporate structure and business model (shifting from a membership and regulation organisation to one focussed solely on the latter) to deal with the "independence issue" cited by the Government as the key reason for deeming this route to be inappropriate.

75. We urge the Government to reconsider its proposal for a single regulator with these considerations in mind.

3. Do you consider the proposed objectives would provide a suitable overarching framework for the new government regulator or do you have any other suggestions? Please explain your answer.

76. Notwithstanding our comments above regarding the desirability of the new government single regulator, the proposed objectives are reasonable although it is difficult to discern much difference between them and the objectives they would replace. We would suggest, however, that the new objectives should maintain two key aspects of the current objectives, namely that the regulatory framework should be 'accountable' and 'proportionate'.

77. Indeed, asked for their views on whether these new objectives would result in a more effective regulatory framework, R3 members largely felt there would be little difference. 27% thought they would make the framework somewhat more effective, 45% thought they would have no impact, while 15% thought they would make the framework somewhat less effective.[16]

[15] R3 (2022). Member survey on the Future of Insolvency Regulation Consultation.
[16] *Ibid.*

78. We welcome the Government's intention that the single regulator would consult with stakeholders on the regulator's more specific non-statutory duties and aims. It is critical that the single regulator has access to a diversity of views and experiences from within the profession to be able to determine such duties and aims that are realistic and appropriate.

4. *Do you consider these to be the correct functions for the regulator in respect of Insolvency Practitioners and in respect of firms offering insolvency services? Please explain your answer.*

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

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

79. Notwithstanding our broader concerns around the introduction of a government single regulator as proposed in the consultation, the functions put forward are the correct ones for the regulator.

80. However, we do have strong concerns about the single regulator having responsibility for setting standards and disagree with how the Government has described/portrayed the current standard setting process.

81. While there are aspects of the existing regulatory framework which would benefit from an increase in speed, there are legitimate and important reasons why it can take time for standards to be set and/or amended under the current system. Standards setting is an important process and it is crucial that those with suitable knowledge and experience are duly consulted – if this process is slow, it is because legitimately interested parties are trying to ensure that the standards put in place are workable and fair. We note that it was the Government that introduced the additional consultation required with external stakeholders (specifically, lay members of the JIC) which many have commented has slowed the process down.

82. That said, we believe it is important that external stakeholders are involved in this process, along with suitably qualified and experienced members of the insolvency profession. While we welcome the suggestion that a "non-statutory committee" *could* be established to provide advice to the single regulator on this issue, we would stress that the regulator should not, and should not be seen to, simply set standards by diktat. Without a committee of sufficiently qualified and experienced members such as the current JIC, standards set purely by the single regulator risk being impractical, illogical and further risk undermining the profession's, and the wider stakeholder community's, confidence in the framework.

83. Furthermore, a government single regulator with tripartite policy making, standard setting and quasi-judicial (disciplinary) functions would represent a fundamental breach of the constitutional principle of the separation of powers.

7. *Do you agree that it would help to improve consistency and increase public confidence if the function of investigation of complaints was carried out directly by the single regulator? Please explain your answer.*

84. As noted at paragraph 50, one of the main attractions of a single regulator would be that it should make it easier to enforce consistent regulation. Ultimately, however, increased public confidence can only be delivered if all of the single regulator's functions are carried out effectively. As we have noted, this is dependent on the regulator being able to attract suitably qualified and experienced staff which we are not confident would be possible under the Government's current proposals.

85. A switch to a single regulator is no guarantee of a more effective regulatory framework. Again, while this reform could help to deal with concerns around perception and thereby increase public confidence, there is no guarantee that the practical aspects of its work would be carried out in a more effective or successful manner. We reiterate that without adequate resourcing and experienced staff, the proposed single regulator could in fact undermine confidence in the framework.

8. What are your views of the proposed disciplinary and enforcement process and the scope to challenge the decision of the regulator? Please provide reasons to support your answer.

86. The disciplinary and enforcement process as suggested in the consultation is broadly reasonable, although we note that there are issues in the way that the appeals process is envisaged. Having also recommended in our response to the 2019 call for evidence that "*clearer 'speak-up' or whistleblowing routes should be identified to allow the profession to tip off regulators – or the Insolvency Service – to behaviour in need of urgent investigation*",[17] we welcome that the Government has recognised that the establishment of a single regulator provides an opportunity to do so.

87. While we recognise that the speed of the current system is an issue – in response to our survey, 37% of R3 members rated the current framework as performing poorly in respect of the speed of the disciplinary process[18] – we believe that the Government should be more specific about what the actual issues are that lead to this situation and what, in turn, the proposed new single regulator would do differently. While the consultation sets out a different framework for the disciplinary and enforcement process, there are no details about how exactly this new process will be practically different, or how the regulator will actually ensure a faster process.

88. Moreover, the consultation makes a great deal of how the current process is perceived to be ineffective and, apart from passing references to the Insolvency Service's own findings from its monitoring of the RPBs, there is little specificity as to what exactly the problems are – or indeed just how prevalent they are – that the Government is intending to address.

89. Indeed, there appears to be something of a discrepancy between the scale of the problem as suggested in the consultation and what the aforementioned monitoring findings actually say. Looking at these findings in each of the Insolvency Service's 'Annual Review of Insolvency Practitioner Regulation' reports between 2018 and 2020, while noting the need for improvements, they do not seem to indicate that an overhaul of the system is necessary.

[17] R3 (2019). Response to Regulation of Insolvency Practitioners – Review of the Current Regulatory Landscape, p.16.
[18] R3 (2022). Member survey on the Future of Insolvency Regulation Consultation.

Speed

90. The main area highlighted for improvement by the Insolvency Service's most recent reports on the ICAEW and IPA complaints handling processes is the length of time it can take to progress complaints – over and above other aspects of their handling of complaints.[19]

91. The Insolvency Service noted that "*the ICAEW had made improvements against all of the areas identified in September 2018*" and that "*the progression of complaints has improved, and the number of complaints remaining open for longer than 12 months has reduced.*"[20]

92. Although the Insolvency Service's most recent report was still critical of the length of time taken by the IPA to handle complaints, it noted that "*to ensure timely progression and updates to complainants, the IPA has also now introduced a requirement for all cases to be reviewed every three weeks.*"[21]

Impartiality/inconsistencies in disciplinary cases

93. According to the Insolvency Service's complaints handling process reports on the RPBs, the number of cases where inconsistencies were found in disciplinary cases seems relatively low: out of the 43 ICAEW complaints cases reviewed by the Insolvency Service in 2020, the Service found some inconsistencies in its approach in 2 cases.[22] Meanwhile, out of the 35 IPA complaints cases reviewed by the Service, it found inconsistencies with disciplinary outcomes in 4 cases.[23]

94. To this end, we question whether the consultation accurately reflects how much the framework has improved over the last ten years – and ultimately whether a sufficient case has been made for the overhaul currently proposed.

95. With regards to the proposed appeals process, there are two main issues. While we welcome that the proposed 'Appeals Officer' is envisaged to be required to "have the necessary skills and technical knowledge and be independent of all parties", we note that this is unlikely to be sufficient in ensuring that the appeal would be appropriately considered. The current system of disciplinary committees involves deliberation by a number of suitably experienced and independent members of the profession, along with lay members, and allows for a fully considered approach to individual complaints. We urge the Government to consider how this positive aspect of the current approach can be retained in some form in respect of the proposed appeals process.

96. Secondly, while the Government intends the new process to be faster than the current framework, the new process adds an extra layer of appeals for insolvency practitioners which will likely lead to increased costs, more delays, and greater dissatisfaction for all parties.

[19] Insolvency Service (2020). Report on the Institute of Chartered Accountants in England & Wales complaints handling process; Insolvency Service (2020). IPA Monitoring Report.
[20] Insolvency Service (2020). Report on the Institute of Chartered Accountants in England & Wales complaints handling process.
[21] Insolvency Service (2020). IPA Monitoring Report.
[22] Insolvency Service (2020). Report on the Institute of Chartered Accountants in England & Wales complaints handling process. The report noted: "The quality of information provided to complainants when complaints are closed has improved. There was evidence that the ICAEW is identifying additional matters of complaint for investigation as a matter of course. This is a positive step, although we did note some inconsistencies across the team when determining which additional matters should be subject to an investigation relating to fees in two cases".
[23] Insolvency Service (2020). IPA Monitoring Report. In the section on "Regulatory outcomes", the report noted: "We identified four cases that were closed where all potential matters of misconduct had not been raised with the insolvency practitioner".

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

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

11. *Are there any other functions that you think should be capable of being delegated to other bodies to carry out on behalf of the single regulator? Please explain your answer.*

97. While we can appreciate the rationale behind the proposals to delegate many of the single regulator's functions, it is ultimately difficult to see the value and purpose of introducing such a regulator only for most of its functions to be delegated to other organisations to carry out – most likely the very same organisations that are subject to actual and implied criticism throughout the consultation document.

98. Rather than improving consistency in the regulatory framework – one of the main aims of the Government's package of reforms – we believe that the proposals as they currently stand, to delegate such a substantial proportion of the single regulator's functions, risks undermining consistency as well as the Government's own case for introducing a single regulator in the first place.

99. The only function that the single regulator could delegate without cause for concern would be the 'provision of education and training for the insolvency profession', potentially including an entry qualification route (as we note at paragraph 116, the consultation does not make reference to future arrangements on this point).

12. *In your opinion would the introduction of the statutory regulation of firms help to improve professional standards and stamp out abuses by making firms accountable, alongside insolvency practitioners? Please explain your answer.*

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

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

100. In our response to the 2019 call for evidence, we said that "*there are good reasons to support the introduction of practice regulation alongside individual licensing across the profession. This would enable regulators to catch up with the reality of the modern insolvency and restructuring profession…Individual insolvency practitioners may have limited control over their wider practice, while the structure of practices and partnerships will have important implications for conflicts of interest questions and case accountability. Introducing practice licensing would enable a regulator to examine the full scope of the insolvency landscape: it would ensure practice accounts – as well as case accounts – could be put under a microscope, and it would help regulators examine the relationship between an individual insolvency practitioner and their practice (including whether or not the practitioner is ever put under pressure to act in a way contrary to their statutory duties)*."[24]

[24] R3 (2019). Response to Regulation of Insolvency Practitioners – Review of the Current Regulatory Landscape, p.20-21.

101. We also said, however, that "*introducing a form of practice licensing would…be a significant change to the insolvency framework and would potentially be disruptive and costly for practices to implement. It is also worth considering how far the scope of practice licensing might extend: there is, perhaps, a greater argument for it in some areas of the profession (such as the 'volume' IVA sector) than others. A full consultation on how practice licensing could be introduced would be welcome*."[25]

102. Once again, based on our recent engagement with members, our position as outlined above still stands; in response to our recent survey, 64% of members agreed that the proposed introduction of firm regulation will improve professional standards.[26] While we support the introduction of firm regulation, it is disappointing that despite being such a significant alteration to the regulatory framework, the consultation dedicates only a few pages' worth of detail as to how this alteration would be made and then operate in practice. We urge the Government to publish a separate consultation on this aspect of the reforms.

The mechanism for applying firm regulation & to which firms additional regulation should be targeted at

103. We welcome the Government's desire to avoid placing an undue financial burden on smaller practices as a result of the introduction of firm regulation. As such, the proposal for essentially a two-tiered system whereby all firms are regulated with certain firms then subject to an additional regulatory requirements regime, is a potential way of addressing this important cost burden issue.

104. However, we question whether it may add complication to the framework to have a base level of firm regulation and then an additional level applied to certain firms on the basis of artificial criteria. There is some risk that the use of artificial criteria could lead to unintended consequences or 'gaming' by firms to avoid the additional level of regulation. We would suggest that it may be better to apply a base level of regulation, with the single regulator then taking a risk-based approach to determine which firms may require greater regulatory consideration.

105. While we would caution against the creation of artificial thresholds at which an additional level of regulation would apply, there are a number of metrics which a regulator should bear in mind when seeking to determine the level of risk of individual firms. Asked for their views on the basis on which firms should become subject to an additional level of regulation, R3 members selected the following:[27]

- By number of appointments undertaken annually: 60%
- By type of insolvency appointments 41%
- By value of appointments undertaken annually: 37%
- By turnover of the insolvency practice within a firm: 22%
- By number of insolvency practitioners within a firm: 21%

106. While the primary driver behind the need for firm regulation comes from the issues surrounding volume IVA/Protected Trust Deed (PTD) providers – given the numbers of indebted individuals undertaking an IVA/PTD from these providers, and the specific changes

[25] *Ibid*, p.23.
[26] R3 (2022). Member survey on the Future of Insolvency Regulation Consultation.
[27] *Ibid.*

to the regulatory framework required to give the RPBs the power to take action where required – we agree that firm regulation should be applied across both the personal and corporate parts of the market.

107. That said, we note that the consultation refers to corporate cases concerning conflicts of interest issues which "*contributed to a perception of a lack of objectivity and integrity*" on the part of the profession, before then acknowledging that these cases "*occurred some time ago.*" While we agree that perception is an important issue, we do not believe that this should be the sole basis on which substantial reforms to the framework are introduced – particularly given the fact that the wide "media attention" on these cases, and the regulatory action taken, show that the framework has worked and wrongdoing is not tolerated.

More detail required

108. As noted above, a separate and substantive consultation on the introduction of firm regulation is required. There are a range of issues and questions identified by R3 members that could only realistically be addressed and considered fully through a separate, detailed consultation. For example, it would be helpful to understand how the Government intends individual disciplinary sanctions to relate to firms as a whole. We would also suggest that the impact assessment significantly underestimates the likely costs of this policy – one hour per insolvency practitioner and 40 hours per senior responsible person are not realistic.

15. Do you think that regulation of firms should require a firm subject to an additional requirements regime to nominate a senior responsible person for ensuring that the firm meets the required standards for firm regulation? Please explain your answer.

109. Should the Government proceed with the proposed two-tiered approach, then the rationale for appointing a senior responsible person is clear and something we would support.

110. That said, we reiterate our comments at paragraph 104 that a single tier, risk-based approach may be a simpler way of structuring firm regulation. Under our suggestion, all firms would need to appoint a firm regulation lead, whose responsibilities and duties could be increased to the same level as the proposed senior responsible person, should their firm be deemed to require additional regulatory consideration.

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

111. While a significant proportion of respondents to our recent R3 member survey (81%) were in favour of the proposed senior responsible person being required to be an insolvency practitioner,[28] from our physical discussions with members there was a view that this need not be a blanket requirement.

112. Indeed, some R3 members have suggested that a person with responsibility for an insolvency firm's liability in this way should be a qualified professional but not necessarily from the insolvency profession – this could include, for instance, a solicitor. Other members have highlighted that some firms may in fact be more comfortable with the senior responsible person being an individual that does not take insolvency appointments.

[28] *Ibid.*

17. Do you think that a single public register for Insolvency Practitioners and firms that offer insolvency services will provide greater transparency and confidence in the regulatory regime? Please explain your answer.

113. On the basis of the limited amount of detail provided in the consultation document as to how the register would operate in practice, we broadly support this proposal.

114. Asked whether they thought the single public register would provide greater transparency and confidence in the regulatory framework, R3 members were somewhat split: 55% thought the proposal would achieve this aim, while 34% thought it would not.[29] These survey results support the points raised in our recent discussions with members that while there is rationale for collating into one place information that is already largely publicly available, the impact on confidence may not be significant.

115. There are some issues that require more consideration from Government before this policy is introduced. Where the register would list details of any disciplinary action or sanction issued against an individual insolvency practitioner or firm, it will be critical to ensure that these references contain sufficient information and context behind these actions or sanctions, to ensure that users of the register are able to make an informed judgement as to the regulatory performance of those insolvency practitioners and firms.

116. Further, we note that despite referencing the need for individuals to pass the JIEB before they can be licensed to practise, there is no reference in the consultation document as to the Government's position on this requirement under its package of reforms, and if it wishes to maintain the JIEB, how it proposes to do so given that it is a body set up by, and dependent on the support of, the RPBs. This is a crucially important part of the current licensing framework and ensuring that the profession is suitably qualified to carry out its significant duties and responsibilities. This omission further highlights the need for full, separate consultations on each of the recommendations put forward by the Government.

18. What is your view on the regulator having a statutory power to direct an Insolvency Practitioner or firm, to pay compensation or otherwise make good loss or damage due to their acts or omissions? Please explain your answer.

117. While R3 understands the Government's rationale for the potential introduction of a compensation scheme, our members have expressed significant concerns about the unintended consequences such a scheme would entail, as well as to whether it is practically appropriate to introduce.

118. The primary difficulty with the proposal is that it focusses on professional negligence, an issue which is normally tackled through the courts and where there is a considerable body of case law to take into account and which provides insolvency practitioners with a clear framework against which their statutory duties and obligations are undertaken and assessed. On that basis, we believe that the courts are best placed to decide whether instances of professional negligence have occurred and what the appropriate level of compensation is.

119. That said, we appreciate the points raised in the consultation about the financial costs and complexity of bringing a legal claim. However, we believe it would be better to look at ways of improving or widening access to financial support to enable those without the means

[29] *Ibid.*

to do so, to bring a legal claim – or indeed to explore ways in which the court process could be made cheaper or more efficient.

120. Otherwise, the potential risks of this proposal are that it could:

- Precipitate a wave of unsubstantiated claims and lead to the creation of a PPI-style claims management industry. Over 96% of R3 members thought that the introduction of the proposed compensation scheme would lead to a significant increase in the number of such claims.[30]

- Lead to a substantial increase in costs as a result of the increased compliance burdens, additional administration, and insurance costs, arising from assimilating this new system and dealing with the likely number of unsubstantiated claims. Over 95% of R3 members thought that the introduction of the proposed compensation scheme would lead to a significant increase in costs.[31]

- As we note below at paragraph 127, this proposal could also make it much harder to appoint insolvency practitioners to certain types of insolvency cases.

121. These additional costs risk making the insolvency process in the UK more expensive and much slower – ultimately detracting from the profession's duty to maximise returns to creditors.

122. Moreover, the very nature of insolvency is inconvenient and can cause anxiety and distress to those affected. As in most instances, insolvency practitioners acting as office holders in insolvency procedures are usually the last people left that debtors and creditors alike can complain to about the understandably difficult or frustrating situation they have found themselves in. These are situations that have not been caused by insolvency practitioners, but by the very fact of the insolvency itself.

123. It is difficult, therefore, to envisage a compensation scheme that could quickly and easily separate out complaints against insolvency practitioners made by those individuals affected by insolvency more generally as outlined above, and those instances where inconvenience, anxiety or distress has occurred due to the negligence of an insolvency practitioner.

124. In our recent discussions with R3 members, a number highlighted hypothetical cases where this problem would be best illustrated. For example, an energy supplier in administration may have tens of thousands of customers that need to be transferred to another supplier. Given the structural limits of the UK's energy infrastructure, only a proportion of customers can be transferred at any one time. A proportion of customers would therefore face a delay in transferring that could easily amount to 5,000 customers. While this delay may cause understandable anxiety on the part of those affected customers, it would be caused by the aforementioned energy infrastructure limits, and not the negligence of the administrator. With the support of a claims management industry it is easy to envisage a situation where 5,000 claims could be submitted against the administrator, all of which would need to be reviewed and dealt with, at considerable cost, despite the administrator being at no fault.

[30] *Ibid.*
[31] *Ibid.*

125. In light of these considerations, we do not believe that a compensation payments scheme where a service failure "has caused undue inconvenience, anxiety or distress to an individual" is viable. The availability of compensation must necessarily be linked to an industry-appropriate test of culpability, such as a proven breach of prevailing professional standards, and the quantum benchmarked against the losses sustained.

126. Notwithstanding our concerns around moving away from a court-based system, which is the most appropriate method of dealing with such cases, further consideration could be given to a scheme that deals with instances where professional negligence on the part of an insolvency practitioner has caused actual financial loss. Once again, we believe these issues and options for reform would be best discussed in a separate consultation.

127. The ready availability of compensation to consumers in instances falling notably short of professional negligence (as appears to be proposed) may also act to limit the pool of practitioners willing accept appointments in cases with high levels of consumer creditors to those with an increased risk appetite and/or lead to increase hourly rates being applied to cases bearing a higher risk profile. The time necessarily expended in resolving compensation claims (whether well-founded or spurious) may also serve to delay the progression and closure of cases.

Insolvency Service/Official Receiver compensation scheme

128. We note that the Government refers to the Insolvency Service's mechanism for making compensation payments where there has been a service failure on the part of the Official Receiver as a basis for the proposed scheme for the private sector.

129. Very few R3 members were aware of the existence of a formal mechanism and as such, the lack of information contained in the consultation about how it is promoted to debtors and creditors, along with the number of payments made under it, makes it difficult to determine whether this is an appropriate scheme to replicate. If the proposal is to model this scheme on that already in place within the Insolvency Service, then details thereof should be shared with relevant stakeholders.

130. To this end, we were also interested to note the responses from the Insolvency Minister, Lord Callanan, to two written parliamentary questions tabled on 9 March 2022 by Lord Leigh of Hurley on the issue of this mechanism. Given that the Minister's responses confirmed that there is no formal Official Receiver compensation scheme,[32] and provided information regarding the "payments made to estates for losses caused by an Official Receiver since 2018" rather than the compensation payments paid in instances where the "official receiver or other staff that has caused a person or persons undue anxiety or distress",[33] it is difficult to judge whether this is an appropriate basis on which to bring forward such a scheme for the private sector.

19. What is your view on the amount of compensation that the regulator could direct an Insolvency Practitioner or firm to pay for financial loss? Please explain your answer.

131. As noted in response to question 18, we believe that this is a matter best determined by the court.

[32] Callanan, M (2022). Official Receiver Compensation: Response to Question for Department of Business, Energy and Industrial Strategy (HL6801).
[33] Callanan, M (2022). Official Receiver Compensation: Response to Question for Department of Business, Energy and Industrial Strategy (HL6802).

20. *Which option or options do you consider would be most suitable to fund a compensation scheme for the insolvency profession? Alternatively, do you have a suggestion on how a compensation scheme for the insolvency profession might be funded? Please explain your answer.*

132. We reiterate our concerns that such a scheme simply could not work in practice. The consultation accurately identifies, however, the increase in insurance costs that would result from the introduction of the proposed compensation scheme and how this would be detrimental to smaller practices. That said, R3 members are largely opposed to the concept of the wider profession contributing to a fund to finance the scheme. Just over 53% of R3 members were in favour of an insolvency practitioner or firm being required to make compensation payments on their own account, compared to just over 29% in favour of a general fund.

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

133. N/A.

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

134. We welcome the Government's desire to avoid any significant increase in the level of fees for insolvency practitioners and to ensure that the impact of the reforms would be cost neutral for individuals. We also welcome the Government's recognition of the need for a separate fee structure under the proposals for firm regulation that would ensure that small and micro businesses are not unduly affected by this change.

135. The potential fee options as outlined in the consultation are broadly reasonable, although we would suggest that the "*fee to cover the cost of additional complaint investigations/monitoring visits*" should only be applied where the insolvency practitioner or firm in question is found to be at fault.

136. We have no further comments other than to reiterate our concerns at paragraphs 55 and 56 that the single regulator may well not have the financial capacity, on a self-funding model, to attract the necessarily qualified and experienced staff required to enable it to carry out its role effectively.

Proposals for reform of the current bonding arrangements

Overview

137. Issues with the bonding regime have been apparent for a number of years and it is disappointing that despite the "Bonding arrangements for insolvency practitioners: call for evidence" in 2016 there has been no obvious progress made since then to introduce reforms. Given this lack of progress, awareness of these issues is unfortunately not very widespread and this has made it difficult for many insolvency practitioners to take part in an informed debate.

138. The consultation section on bonding, which we have been advised is more akin to a call for evidence, does not sit well within a consultation regarding regulatory reform and we would be pleased to see a more focussed consultation on planned bonding reforms in due course.

139. The fundamental issue which has not been addressed or identified within this consultation is the problem which arises when a successor insolvency practitioner takes over a portfolio of cases when a preceding insolvency practitioner loses their licence, be that by voluntarily handing it back due to a change in circumstances such as illness or death, or having it removed following a disciplinary process.

140. The successor insolvency practitioner is often required to accept a portfolio of cases with little information provided regarding available assets. It can often be the case that the insolvency practitioner will have to carry out an investigation into the case and administer it to an orderly closure. Where there are no assets available the insolvency practitioner cannot recover the costs incurred in doing so and without evidence of fraud or dishonesty, no claim may be made under the bond to cover for such costs. Consideration should be given to ensuring that the bonding scheme facilitates the payment of the insolvency practitioner's investigation costs on such cases.

141. If there were an easier route to being paid for work validly undertaken in administering the estate and investigating the actions of the insolvency practitioner to date, then more insolvency practitioners would be willing to take on such work which would be of benefit to the creditors and the wider economy.

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

    a. *An allowance for reasonable associated costs of a bond claim;*

    b. *A period of run off cover that allows for claims to be submitted for a period after the Insolvency Practitioner has left office;*

    c. *Interest to be claimable against a bond to be calculated on the amount of the loss from the date it was incurred (if so, which interest rate benchmark should the rate be tied to?);*

    d. *GPS cover to be available for all of an office-holder's appointments, including those where no SPS cover has been obtained.*

142. We have included our comments on each of the suggestions above:

a) We would agree – this could allow for a set fee to be paid for an initial investigation by the successor insolvency practitioner that could then be shared with the bond provider. Evidence of possible claims could then be reviewed and agreement made with the bond provider as to which cases claims would continue to be progressed/investigated. This would not, however, provide cover for the costs of a successor insolvency practitioner for work involved in the day-to-day administration of an estate where there are no estate funds available.

b) We understand that this is an essential requirement for the bonds to be workable in practice and that all bond providers have voluntarily included a period of run off cover in their bond terms.

c) Given the current amount of time taken to agree bond claims, an element of interest would seem to be sensible. However, this should reflect the interest that may be payable on creditor claims to ensure that creditors do not lose out due to delays in submitting and agreeing claims. A better approach would be to introduce a process to ensure swifter agreement of claims.

d) We would agree.

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

143. We believe that the requirement for the Secretary of State to agree the bond wording is a sensible one as it acts as a safeguard to help ensure the consistency of cover between the bond providers so that insolvency practitioners may be confident that they are adequately covered. Removal of this requirement may be counter-productive and push the responsibility for ensuring that cover is provided from the regulator to the insolvency practitioner. This could in turn lead to significant gaps in cover provided.

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

144. We understand that run-off cover is essential for bonds to operate as intended and two years would be the minimum period needed. A longer period – some R3 members have suggested replicating the six-year run-off cover period for solicitors – could make it easier to make claims, although this would likely result in increased costs.

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

    a. *should the maximum period an insolvency estate is covered be at least 6 years from the date of appointment?*

    b. *should the Insolvency Practitioner be able to extend cover past the maximum period if they are still appointed on the case, with agreements from the bond provider?*

145. We agree that the maximum period an insolvency estate is covered should be at least six years and that while it is unlikely for a case to remain open for longer than this length of

time, insolvency practitioners should be able to extend cover past the maximum indemnity period for as long as required until the case is closed.

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

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

146. We understand from the bond providers that the bond is not an insurance product and cover is not dependent on the premium being paid – once it is in existence it cannot be cancelled. Where premiums have not been paid, however, it would seem to be appropriate for the RPB to make up the outstanding premium and seek to recover that cost from the insolvency practitioner as part of the usual regulatory process. This would ensure continued protection of the estate.

147. Bond providers should be required to promptly notify the RPB of any unpaid premiums due as this can be a sign that there are other regulatory issues at play.

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

148. We would agree that this increase is reasonable, although there may be instances where it is insufficient to provide full protection to creditors. R3 members have, however, highlighted concerns about the increased costs of premiums by increasing cover much further above the proposed figure.

149. Asked for their views on this question in our recent members' survey, 29% agreed the new figure was sufficient, 11% disagreed, while 58% did not know.[34]

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

150. Again, this proposed increase is reasonable, but the same issue applies in regard to the potential increase in costs. R3 members were largely in favour of this change with 73% agreeing with the increase while 8% disagreed, with 17% not knowing.[35]

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

151. R3 members agree that the general penalty sum (GPS) should cover all of these additional costs. A number of members have also noted that when a successor insolvency practitioner takes on a preceding insolvency practitioner's portfolio of cases where fraud has been committed, there will usually be instances where no fraud has taken place. We would suggest that there should be some form of separate or additional cover for the costs of investigating and administering the cases where no fraud has taken place and there are no assets remaining.

[34] R3 (2022). Member survey on the Future of Insolvency Regulation Consultation.
[35] *Ibid.*

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

152. It is difficult to envisage that this change would achieve what is intended, particularly on low asset cases or where an insolvency practitioner has under-bonded. A more realistic idea could be to have a fixed amount which could cover investigations.

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

153. It is difficult to provide a definitive answer to this question and greater clarification as to what is meant by a global bond and its potential operation is required before further comments can be made; that said, greater flexibility for bond providers to innovate is better than less. Notwithstanding the lack of information highlighted above, one concern raised about a global bond is that it could take some time for the requisite pot of money to build up in order to have sufficient funds to cover potential claims. Ultimately, however, such a reform would have to be practically feasible for bond providers to facilitate.

154. One R3 member has suggested that it could be advantageous if every insolvency practitioner, regardless of firm size, had a fidelity bond of the same size, for example £1 million, with the insolvency practitioner's firm being liable for losses along with the insolvency practitioner and the insurer. This could help to cover successor insolvency practitioners, providing them with a reasonable sum to allocate to estates on an appropriate basis.

155. At the same time, making firms liable for the loss would help to protect creditors' interests where larger firms are involved, as these firms would have the funds to be able to pay out. Such a fidelity bond could be extended to cover special managers.

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

156. R3 members are clear that this additional requirement would not be helpful information for creditors. Largely as a result of the requirements in the Insolvency (England and Wales) Rules 2016, office holders are already required to provide creditors with an extensive amount of information which often goes unread as a result. Providing creditors with yet more information in this way is unlikely to be beneficial to anyone.

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

157. We broadly agree with this suggestion but note that more consideration is required as to how it would work in practice.

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

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

158. It is not clear that there are any major issues with the current rules: an insolvency practitioner taking an appointment as a special manager will seek security by obtaining an extension to their bond.

159. Further, an insolvency practitioner acting as a special manager should not be treated any differently from any other special manager. A special manager is employed and working for a liquidator – it is the liquidator that should have the cover.

38. *Do you agree that the proposed changes to the current requirements for bonding should be made now pending more significant changes to the regulatory regime?*

160. We strongly agree that the proposed changes should be made now – they do not particularly relate to regulation and the broader reforms that the Government is proposing. These broader reforms could take a significant amount of time to implement and it is important that the current issues which have been ongoing already for a number of years are addressed.

39. *Considering the changes proposed to the bonding regime above, would the introduction of a single regulator present opportunities for more fundamental reform of the bonding regime? If so, please give reasons for your answers including any suggestions you may have on a proposed reform.*

161. As above, we do not believe that the issues regarding bonding are linked to the structure of the regulatory framework – the former should be dealt with separately and should not depend on the introduction of the Government's broader reforms.

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

41. *Do you think that a levy funded scheme should replace the existing bonding regime, and cover not only acts of fraud or dishonesty by an Insolvency Practitioner but also a broader compensation regime? Please explain your answer.*

162. It is difficult to answer these questions definitively, although we would argue that fraud and dishonesty should be dealt with separately from the proposed compensation regime, as they are separate issues as we highlight in our responses to the earlier questions on this topic.

163. A levy funded scheme raises the issue of the fairness of having the whole profession paying for the misdemeanours committed by a small minority of insolvency practitioners. Practically speaking, it would be difficult to build up sufficient reserves under such a fund to cover all claims.