Association of Business Recovery Professionals

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Kevin Hollinrake MP
Chair of the Fair Business Banking APPG
House of Commons
London
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Friday 19th February 2021

Dear Mr Hollinrake,

The Fair Business Banking APPG's insolvency inquiry: submission from insolvency and restructuring trade body R3

I write as President of insolvency and restructuring trade body R3, to provide a submission to the Fair Business Banking APPG's inquiry into the regulation and standards of the UK's insolvency profession.

As you know, R3 is the trade association for the UK's insolvency, restructuring, advisory, and turnaround professionals. We represent licensed insolvency practitioners, lawyers, turnaround and restructuring experts, students, and others in the profession. Our members work across the spectrum of the profession, from global legal and accountancy firms through to smaller, local practices. Our members have direct experience of insolvencies and their impact on individuals and businesses across the UK.

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.

In light of the role the insolvency and restructuring profession plays in the economy, it is absolutely crucial that its regulatory framework is as effective as possible. The profession occupies a position of significant importance and responsibility within the UK's economy. Great trust is placed in the profession to uphold the law, act ethically, and protect and restore economic value. The profession needs to repay this trust. A lack of trust and confidence in the profession will lead to a lack of trust and confidence in the insolvency and restructuring framework. And, a lack of trust and confidence in the insolvency and restructuring framework will weaken the UK's economy.

Helping to foster this confidence 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.

The APPG's inquiry sets out to "conduct an in-depth investigation into standards in the UK insolvency profession…aimed at building on and supporting Governmental studies into regulation and standards in the industry…". For the reasons we set out in this document, we believe that the profession's regulatory framework, which sets out an extensive range of duties and responsibilities that must be met, is robust, effective and transparent. Indeed, each year, insolvency practitioners who have fallen foul of the framework are issued with public sanctions, the number of complaints received about insolvency practitioners is low, and the framework is under constant review by the oversight regulator the Insolvency Service, while external stakeholder bodies have a number of opportunities to contribute to the oversight and efficacy of this framework.

That said, we do believe that there are a number of improvements that could and should be made to the framework, particularly in relation to speed, consistency in monitoring and enforcement, and the scope of regulation. We provide further context to these recommendations at page 10.

Notwithstanding the above, we hope that the Insolvency Service's planned 'Regulation of insolvency practitioners: Review of current regulatory landscape' consultation, further to its 2019 call for evidence, will provide the profession, stakeholders, and others, with the opportunity to contribute to this important discussion about the structure and efficacy of the profession's regulatory framework.

We would be delighted to meet with you to discuss this submission in further detail, or to provide you with any further information, if that would be helpful. If you would like to meet us or if you have any other queries, please contact R3's Head of Press, Policy and Public Affairs, James Jeffreys, at james.jeffreys@r3.org.uk or on 020 7566 4220.

Yours sincerely,

Colin Haig
R3 President

Overview

The insolvency and restructuring profession operates in highly pressurised situations. Members of the profession are personally responsible for protecting creditors' interests in insolvencies. They are personally responsible for protecting the interests of employees, consumers, and individuals in debt. They are personally responsible for dealing with the aftermath of governance and financial wrongdoings. And, when appointed to a company, they can be personally responsible for the company's actions in ways that the directors they have replaced were not.

In carrying out their duties, members of the profession must balance competing interests and statutory requirements. Working in time-pressured environments, decisions must be made quickly to protect creditor returns and to rescue jobs. When taking appointments, the profession will often step into the unknown, and will have to deal with the poor governance, record-keeping and compliance problems often encountered at struggling companies.

R3 believes that the current framework – from regulatory oversight through to ethical codes and best practice guidance – while not perfect, is effective and helps the profession to navigate these difficult and sensitive situations in a way that protects creditors and the wider business community.

However, there is always room for improvement and the profession is not complacent about the efficacy of its current regulatory framework. R3 has identified a number of opportunities for potential reforms: speed, consistency in monitoring and enforcement, and the scope of regulation could all be improved.

In considering any potential changes for insolvency regulation, such as through the Government's planned consultation on this issue later this year, it is important to consider that any framework for regulating the insolvency profession will have its own advantages and disadvantages – a 'single regulator', for example, would not be a silver bullet solution for concerns – perceived or otherwise – expressed by stakeholders.

Indeed, in understanding where the framework can be improved, care should be taken to understand the extent and scope of the current framework, including where it works well. As noted above, R3 believes that the profession's regulatory framework is robust, effective and transparent. Each year, insolvency practitioners who have fallen foul of the framework are issued with public sanctions, the number of complaints received about insolvency practitioners is low, and the framework is under constant review by the oversight regulator the Insolvency Service, while external stakeholder bodies have a number of opportunities to contribute to the oversight and efficacy of this framework.

To provide further context to this position, we have structured our submission to set out:

The APPG's questionnaire for insolvency practices

We were grateful for the opportunity to review and provide comments on the APPG's draft questionnaire late last year. As we noted at the time, the amount of information the questionnaire seeks, particularly where that information is commercially sensitive, may make it difficult for insolvency practitioners and their firms to provide a response. While not all information requested will be held by the Insolvency Service and the Recognised Professional Bodies (RPBs), we would encourage you to discuss with them directly what further information they may be able to provide in addition to that which is already published publicly.

The role and duties of insolvency practitioners

The insolvency profession works with thousands of distressed and insolvent companies and individuals every year. This can be in a statutory or non-statutory capacity. Statutory insolvency procedures under the Insolvency Act 1986 can be started by an insolvent company's shareholders, directors or creditors when it can be shown that the company cannot pay its debts, or if its liabilities outweigh its assets – this is not an ability limited to secured creditors. Typically, the purpose of an insolvency procedure is to return as much money as possible to *all* creditors in a regulated and planned manner after a company has become insolvent. This objective can be achieved by winding up or rescuing the company. Insolvency practitioners are the only individuals licensed to take insolvency appointments as an 'office holder' under the Insolvency Act 1986 (except for the government's Official Receiver who takes insolvency appointments as made by the Courts in compulsory liquidations and personal bankruptcies).

Licensed insolvency practitioners are bound by strict legal obligations and duties, and at all times – whether appointed as an insolvency 'office holder' or not – are subject to scrutiny from their regulator, which is in turn answerable to the government.

When appointed to act as an 'office holder' in an administration, liquidation or voluntary arrangement, insolvency practitioners have a duty to maximise returns to the company's whole body of creditors. Insolvency practitioners are aware of the stresses of the insolvency process and will seek to work with company directors and other stakeholders to manage the process sensitively and effectively. As an 'office holder', the insolvency practitioner is not answerable to the company's directors or specifically to the creditor or any class of creditors which appointed them. They are answerable to the company's body of creditors as a whole.

Once appointed as an 'office holder', an insolvency practitioner will seek to establish how they can maximise creditor returns. They will look into all aspects of the company, including whether or not the company has a claim for wrongdoing against its directors or any other parties. These claims will be pursued if they are financially viable and will help achieve the office holder's objective of maximising returns to the company's body of creditors. An insolvency practitioner is required to be independent and objective, and bring transparency to proceedings when reporting to creditors.

An insolvency practitioner's primary duty is to the creditors of the insolvent company, and every decision taken about a distressed company is made with the ultimate benefit of creditors in mind. If a creditor or any stakeholder believes that an insolvency practitioner has acted improperly, they can and should submit a complaint via the Insolvency Service's Complaints Gateway. The Gateway was set up in 2013 to act as a single-entry point for complaints about insolvency practitioners and it covers complaints across the full range of insolvency procedures.

In addition, insolvency practitioners are required to – and do – register a complaint when they encounter misconduct by another insolvency practitioner.

The current regulatory framework

The role of Recognised Professional Bodies (RPBs)

Under the provisions of the Insolvency Act 1986, the Secretary of State (BEIS) recognises certain independent professional bodies ('Recognised Professional Bodies' - RPBs) for the purposes of authorising their members to act as insolvency practitioners.

The Insolvency Service regulates the RPBs to ensure that the members they authorise are fit to act as insolvency practitioners, as well as to ensure that the RPBs themselves are fit for purpose. The RPBs are required to have rules in place to ensure their insolvency practitioners meet acceptable education, practical training and experience requirements.

Each year, the Insolvency Service publishes an annual review of insolvency practitioner regulation which: summarises the regulatory activities of both the Insolvency Service and the RPBs over the year; collates statistical information provided by the RPBs on authorisations, monitoring visits, complaints and disciplinary sanctions; provides statistical information on the performance of the Complaints Gateway; and summarises monitoring activities and findings. The latest review was published in August 2020[1].

There are currently four RPBs[2]: the Institute of Chartered Accountants in England and Wales (ICAEW), the Insolvency Practitioners Association (IPA), the Institute of Chartered Accountants of Scotland (ICAS), and Chartered Accountants Ireland (CAI). Between them, at 1 January 2020, the RPBs authorise 1,553 insolvency practitioners, 1,236 of whom take appointments as office holders in insolvency procedures.

There are practical and historical reasons why the current system of regulation has developed in the way it has – not least because there are three different jurisdictions (England and Wales, Scotland, and Northern Ireland) with devolved responsibility for insolvency and different insolvency frameworks. Additionally, some firms comprise a variety of professionals (such as those working on tax and audit, as well as insolvency practitioners) so they may want to ensure all their members are regulated by one body capable of covering the variety of disciplines (rather than an insolvency-specific body). Further, some insolvency practitioners have a legal rather than an accounting background and so are not members of the ICAEW.

Any reform to the number or role of RPBs, including the introduction of a single insolvency regulator, would need to take these factors into account.

Insolvency practitioner and RPB monitoring

All insolvency practitioners are also subject to regular monitoring visits from their RPB. Monitors seek to establish that insolvency practitioners are adhering to the legislation, and to accepted standards such as Statements of Insolvency Practice (SIPs), the Insolvency Code of Ethics and the relevant rules and regulations of the authorising bodies.

These visits are intensive, with the first taking place within twelve months of an insolvency practitioner obtaining their licence. Visits subsequently take place between every three and five years, depending on the risk profile of the insolvency practitioner (the higher the perceived risk profile of the insolvency practitioner, based on previous monitoring outcomes and the type of appointments taken by the insolvency practitioner, the more frequent the visits that an RPB will undertake). When undertaking a visit, the RPB will look through a sample of open and closed cases to check that all of an insolvency practitioner's work has been performed in accordance with the Insolvency Act 1986, the Code of Ethics, and the various SIPs, as set out below.

[1] https://www.gov.uk/government/publications/insolvency-practitioner-regulation-process-review-2019/annual-review-of-insolvency-practitioner-regulation-2019

[2] The Association of Chartered Certified Accountants (ACCA) ceased authorising and regulating insolvency practitioners from 31st December 2019, and legislation was introduced last month to formally remove formally remove the ACCA's status as an RPB, taking effect from 1 March 2021.

Even though there were fewer authorised insolvency practitioners and appointment takers in 2019 than in 2018 (1,565 insolvency practitioners and 1,244 appointment takers in 2019 compared to 1570 Insolvency practitioners and 1,264 appointment takers in 2018), the number of routine and targeted RPB monitoring visits to insolvency practitioners increased between 2018 (325 visits) and 2019 (362 visits).

Monitors from the Insolvency Service visit each RPB on a regular basis (usually at least once in three years) to ensure that the RPB is complying with its commitments. If any RPB fails to meet the requirements set by the Insolvency Service, the matter may be referred to the Secretary of State, which could result in the body itself being subject to a sanction, or indeed its status as a recognised professional body being revoked.

The role of the Joint Insolvency Committee (JIC)

Sitting alongside the Insolvency Service and the RPBs, although distinct in its role, the Joint Insolvency Committee (JIC) develops, improves and maintains insolvency standards from a regulatory, ethical and best practice perspective.

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

The committee is made up of representatives from each of the four RPBs, five lay members (most of whom represent creditors) and representatives from the Insolvency Service and the Insolvency Service Northern Ireland. R3 and the Law Society of Scotland attend JIC as observers. Other observers may attend by arrangement.

The membership of creditor bodies and other stakeholders on the JIC ensures that the views and input of external bodies are heard and taken into account in the drafting and revision of the key documents setting out the ethical and practical requirements for insolvency practitioners to comply with at all times. The current lay members of the JIC are the Association of British Insurers (ABI), British Property Federation (BPF), HM Revenue and Customs (HMRC), and the Chartered Institute of Credit Management (CICM).

The Insolvency Code of Ethics

As above, insolvency practitioners are required to abide by the profession’s Code of Ethics at all times, whether or not they have been appointed as an ‘office holder’. Breaches of this code should be reported to or picked up by RPBs.

The Code covers the issues which insolvency practitioners must consider carefully in their work, and sets out steps which need to be taken to mitigate risks. The fundamental principles of the Code are: integrity; objectivity; professional competence and due care; confidentiality; and professional behaviour. Specific issues covered by the Code include (but are not limited to): taking insolvency appointments; conflicts of interest; transparency; and professional and personal relationships.

In early 2020, an updated Code was published. While the fundamental principles of the Code have not altered, its size has increased. The Code is now split into two parts to help provide clarity on emerging as well as known ethical situations for insolvency practitioners. Part One of the Code establishes the fundamental principles of professional ethics for Insolvency practitioners, while Part Two describes how the ethical framework applies in certain situations, together with examples. A copy of the Code is attached for the APPG’s reference.

Statements of Insolvency Practice (SIPs)

Statements of Insolvency Practice (SIPs) are a series of guidance notes issued to licensed insolvency practitioners with a view to maintaining standards by setting out required principles and best practice and harmonising practitioners’ approach to particular aspects of insolvency. There are 17 SIPs in total, which cover a wide range of matters which insolvency practitioners must adhere to at all times; many involve matters of public interest and we would be happy to provide you with further briefing on the detail of these SIPs should that be of interest.

These SIPs are issued under procedures agreed between the insolvency regulatory authorities acting through the Joint Insolvency Committee (JIC). They are approved by the JIC and adopted by each of the regulatory bodies listed in the introduction to each SIP.

Complaints and sanctions

Complaints

If creditors or stakeholders have concerns about an insolvency practitioner's conduct they should make a complaint through the Insolvency Service's Single Complaints Gateway. Insolvency practitioners face sanctions, including fines or the loss of their licence, for wrongdoing.

Complaints about insolvency practitioner conduct occur in only a very small minority of cases. In 2019, there were **121,882** personal and **17,224** corporate insolvencies (some of which were handled by the Official Receiver as well as insolvency practitioners); in that year, there were a total of 856 complaints about insolvency practitioners to the Complaints Gateway, of which **428** were deemed appropriate to be referred to the RPBs (the Insolvency Service gives a number of reasons why complaints are rejected: no response received from complainant to follow up request for further information; the complaint was about the effect of the insolvency procedure; the complaint was not about an insolvency practitioner; the complaint had already been through the complaints process). A further two complaints were on hold while the Gateway sought further information from the complainant.

The Insolvency Service's annual review of insolvency practitioner regulation also cites the number of complaints made against the RPBs. 2019 saw a slight decrease in the number of these complaints, with 24 complaints received compared to 26 in 2018.

In the press release promoting the launch of the APPG's inquiry, a partner at the law firm supporting the inquiry stated that "…what we are interested in exploring is whether such behaviour is indicative of a wider, systemic problem." The complaints statistics above would appear to suggest that a systemic problem is not present within the framework.

It is also worth noting that insolvency situations, by their very nature, result in creditors losing amounts of monies that they are owed by the insolvent company or personal debtor; other stakeholders, who may not be creditors, are often also affected by these situations. These situations can understandably lead to frustration and disappointment on the part of creditors and stakeholders. This can also lead to a sense that insolvency practitioners, rather than the insolvency situation itself, are somehow at fault. While some complaints in relation to those insolvency practitioners may be valid, the proportion of complaints that are actually deemed appropriate for referral suggests that this is often not the case. It is important for creditors and stakeholders, particularly when considering reform of the regulatory framework, to consider whether more attention should instead be focussed on those parties, including directors, who may have caused the insolvency situation to occur.

Sanctions

As set out in the Insolvency Service's Common Sanctions Guidance[3], which aims to ensure consistency between the RPBs regarding sanctions, once an RPB has investigated the conduct of any insolvency practitioner it licenses, it can (under its own disciplinary processes) impose sanctions on that licence holder. Such sanctions can follow an investigation of a complaint, or can be a result of a finding on a monitoring visit carried out by the RPB or following the receipt of any other intelligence.

The circumstances that lead to a complaint and the issues that arise as part of the complaint will vary, possibly significantly, on a case-by-case basis. Not all complaints about an insolvency practitioner lead to them being disciplined. For example, errors of judgement and innocent mistakes are not generally considered to be misconduct. If, however, an insolvency practitioner has made a serious error or a repeated number of less serious errors, this may mean they have performed their work inefficiently or incompetently to such an extent or on such a number of occasions as to have brought discredit to themselves, their regulator, or the insolvency profession.

[3] https://www.gov.uk/government/publications/disciplinary-sanctions-against-insolvency-practitioners/common-sanctions-guidance

Although the aim of the Common Sanctions Guidance is to ensure consistency of approach, it is not prescriptive and does not bind each RPB's processes to a fixed sanctions regime. Although it gives an indication of the level of sanction to be imposed, each RPB's disciplinary committee or tribunal will use its own judgement to set a sanction appropriate to the circumstances of the individual case.

When a disciplinary committee or tribunal considers what would be an appropriate sanction, it will refer to the guidance and may, within its discretion, vary the sanction depending on aggravating and mitigating factors.

When a disciplinary committee or tribunal decides that a complaint has been proved or where it is admitted, the committee or tribunal will decide the appropriate sanction. If the committee or tribunal decides a penalty (for example, exclusion, reprimand or a fine) is necessary, it will identify the relevant category of complaint and the relevant behaviour.

There are two types of sanction available to the disciplinary committee or tribunal: non-financial sanctions and financial sanctions. Non-financial sanctions range from a reprimand, severe reprimand, and suspension of a licence or membership, to withdrawal of a licence (which is career ending), and exclusion from membership, as set out in the RPB's bye-laws. For each type of complaint there is a suggested starting point for a financial sanction, ranging from £1,500 to over £20,000.

Since 2014, all published disciplinary sanctions are also included on the Insolvency Service's website. The publication includes details of the insolvency practitioner, the nature of the complaint, the finding and any sanction together with reasons for the decision including aggravating and mitigating factors considered as part of that decision.

For example, in November and December 2020, three insolvency practitioners incurred financial sanctions of £21,000, £7,000 and £6,855 respectively (the latter figure was broken down into four different sanctions for four different complaints).

Given that this information is publicly available and publicised by the Insolvency Service, these sanctions can have substantial reputational, as well as financial, implications.

Further, the regulatory framework can be described as impartial. Regulators' committees include – and can be dominated by – lay members, while, in R3's experience, those members of the profession who sit on disciplinary committees take seriously their roles as guardians of professional standards. Information about the RPBs' disciplinary processes are also publicly available[4].

[4] ICAEW: https://www.icaew.com/-/media/corporate/files/about-icaew/what-we-do/protecting-the-public/complaints-process/how-we-investigate-complaints-booklet.ashx?la=en
ICAS: https://www.icas.com/regulation/complaints-and-sanctions/how-to-make-a-complaint-against-an-icas-member
IPA: https://insolvency-practitioners.org.uk/regulation-and-guidance/complaints-procedure/

How the framework can be improved: R3's recommendations

Ultimately, what is delivered by a regulatory framework is more important than how regulation is delivered. From R3's perspective, it is important that the UK has a regulatory framework for insolvency which is:

- Fair and proportionate for those who have cause to make a valid complaint or have made a valid complaint, and for those subject to the regulatory process. Regulation should not be an excessive burden on the profession, debtors, or creditors; and, should not provide unnecessary 'oxygen' to vexatious or misplaced complaints;

- Transparent in terms of how to complain or to raise a concern, and it must be clear what is involved in the regulatory process. It must also be clear what action is being undertaken (whether this is dealing with a complaint or standard monitoring), and what the outcomes of any regulatory actions have been;

- Effective, in that oversight provides as complete a picture of the insolvency profession's work as possible. Regulators should be given the necessary powers to do their work, and should also be given any government support necessary to develop innovative approaches to regulation;

- Efficient so that regulatory processes have clear timetables and any delays or extensions of a process should be transparent and justified. Complaints should be dealt with quickly, while extended gaps between monitoring visits should not be allowed to develop;

- Flexible enough that it can adapt to innovation within the insolvency and restructuring profession, and be able to keep up with the way the market operates; and

- Consistent in terms of the powers available to regulators, the regulatory requirements that the insolvency profession is expected to meet, the approach taken to complaints, and the consequences of breaching regulatory requirements.

While the current framework largely meets these criteria, and as we set out in our response to the Insolvency Service's 'Regulation of Insolvency Practitioners – Review of the Current Regulatory Landscape' call for evidence[5], there are a range of improvements that can be made:

- service standards could help speed up disciplinary processes;

- further transparency around sanctions outcomes is possible;

- closer regulatory collaboration on monitoring and sanctions would aid consistency, although care should be taken that consistency does not push regulators towards a tick box approach;

- the profession itself needs to be given clearer routes to 'speak up' about unethical behaviour on an anonymous basis, including a recognised protected-disclosure 'whistle-blowing' channel to the Insolvency Service; and,

- there is a need to expand the scope of regulators' powers so that they can monitor and sanction the work of practices alongside individual insolvency practitioners. The extent to which this latter change is made needs to be considered in more detail, and some specific parts of the insolvency framework may be in more need of a practice-wide rather than individual insolvency practitioner-based regulatory approach than others.

[5] https://www.r3.org.uk/stream.asp?stream=true&eid=22648&node=202&checksum=92F7BC8827C37136555FF75FDDF8997F

A single regulator for the profession

The question of whether the profession needs a single regulator has been debated for some time and has been a frequent recommendation of the APPG and other stakeholders. The attractions of a single regulator are clear: it would 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.

The attractions of a single regulator are not, however, exclusive to this type of regulation. Consistent regulation is not impossible in a multi-regulator framework, particularly a framework with a shrinking number of regulators. When the Government's reserve power was established, there were eight regulators; there are currently only four: ICAEW; ICAS (some of whose duties will soon be carried out by ICAEW); IPA; and CAI. Only two (ICAEW, IPA) are effectively UK-wide. Further, as the Insolvency Service noted in its September 2018 review of insolvency practitioner regulation, all regulators "have procedures in place to separate membership functions from regulatory activities". Self-regulation is not automatically bad regulation.

Moreover, a switch to a single regulator is no guarantee that disciplinary procedures will be processed more rapidly, and, without changes to the regulator's 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.

It may be helpful to note R3's members' own views on this issue. Respondents to R3's most recent member[6] survey were most likely to favour a 'single regulatory process', where the existing regulators share a single monitoring, complaints and disciplinary process (28% were in favour). The next most popular option was a 'single, independent regulator', with 25% in favour. The third most popular option was for the existing framework to stay the same: 17% were in favour. One of the existing regulators becoming a 'single regulator' (14%) or maintaining the existing framework but with fewer regulators (13%) received broadly the same level of support.

A shared regulatory process could combine the positive features of the current framework with improvements in consistency. R3 would encourage the Government to explore with the existing regulators how shared regulation might work in the 21st century, and, in particular, how the existing regulators could collaborate more on monitoring and sanctions.

The role of the government in regulation

Whatever the eventual outcome of the Government's review of the regulatory framework, we believe that government itself should not play a role in the direct regulation of insolvency practitioners.

On one level, this is because the government's 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 through its Official Receiver arm, compete with those same insolvency practitioners for work – while not being subject to the same legislation and regulation itself. This would not be an even, or fair, playing field.

[6] R3 Member Survey, Future of Insolvency Regulation, Aug-Sep 2019

The relationship between secured lenders and insolvency practitioners

The press release highlighting the launch of the APPG's inquiry notes that "…given the nature of the APPG, a key focus of the investigation is likely to be on the relationship between insolvency practitioners and the lending institutions that have the power to appoint them." While R3 is unable to comment on specific cases, we hope it will be helpful to comment below on some of the issues and claims often made by stakeholders about this relationship.

More broadly, there have long been strict rules for insolvency practitioners on conflicts of interest and many banks have had long-standing policies on using different insolvency practitioners for different types of work with the same company. Historical shortcomings by insolvency practitioners should be brought to regulators' attention.

It is fair to say that secured lenders are increasingly mindful of the potential impact of decisions to restrict lending facilities or call-in loans, and the increased scrutiny of their dealings with clients and debtors. Anecdotally, banks are looking at other ways to deal with struggling companies other than through formal insolvency processes. Other options include helping struggling companies make use of the alternative sources of finance that have sprung up in the last few years.

This move away from using formal insolvency processes to resolve corporate financial distress reflects a more general shift in focus of the insolvency and restructuring framework, to one that allows for more debtor-led solutions rather than those led by creditors. For example, the Corporate Insolvency and Governance Act, introduced last year, introduced two new tools – the moratorium and Restructuring Plan – which will likely lead to a strengthening of this trend.

The role of Independent Business Reviews

There are hundreds of Independent Business Reviews (IBRs) every year; the conclusion of each depends on the particular case. Not all of these reviews are carried out by an insolvency practitioner.

The IBR does not necessarily make recommendations about a company and is carried out to establish the facts about its financial health. The reviews are used as a starting point for negotiations between the bank and the company and their contents should be discussed by the insolvency practitioner with company directors; company directors sign off on the review.

Often, rescuing a company is actually the best option for its creditors. A company that continues trading is more likely to be able to repay its debts and creditors will not be required to crystallise a loss. There will be cases where company rescue is not possible, however, and the priority then necessarily becomes business rescue via a formal insolvency procedure.

Firms and regulators have strict rules on what appointments insolvency practitioners can or cannot take to guard against conflicts of interest. Although, in theory, it would be acceptable or indeed helpful for the same insolvency practitioner to handle a company's IBR and administration, many banks will make a point of not using the same insolvency practitioner for both roles.

Insolvency practitioners are licensed and are answerable to their regulator. If anyone has any concern about the conduct of an insolvency practitioner during or following an IBR, they should make a complaint to the regulator through the Insolvency Service's Complaints Gateway.

Unequal treatment of creditors

As noted previously, when appointed as an administrator, the insolvency practitioner is legally required to report to all of the insolvent company's creditors, treating them on an equal basis. The insolvency practitioner, who will be acting as an officer of the court, will also listen to the insolvent company's staff and directors.

If appointed to administer an insolvent company, the insolvency practitioner's statutory duty is to achieve as good a return for all creditors as is possible in the circumstances. Ideally, this will mean trying to rescue the company, and failing that to rescue all or part of its business by way of a going concern sale. Where business rescue is not possible, the insolvency practitioner may have to sell the company's assets to raise money to repay creditors; assets will be marketed and will be independently valued by a third party. The insolvency practitioner will have to agree to the best deal on the table or be at risk of a legal claim against them or sanction by their regulator.

The legitimate use of the insolvency framework in respect of insolvent companies

In every case where an insolvency practitioner is appointed, their appointment is reviewed by a solicitor. This will include a check that the grounds for the insolvency procedure are valid and that there has been a genuine default for a creditor to act on. Insolvency is a matter of fact: insolvency practitioners can only be formally appointed if a company is insolvent.

If there is any evidence of wrongdoing, including wrongdoing against the insolvent company, the insolvency practitioner can pursue a claim on its behalf and use the money retrieved to repay creditors.

Insolvency practitioners cannot stop creditors taking action to reclaim the security they have on loans. However, putting a company into an insolvency procedure is a step of last resort: creditors would see more of their money back if the company itself could be rescued and continued as a going concern.

The role of bank 'panels'

Banks will have a number of insolvency firms on their 'panels', while insolvency firms themselves will be on the panels of different banks. Firms are very unlikely to be reliant on one particular bank for their work, and anecdotally, this work has become increasingly less important as a source of work for insolvency practices. Directors of companies do have the chance to object to the insolvency practitioner proposed by their creditor bank and banks will usually ask the company directors to make the appointment. This should not be confused with 'forcing' directors to do so: directors have a legal obligation not to make creditors' positions worse when they are aware their company is insolvent and to take steps to minimise losses to creditors – banks will often remind directors of these duties.

Some banks have policies that prevent them from involving an insolvency firm for a company's insolvency procedure if that same firm previously carried out an IBR of the company. The rationale for this is to demonstrate objectivity, but the strict standards by which the insolvency profession operates should make this split unnecessary.

If appointed to a case, the insolvency practitioner should not be swayed by their relationship with a bank: they have to fulfil their legal objectives or risk sanction.

Professional standards, particularly the Code of Ethics, mean that an insolvency practitioner cannot take an appointment where there is likely to be an actual or perceived conflict of interest. That means an insolvency practitioner would not take an appointment to work with a current or recent audit client, or with a company with whom the insolvency practitioner has a significant prior professional relationship.