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Review of the regulatory system: how effective has the Complaints Gateway been?

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Introduction

Over the last few years the UK² has sought to significantly revise its approach to how Insolvency Practitioners (“IPs”) operate within the insolvency market. In response to a number of reports into the adequacy of the insolvency regulatory regime,³ it was identified, amongst other concerns, that the IP should be more answerable for the decisions they make. To address the perceived lack of accountability and transparency traditionally associated with making a complaint against an IP, the Insolvency Service responded with the creation of the Complaints Gateway (“Gateway”), a new body that would primarily act as a single contact point for complaints made against IPs.⁴ Hosted by the Insolvency Service, the Gateway currently has the responsibility to assess the merits of complaints received before deciding whether to reject the claim or refer the case to the IPs’ respective Recognised Professional Body (“RPB”) for further investigation, and if necessary, apply sanction that they deem as appropriate.⁵ The outcomes reached from these complaints are collated by both the Insolvency Service and the RPBs and the resultant statistical information is summarised every year in an annual review documenting all key regulatory activities, including the type and number of complaints received.

Since the Gateway was introduced in June 2013 the insolvency industry has seen a steady stream of developments aimed at modifying insolvency regulation. One of the most notable objectives has been to address the conduct of IPs and how fees were generated, something which was highlighted as a concern in the 2010 OFT market report.⁶ Subsequent legislation has followed in the form of the Small Business, Enterprise and Employment Act (SBEEA) 2015, which has provided the Secretary of State with a new power to revoke the RPB’s recognition;⁷ the Regulatory Objectives and Oversight

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² In this article the UK will refer to England and Wales.

³ For example, see Report of Mr Justice Ferris’ Working Party on *The Remuneration of Office Holders and Certain Related Matters* (London 1998) (“Ferris Report”); *The Market for Corporate Insolvency Practitioners – a Market Study*, OFT (June 2010) available at http://webarchive.nationalarchives.gov.uk/20140525130048/http://www.oft.gov.uk/shared_oftr/reports/Insolvency/oft1245 [Accessed 01.06.17]; E. Kempson’s 2013 report ‘Reviewing Insolvency Practitioner Fees’, available at <http://www.bis.gov.uk/insolvency/insolvency-profession/review-of-ip-fees> [Accessed 01.06.17].

⁴ Note that concerns regarding professional fees operate outside of the Gateway. Further information on the Complaint Gateway can be found on the Government website GOV.UK at <https://www.gov.uk/complain-about-insolvency-practitioner> [17.01.2017].

⁵ The remaining five RPBs are: Institute of Chartered Accountants in England & Wales (ICAEW): www.icaew.com; Insolvency Practitioners Association (IPA): www.insolvency-practitioners.org.uk; Association of Chartered Certified Accountants (ACCA): www.accaglobal.com; Institute of Chartered Accountants of Scotland (ICAS): www.icas.com; Chartered Accountants Ireland (CAI): www.charteredaccountants.ie

⁶ For a comprehensive overview of the issues see, *The Market for Corporate Insolvency Practitioners – a Market Study*, OFT (June 2010) available at http://webarchive.nationalarchives.gov.uk/20140525130048/http://www.oft.gov.uk/shared_oftr/reports/Insolvency/oft1245 [Accessed 01.06.17].

⁷ See SBEEA 2015, Sections 140; 391L; with the procedure listed under s.391M. Part 10 of the SBEEA provides for reform in relation to insolvency. The subsection entitled: *Regulation of insolvency practitioners:*

Powers 2015, which has clarified what the regulatory objectives for insolvency regulators should be;⁸ Insolvency (Amendments) Rules 2015, which introduced fee “estimates” to tackle issues surrounding over-charging;⁹ and the Insolvency Rules 2016, which looks to achieve and improve effective communication between creditors and IPs.¹⁰ In light of the recent complaints received by the Gateway this article will look to assess whether the recent regulatory reforms have had an impact on the number and type of complaints received; and determine whether there are any viable alternative approaches to the Gateway’s referral process.

1. The complaints gateway: investigation and referral process

Upon receiving a complaint, the Gateway will assess the complainants claim and the evidence provided in support before making a decision as to whether or not further investigation is warranted. If the complaint has merit and is supported by sufficient evidence, then the complaint will be referred to the relevant RPB to determine, if any, what sanction to impose on the IP.¹¹ If a sanction is warranted then the RPBs should comply with both the Common Sanctions Guidance and the regulatory objectives set out in the 2015 powers, which aims to ensure that a consistent approach to dealing with complaints and regulation is met across the industry. Such an approach enables the RPBs to have a regulatory system in place that promotes fair treatment for people affected by the acts of IPs, is transparent in its operations, accountable, proportionate, and ensures consistent outcomes.¹² While the sanction guidance is useful and is often referred to, it should be emphasised that it does not bind the RPB’s approach to how it may implement its sanctions regime; leaving the respective disciplinary committees with an element of flexibility as to how it may impose its own decisions to set a sanction that it feels is appropriate to the circumstances of the individual case. This is also the case following the 2015 powers which leaves an element of discretion to the RPB to deal with its members and ensure that their conduct is “fair and reasonable”.¹³

Needless to say when it comes to assessing what is the appropriate sanction following a successful complaint, some disparities will occur due to the discretion that the disciplinary committees have been afforded, and this will be more notable in cases involving the same or similar issues.¹⁴ Additionally, sanctions awarded are not merely reflective of the breaches committed in isolation, other considerations must be taken into account such as: protecting and promoting the public interest; maintaining the reputation of the profession; upholding the proper standards of conduct in the profession; and correcting and deterring breaches of those standards. While full details are not always readily available, it is with contemplating these other factors that help to explain why similar breaches can receive different sanctions.

amendments to existing regime between sections 137-146 relates to the new law concerning the regulatory regime.

⁸ See Insolvency Service, ‘Insolvency Practitioner regulation – regulatory objectives and oversight powers, December 2015. Legislative changes introduced on 1 October 2015.

⁹ The Insolvency (Amendment) Rules 2015 (SI 2015/443). However, there still remains a considerable level of uncertainty as to what amounts to fair treatment to the complainant.

¹⁰ Insolvency Rules 2016 (SI 2016/ 1024). In force from April 2017.

¹¹ It will be seen that the regulatory objectives introduced in 2015 provide the RPBs with a clearer, enhanced structure within which to carry out their functions of authorising and regulating insolvency practitioners.

¹² Further information on the Common Sanction Guidance can be found on the Government website GOV.UK at <https://www.gov.uk/government/publications/disciplinary-sanctions-against-insolvency-practitioners/common-sanctions-guidance> [17.06.2017].

¹³ But note that a RPB will need to demonstrate compliance with this objective, and show that it has acted on complaints made in relation to the level of fees and other costs.

¹⁴ The guidance permits a sanction to vary from the usual result depending on aggravating and mitigating factors. The only requirement is that the variation is clearly documented and explained by the RPB.

It is therefore apparent that the purpose of the regulatory framework is not just to ensure that the various legal provisions are being complied with, but also to safeguard the integrity and reputation of the insolvency industry through monitoring and reviewing the conduct of IPs and how they undertake insolvency procedures. To this end, the statistical information collated in the annual reviews enables the outcome of any breaches to be openly scrutinised, offering in the process greater transparency to help determine the effectiveness of the regulatory system. In respect of measuring the success of the Gateway, this task rests with reviewing how complaints about IPs are handled, and what impact did the outcomes have on revising practices. Reviewing IP conduct rests with the RPBs who recognise that they as the regulators need to be proactive in providing guidance to its members as to how insolvency procedures should be undertaken. However, while there is a need to ensure that the IPs are aware of their responsibilities there is a greater need to attain satisfactory levels of consistency across the regulators. Such an objective could be realised through the RPBs supporting IPs to achieve compliance with the professional standards as set out in the Insolvency Act 1986, the Statements of Insolvency Practice (“SIPs”), and ethical issues as set out in the Code of Ethics.

It should be made clear that attaining the required professional standards are necessary since it improves confidence in the system, and encourages an independent and competitive insolvency profession that is responsive to the ever-changing needs of businesses. That said, while the IA 1986, SIPs and the Code of Ethics provide an IP with guidance as to what they should consider when dealing with an insolvent company in various circumstances, this guidance alone does not stop poor conduct and subsequent complaints being made. It is therefore imperative that the Gateway does not attempt to be evasive with any information concerning the complaints received, instead it should be designed to be transparent and readily amenable to scrutiny.

In cases whereby a disciplinary committee or tribunal makes an adverse finding and an order, the RPB will publish the record of that decision in the manner that it sees fit. The sanction(s) imposed on the IP by the RPBs will be published in the annual review of insolvency practitioner regulation usually in March of the following year in which the disciplinary hearing occurred.¹⁵ The IP in question will be named with the sanction that was imposed unless a disciplinary committee or tribunal orders no publicity or publicity on an anonymous basis, in which case reasons for not doing so will be provided by the disciplinary committee or tribunal. While disciplinary committees or tribunals will rarely order that there should be no publicity associated with an adverse finding, it nevertheless remains a factor that could contribute to the profession being viewed in an adverse way.

2. The use of discretion by the regulators and the regulated

While the IP should adhere to professional standards at all times, it is essential to note that not all breaches automatically result in sanctions, nor is there a restriction on the number of sanctions that can be applied to one incident. In some circumstances, the breach committed may have been minor in nature and as a consequence likely to have had no impact on the outcome of the case. In others, breaches that have for instance involved the misappropriation of funds, failing to file accurate reports or information, or conduct that renders the IP as unfit to act are all examples that are highly likely to lead to severe sanctions being applied. Such sanctions could include the withdrawal of the IPs’ insolvency licence (in the most extreme of cases), a reprimand (can be classified as severe if warranted), and or a fine, with or without costs. The type and severity of the sanction applied will often be dependent on the costs that were rendered due to the breach occurring and whether the action taken by the IP can be reasonably justified. Establishing this will be reliant on the evidence available and whether the decision reached fell within the circumstances whereby the IP can rely on his discretion to call it as he or she sees fit. Such a case would normally concern a decision or

¹⁵ This would be in addition to the outcomes featuring on the Insolvency Service website.

decisions that were made on “commercial” premises. This level of discretion is recognised in the Insolvency Act 1986 and permits the IP, to a large degree, to define the scope of his job and by doing so make some unpopular decisions that are not readily amenable to review.

Upon that basis it follows that not all complaints will be successful. The statistics from the last two annual reviews shows that approximately a quarter of complaints that are referred to RPBs are subsequently rejected. In response to this, it would be a mistake to believe that the courts could offer recourse in all circumstances. The courts have traditionally been reluctant to interfere with the decisions made by IPs who they consider to be better equipped with the knowledge and expertise to make those decisions.¹⁶ However, the level of trust instilled on IPs by the courts is not impregnable, as the courts have shown that it will not shy away from examining the conduct of the IP, especially when excessive fees are being challenged – a complaint type that is beyond the scope of the Gateway.¹⁷ This flexible approach for the courts to intervene when necessary, rather than dismissing any possibility, is of particular relevance with complex insolvency claims that have issues that go beyond mere commercial decisions made by the IP.¹⁸ Therefore, the RPBs should not be seen as a substitute for taking action through the courts; the two bodies despite the courts being inclined to give room to the RPBs remain distinct and it is clear that the powers of the RPBs are limited in comparison. For instance, a RPB cannot compel an IP to alter, amend or reverse an action he considers is correct. The proper means for controlling, replacing or challenging the actions of the IP rests in accordance with the provisions set out in the Insolvency Act 1986, which when required can be enforced by the court. Given that the IP undertakes a difficult job and has a wide scope to define his role it is worth turning to the type of complaints that have been referred to the RPBs.

3. An overview of the complaints: the statistics

3.1. Complaints received by the Gateway since June 2013

Since June 2013 the Insolvency Service has made available statistical information relating to the number of complaints the Gateway receives, refers and rejects. Since the first year of the Gateway cuts from June 2013 to June 2014 the tables contained within this article have omitted the six months from June 2014 to the end of that year so that clear year-on-year comparisons can be made.¹⁹ The statistics for the last three years are as follows:

¹⁶ Very often when the exercise of powers is challenged in court the office-holder can seek solace in the *Wednesbury* test (*Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 K.B. 223). The courts traditionally have been disinclined to intervene with a matter of professional judgement unless *Wednesbury* unreasonableness is established. But in *Bramston v Haut* [2012] EWHC 1279 (Ch) Arnold J. made it clear that the *Wednesbury* test is now viewed as a flexible standard and that each case does turn on its own individual facts. See also See D. Milman, ‘Governance, Stewardship and the Insolvency Practitioner’, *Company law Newsletter*, (2012), 1, at 3.

¹⁷ *Beattie v Smiles* [2011] EWHC 1563 (Ch); [2012] B.C.C.205, which dismissed ‘extravagant’ costs claimed by the joint liquidators.

¹⁸ It is perhaps time to revisit the Cork Committee’s idea of establishing an Insolvency Ombudsman (Cmnd 8558, para 1772). The profession appears to be in two minds on such a move and, in fairness, there is little to suggest that the current system is failing, but public perceptions do matter. The Office of Fair Trading report (*The Market for Corporate Insolvency Practitioners*) (OFT 1245, June 2010) favoured moves in this direction with the setting up of an independent complaints body (see paras 1.26-1.29), but it is clear as a result of the Insolvency Service’s *Consultation on reforms to the Regulation of Insolvency Practitioners*, published on December 20, 2011 (at pp. 7-9), that there is a lack of consensus on the form and financing of the independent complaints mechanism. See D. Milman, ‘Governance, Stewardship and the Insolvency Practitioner’, *Company Law Newsletter*, (2012), 1 at 4.

¹⁹ For statistics relating to 6 June 2014 – 31 December 2014 see the 2014 Annual Review of Insolvency Practitioner Regulation, March 2015, available at

Table 1: Number of complaints received

Year	Received	Referred	%	Rejected	%
June 2013 – June 2014	941 ²⁰	699	74%	170	18%
2015	895	629	70%	237	26%
2016	847 ²¹	456	54%	247	29%

The recent statistics available from the 2016 annual review of insolvency practitioner regulation show that of the 847 complaints received by the Gateway, 456 were referred (54%) and 247 were rejected (29%). The overall number of complaints received was down 5% from the 2015 total of 895, of which 629 were referred (70%) and 237 were rejected (26%). The difference in referrals over the 2015 and 2016 period equates to a noticeable 38% drop, while the difference between the number of rejected cases across the two years is only 3%.

Compared to the Gateway's first annual report created between June 2013 and June 2014, a total of 941 complaints were received (which equates to a 5% and 10% drop on 2015 and 2016 respectively), of which 699 (74%) were referred (a decrease of 10% and 35% difference on 2015 and 2016 respectively), and 170 (18%) were rejected (put increased by 28% and 31% in 2015 and 2016 respectively). The significant decrease in referred cases since 2013 therefore poses a number of questions, which include: whether there are less breaches occurring in relation to regulations; whether the Gateway has become critical and rejects more complaints due to a lack of evidence (the rejection percentages in 2015 and 2016 seem to suggest that this is the case); and lastly whether the recent changes to insolvency regulation has had an impact on the level and type of complaints received by the Gateway. While the number of complaints received since the introduction of the Gateway suggests a steady decline, the yearly figures compiled after 2013 represent an overall increase on the complaints received before the Gateway was introduced with total complaints made to the RPBs at 748 in 2013 and 578 in 2012. It should however be noted that the Gateway has made the complaint process arguably easier for would-be complainants and this has perhaps led to an outcome, in terms of complaints received, that is not all that surprising. In terms of the subject matter of the complaints received, table 2 provides an overview.

3.2. Complaints referred by subject matter

While not all complaints are listed under their type, the dominate issues are. The statistics produced are vague in nature since it is not possible to determine what issues arose within the main complaint heading. Nevertheless, it is clear from the numbers that some patterns can be identified.

Table 2: Complaints referred by subject matter

Complaint heading	Number of Complaints ²²			% of complaints		
	June 2013 – June 2014	2015	2016	June 2013 – June 2014	2015	2016
SIP 3	133	204	147	19%	32%	32%
Communication breakdown/failure	167	161	134	23%	25%	29%

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/410589/Annual_Review_of_IP_Regulation_2014.pdf [Accessed 17.07.2017].

²⁰ These statistics related to complaints received via the Gateway and do not include complaints generated through monitoring visits by the RPBs and those arising from SIP1 and SIP16.

²¹ 144 cases from September – December were on hold as at 31 January 2017.

²² Figure is higher than total as some complaints have more than one category.

Breach of ethics	96	170	126	13%	27%	28%
SIP 2	128	18	13	19%	3%	3%
Sale/Dealing with assets	74	36	10	10%	6%	2%
Misconduct/irregularity at creditor meetings	17	23	10	2%	4%	2%
Remuneration	24	7	3	3%	1%	Below 1%
SIP 16/Pre-pack administrations	7	6	3	1%	1%	Below 1%
SIP 9	3	2	2	0.4%	Below 1%	Below 1%
Other	70 ²³	10	9	10%	2%	2%
Total	715	637	457	100%	100%	100%

The 2016 statistics show that 32% of the complaints received by the Gateway related to SIP 3 (voluntary arrangements), 29% to communication breakdown/failure and 28% breach of ethics. These three categories are the same as 2015 albeit in a different order with 32% relating to SIP 3, 27% breach of ethics and 25% communication breakdown/failure. While a consistent level of complaint seems to have been maintained in the last two years, these three areas differ to the top three complaint areas in the Gateway's first year where the areas attracting complaints were 23% communication breakdown/failure, 19% SIP 3 and 19% SIP 2 (liquidator investigations) and 13% for breach of ethics.

It is suspected that one of the reasons for the increase in SIP 2 and ethical complaints has much to do with how the statistics were compiled with a number of complaints ongoing assessment within the first year and concluding only after the initial review was published, leaving the statistics to be included in the 2015 annual review. This is a plausible explanation given that the 2015 and 2016 statistics report similar percentages. Another plausible reason which may provide for the increase can be understood from reviewing table 3 (below) which provides a breakdown of the complaints received relating to the code of ethics.

Table 3: Complaints concerning ethics

Ethical Code	Number of Complaints ²⁴			% of complaints		
	June 2013 - June 2014 ²⁵	2015	2016	June 2013 – June 2014	2015	2016
Professional competence and due care	35	102	77	36%	60%	61%
Conflict of interest	40	46	30	42%	27%	24%
Professional behaviour	6	6	8	6%	4%	6%
Objectivity	n/a	n/a	7	n/a	n/a	6%
Integrity	4	7	1	4%	4%	Below 1%
Confidentiality	4	3	n/a	4%	2%	n/a
Misleading marketing/advertising	1	n/a	n/a	1%	n/a	n/a
Commission payments	1	2	n/a	1%	1%	n/a
Other	5	4	3	5%	2%	2%
Total	96	170	126	100%	100%	100%

²³ Includes delay in dividend payment.

²⁴ Figure is higher than total as some complaints have more than one category.

²⁵ Statistics available from 6 June – 31 December 2014.

The most prevalent ethical complaint relates to a failure to maintain professional competence and due care which has seen an increase over the last three years from 36% to 61%. From examining the summary of regulatory action and disciplinary sanctions issued by the RPBs (and published in the annual reviews) it is possible to infer that the regulators are becoming more stern with enforcing the Code and have shown a willingness to find in favour of the complainant that higher standards were expected by the IP in the circumstances.²⁶ What this means for the IP is difficult to determine with the limited information available, but it is possible to at least conclude that the RPBs will not shy away from applying sanctions against its members – something which is not a surprise given the regulatory developments that have occurred in the insolvency industry over the last few years. It is therefore sound to suggest that it is not through the lack of regulation in the insolvency industry that leads to a growing number of complaints and what is perceived to be a lack of sanctions, but rather the promotion of a complaint procedure that makes it easier for the complainant to make a complaint. The rejections while increasing can be for a number of reasons, but claims are more likely to fail because they are not supported than suggesting that there is a lack of action taken in the insolvency industry by the professional regulators against its members. The rejection statistics are perhaps a testament to the RPBs that they are monitoring and regulating their members to a higher degree than they have perhaps done in the past. But this conclusion should be approached with an element of caution since the Gateway can only refer complaints that are supported by evidence and this is not the same as saying the issue never occurred. Additionally, further action is reliant on the RPB to find that a sanction is warranted which it may find there is no case to handle if it exercises wide discretion on the matter. Therefore, while the percentages show an increase in complaints, what must be reviewed is the number of cases where sanctions have been applied. This will be reviewed momentarily in table 4.

3.3. Insolvency procedure

Another aspect of the annual review that requires further scrutiny is the number of complaints that are referred based on the insolvency procedure undertaken. While IVAs have remained the leading insolvency type to have attracted complaints, a notable drop is seen with administration over the three-year period. Reasons which may account for the drop in administration procedures receiving complaints can be as a result of the decrease in administration procedures that are generally undertaken, and that figure stabilising over the last few years. For example, in 2016 there were 1374 administrations from 16,532 company insolvencies, accounting for 8% of the total amount of that year. For IVAs over the the same period there were 49,417 from a possible 90,619 cases, accounting for 54% of the total amount.²⁷ Contrasting this with 2013, there were 2365 administrations in 18,856 company insolvency procedures (13%), and IVAs accounted for 48,967 from 101,084 personal insolvency procedures (48%).²⁸ More generally, the Gateway has found its feet becoming strict with what case it rejects and refers. This can be seen in the 2015 and 2016 statistics where 26% and 29% of complaints were rejected respectively, compared to just 18% in the first year. Table 4 provides an overview of these findings.

²⁶ For example, see the regulatory action and disciplinary sanctions issued in the 2016 Annual Review of Insolvency Practitioner Regulation, Insolvency Service, March 2017, at 13, available at, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/605331/Annual_Review_Of_IP_Regulation_2016_final.pdf [Accessed 14.07.17].

²⁷ The statistics can be obtained from the Insolvency Service website, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/611370/Q1_2017_statistics_release_-_commentary.pdf [Accessed 17.07.17].

²⁸ The statistics can be obtained from the Insolvency Service website, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/306090/Q1_2014_press_notice_-_Web.pdf [Accessed 17.07.17].

Table 4: Number of complaints referred by insolvency procedure

Insolvency Type	Number of Complaints ²⁹			% of complaints		
	June 2013 - June 2014 ³⁰	2015	2016	June 2013 – June 2014	2015	2016
Individual voluntary arrangement (IVA)	220	242	210	32%	38%	46%
Liquidation	148	162	108	21%	26%	24%
Bankruptcy	105	116	55	15%	18%	12%
Administration	174	60	49	25%	10%	11%
Trust Deed	18	16	19	2%	2%	4%
Company Voluntary arrangement (CVA)	19	15	11	3%	2%	2%
Sequestration	6	5	3	1%	1%	Below 1%
Other	9	13	1	1%	2%	Below 1%
Total	699	629	456	100%	100%	100%

3.4. Reasons for rejecting complaints

Following on from the last section, the number of complaints that have been rejected has increased from 18% in 2013 to 29% in 2016. This is reassuring from the perspective of IPs, but from the complainants' viewpoint it could be seen as a concern. A conclusion that is reached from the statistical information contained in Table 4 is that most complaints fail because the complainant does not follow up the request for further information. This leads to two alternative outcomes. First, there was no case for the IP to answer because no breaches were committed by the IP that would ordinarily amount to a ground for a complaint, or second, breaches were committed by the IP but the complainant does not have any evidence to substantiate the claim. It remains of particular interest to see whether the rejection rate continues to grow in the next few years.

Table 5: Reasons for rejecting complaints

Complaint Heading	No. of complaints rejected ³¹			% of complaints		
	June 2013 - June 2014 ³²	2015	2016	June 2013 – June 2014	2015	2016
No response received from complainant to follow up request for further information	90	147	138	53%	62%	56%
Not a complaint about an insolvency practitioner	47	30	47	28%	13%	19%
Complaint about the effect of an insolvency procedure	8	n/a	n/a	5%	n/a	n/a
Complaint about charge out rates	7	2	2	4%	Below 1%	Below 1%

²⁹ Figure is higher than total as some complaints have more than one category.

³⁰ Statistics available from 6 June – 31 December 2014.

³¹ Figure is higher than total as some complaints have more than one category.

³² Statistics available from 6 June – 31 December 2014.

Already been through the complaints process	5	13	8	3%	5%	3%
Complainant has not raised the matter with the insolvency practitioner first	n/a	n/a	13	n/a	n/a	5%
Other	13	45	39	8%	19%	16%
Total	170	237	247	100%	100%	100%

3.5. Sanctions following complaints and the RPB's approach to compensation

If the complaint is substantiated the Gateway will refer the matter to the respective RPBs, at which point it is for the regulators to determine what sanctions, if any, are required to be placed on its member. Table 6 shows that by comparing the information gathered in 2015 and 2016 there was something of a reverse in the sanctions that were applied with the RPB not issuing many warnings (not published) in 2015 but doing so in 2016, and in 2016 the RPBs issuing many reprimands that may or not have also included a fine, but reducing this substantially in 2016. While it is important to note that some IPs may have received multiple sanctions for the acts that they had committed, the reversed popularity in which sanction to apply suggests a change in policy with a warning preferred to applying more serious sanctions. Professional discretion and IP justification may have played a role here and it will be of interest to see how these figures change in the next few years.

Table 6: Sanctions following complaints

Type of Sanction	Number of Complaints ³³			% of complaints		
	June 2013 - June 2014 ³⁴	2015	2016	June 2013 – June 2014	2015	2016
Warning, caution or rest on file (not published)	3	15	47	100%	18%	65%
Consent order – reprimand and/or fine	0	65	25	0%	79%	35%
Exclusion and fine	0	2	0	0%	2%	0%
Total	3	82	72	100%	100%	100%

In terms of how the regulators apply the sanctions, it is apparent from the available statistics that the five RPBs attract a different volume of complaints. While each of the RPBs take on varying number of IP appointments, there is a clear message from information contained in the annual reviews that the Insolvency Practitioners Association (“IPA”) and the Institute of Chartered Accountants in England and Wales (“ICAEW”) consistently receive the most number of complaints.³⁵ By permitting the RPBs to investigate their own members the insolvency industry has complicated the sanction process since there are no formal or agreed regulatory mechanism for compensation across the RPBs, meaning inconsistent sanction awards are possible.

The promotion of this position is explained by the unique nature of the profession, whereby individuals are members of an authorised body, but act under the general supervision and powers of the court. That said, referral to a RPB would not be a substitute for any legal remedies available to

³³ Figure is higher than total as some complaints have more than one category.

³⁴ Statistics available from 6 June – 31 December 2014.

³⁵ For example, in 2016 the IPA received 240 complaints and the ICAEW received 156 complaints, which collected amounted to 86% of the complaints referred to RPBs. See 2016 Annual Review, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/605331/Annual_Review_Of_IP_Regulation_2016_final.pdf, at 19 [Accessed 17.07.2017].

individual complainants through the courts. This is of particular significance since not all of the RPBs have a clear, or indeed any, framework in place for paying compensation.³⁶ For instance, the Association of Chartered Certified Accountants (“ACCA”) disciplinary committee is able to award compensation from the IP to a complainant of up to £1,000, in addition to being able to order a waiver or reduction in fees.³⁷ This is in contrast with the ICAEW who do not operate a formal compensation or redress scheme, although its disciplinary committee can order a waiver or return of fees depending on the nature of the case.³⁸ The ICAEW does operate a conciliation process which seeks to resolve complaints where there is a potential liability to disciplinary action but this is dependent on where both parties are amenable to resolution and where the outcome can result in a voluntary payment of financial compensation by the IP. The IPA position since the 2015 regulatory objectives were introduced has been in line with the other RPBs, introducing common sanctions that are compatible with the objectives,; this is of particularly importance given the number of consumer complaints in recent years.³⁹

Collectively, while the recent regulatory developments have helped the RPBs to create a more consistent approach when it comes to applying sanctions, inconsistent outcomes are still inevitable as the RPBs maintain their discretion to deal as they see fit. This position has been exacerbated further by situations where IPs have remedied errors through compensation payments before a formal complaint has been made to the Gateway.⁴⁰ The Insolvency Service have justified the use of informal remedies by stating that there are identifiable complaints where the IP’s conduct was not regarded as a serious matter but there had been a minor error or poor practice.⁴¹ To this end, having the flexibility to define the type or level of breach permits the RPBs to continue in dealing with those complaints in a discretionary manner as opposed to rigidly applying a fixed sanction which may not be wholly appropriate in the circumstances. It is likely that quite a number of the complaints received have been resolved through compensation from the IP to the complainant directly since this position is encouraged across the RPBs. However, given the variation and scope for different outcomes being reached in similar cases, it is essential to the future reputation of the profession to ensure fair treatment to all complainants is realised. Such is the concern that surrounds unfair treatment to some complainants that the Insolvency Service is of the view that the ability to offer compensation should be explored in greater detail.⁴²

³⁶ For the following approaches to compensation see the report by the Insolvency Service entitled ‘Review of handling of complaints about Insolvency Practitioners’, September 2016, at 11. Available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/554113/Review_of_handling_of_complaints_about_insolvency_practitioners.pdf [Accessed 15.07.2017].

³⁷ See ACCA website, available at http://www.accaglobal.com/content/dam/ACCA_Global/Members/news/2017/June/Guidance%20for%20disciplinary%20sanctions%20ONLINE%20VERSION.pdf [Accessed 17.07.2017].

³⁸ See ICAEW website, available at <https://www.icaew.com/en/membership/regulations-standards-and-guidance/regulation-and-complaints> [Accessed 17.07.2017].

³⁹ See generally the IPA website, available at file:///C:/Users/jwood12/Downloads/Common_Sanctions_Guidance_2016.pdf [Accessed 17.07.2017].

⁴⁰ Such awards have the potential to cover a vast array of issues such as the distress someone’s experienced, any inconvenience they’ve had, any unnecessary pain and suffering, and damage to their reputation. It is imagined that most of these would involve minimal awards being granted.

⁴¹ See the report by the Insolvency Service entitled ‘Review of handling of complaints about Insolvency Practitioners’, September 2016, at 11-12.

⁴² For example, where minor errors or mistakes have been made which can be rectified and have been accepted by the IP.

4. Trends identified from the Gateway statistics

While the statistics compiled from the first three years of the Gateway present a limited view on how the complaint process has developed, it has nevertheless provided some useful information about the type and volume of complaints received. To begin, and to reiterate a point mentioned above, what is apparent and encouraging for practitioners from the available statistics is that there appears to be a marked increase in the number of complaints being rejected by the Gateway, particularly compared to the Gateway's first full year. While it is important to ensure that the Gateway is accessible to complainants, the complaints made need to be just and reasonable, not merely used as a weapon to attack unpopular decisions made by IPs.

It is also worth pointing out statistical distinctions between corporate and personal insolvency. Personal insolvencies, given its nature, have attracted the highest level of complaints compared to corporate insolvencies but it is notable that in the last two years' liquidations have attracted a greater number of complaints than administrations although there is no explanation for this in the statistics.

5. Alternatives approaches to the complaints process

It is worth considering a few alternative approaches to the current complaint system to determine whether a more accountable and consistent approach could be achieved. The first suggestion calls for the five remaining RPBs to merge into a single professional regulator thereby creating one pathway for all complainants to be referred to from the Gateway. However, while it is accepted that this suggestion may result in more consistent outcomes being reached, it does not necessarily provide for greater transparency in the complaint process itself. The continuance of the insolvency industry to self-regulate its members and thus assess the threshold that must be met to successfully prove a claim is one that needs to be overcome. That said, there is already evidence that this approach is operating since on 1 January 2017, the ACCA are now collaborating with the IPA which will see all of ACCA's regulatory functions, except for the initial authorisation of new insolvency practitioners, consolidated with those of the IPA. IPs licensed by ACCA will therefore be subject to the complaints and monitoring procedures, including the disciplinary processes, of the IPA. If the other three RPBs agreed to have its complaints reviewed by the IPA, the RPBs would retain their identities but pool their resources when it came to administrative tasks and the complaints procedure ensuring consistency and an efficient process.

A second possible alternative would be for the Gateway to not refer claims to the RPBs, but for the Gateway itself to be afforded with the power to investigate and award sanctions on the RPBs behalf thereby providing a clear separation of powers between the overseer (Gateway), the professional regulators and their members. Such an approach would likely lead to the RPBs providing greater guidance to its members as to what is acceptable practice and also reinforce the monitoring and training duties of the RPB, as well as acting as a contact point for IPs for advice on practical issues if needed. In terms of the expertise that the Gateway would require to undertake such a role it would be recommended that a panel would be created consisting of a "pool of experts" to deal with the disciplinary hearing. In terms of who would administer the pool, it is envisaged that a small secretariat would be involved, which would control membership of the pool; including responsibility for selection, training, monitoring and evaluation of individual performances, including suitability. It is important to clarify that the independent aspect of the pool can only be achieved if the pool is free from the influence of any of the RPBs, and as such be seen to operate as a separate body that reviews and actions complaints before reporting directly back to the RPB in question. For this suggestion to be feasible it would be recommended that the pool members operate on a strict rotation basis, which would if too small add an unrealistic burden on the complaint process.

6. Conclusion

The Gateway referral process has the potential to offer a level of transparency that surpasses that associated with the previous complaint system. With future annual reviews only likely to refine the way in which statistical information is captured and recorded, the question of whether the existing insolvency regulations are effective in dealing with IP conduct will become clearer. As a complaint process the Gateway has strived to respond and rectify, as far as possible, the criticisms that were common under the old process. The annual reviews focus on highlighting the number of complaints received, what subject matter they relate to, detailing ethical breaches, and what insolvency procedure attracts the most complaints. Of critical importance is the statistics relating to the reasons for the Gateway rejecting complaints, with the main reason due to a lack of a response from complainants to follow up request for further information. The lack of transparency involved with the Gateway's decision making process poses an interesting question as to whether the evidence requested in these rejected cases could have been readily attained. If that was the case, then the number of complaints that the Gateway would refer would increase by at least 50% (see table 5).

Based on this possibility the true level of justifiable complaints is unknown. While the complaints that are referred to the RPBs are well recorded, the way in which the complaints are processed is not. At this point it is realised that the Gateway's success has been limited. While it has brought an element of transparency in terms of the number of claims, individual case details are restricted. It is commendable that the RPBs are embracing their regulatory obligations and will when warranted issue sanctions against their members, but in relation to the total number of complaints received it would seem that the level of sanctions awarded are minimal in comparison to the volume of insolvency procedures undertaken. As such it will be of interest to note what the future statistics will show.