Written evidence from Mira Makar

SCOPE

(a) professional standards; and
(b) culture of the UK banking sector, taking account of
  (i) regulatory; and
  (ii) competition investigations,

into the LIBOR rate-setting process;

lessons to be learned about.

(a) corporate governance,
(b) transparency, and
(c) conflicts of interest, and
(d) their implications;
  (iii) for regulation and
  (iv) for Government policy;

Evidence provided by Mira Makar MA FCA.

Each point is backed by evidence, available to the Commission in live evidence. Court relief is backed by default judgment ie is not, "yet to be decided" (2005–2012). Relief for the abuses (damages) has yet to be assessed by the court.

The witness thanks the Commission for the opportunity to contribute.

1. To what extent are professional standards in UK banking absent or defective? How does this compare to (a) other leading markets (b) other professions and (c) the historic experience of the UK and its place in global markets?

1.1. Banking standards including the FSA business rules are universally ignored or are being actively diluted in effectiveness. In particular:

1.1.1. corporate lending happens on the say-so of City intermediaries, not by the proper authorisation by the relevant Board; purported debt (or client monies) is used to cover defaults and/or shift risk. Markets are not informed of the true position in regard third party financial dependence and basic compliance returns, for example in Companies House, can be circumvented by retaining documentation in draft form. This position has acutely worsened by the purported reduction of red tape, work that has regretfully been hijacked to, effectively, defeat the law.

A simple, but financially devastating, example is that once a notifiable debenture is redeemed, there is no longer an obligation to make a return to Companies House, including with the date of the redemption, whereas until recently there was. This has the practical effect of circumventing the rights of a trustee in bankruptcy to set aside preferred transactions two years before the date of administration. This is because the public warning on the date of the redemption, and the two year clock starting to tick, is not public;

1.1.2. there is no due diligence carried out on RNS reporting and Companies House reporting. In particular, a failure on the AIM market can just disappear without trace, as Companies House reporting of matters such as lodging a prospectus is not required, and once an AIM company is de-listed, there is no automatic investigation on the failure, in particular of the auditor;

1.1.3. the move to "reduce red tape" is diluting the previous rigour of reporting (the above example is that of the redemption of a debenture which does not have to be reported in Companies House; if it is reported voluntarily, no date is required: therefore third parties get a distorted view of the debt and asset cover base);

1.1.4. investment banks (Sponsors/advisers/NOMADs) prioritize "their" interests over the market. They will operate a "split market" in order to avert resigning (which would bring reputational damage on grounds of "letting down the market"), whilst "protecting" their clients: the FSA will not in practice prosecute Companies Act breaches, for no good reason at all, or auditors who report without agreeing estimates to the underlying contracts, which, generally the auditor's staff do not understand (banks in the hands of administrators find they have to pay bank staff premium amounts to teach the administrator's staff);

1.1.5. mixing client monies and banks' funds is prevalent, especially if something has gone wrong, that middle management do not want revealed to top management. Clients whose money is managed by intermediaries are particularly vulnerable, as are the estates of deceased clients. Auditors are able to avert liability by hiring lawyers and subjecting themselves to a "tribunal" and a paltry fine, as opposed to prosecution by BIS/SFO;

1.1.6. internal lawyers operate a "strangle hold" on the business and make decisions that ought to be made by the relevant managers, informed on the circumstances. The effect is that, if third parties wish to defraud a bank or use it to launder money/benefits, eg a bribe, they have no difficulty, they simply "wrapper" the

transaction in a form that "gets through" the internal lawyers on the nod. Banks are "geared up" for money laundering checks when new money comes in, but have no protection whatsoever if their customers are the victims of theft.

SARs (Suspicious Activity Reports) go nowhere, and get buried, with no redress for victims. Banks state they have Complaints Procedures to give redress to victims but do not persue them, instead taking action against their customers and hiding behind internal and external lawyers.

1.1.7. "top down" management and bullying, are common, with wide spread "cover up" rather that "own up" and repair. Complaints departments are treated as the same as risk departments and, unless the point is trivial, are about warding off the victim and not addressing the problem;

1.2. FOS, the body for rectifying defaults, and compensating victims, does not assess with regard to Banking/ Insurance licensing rules or the FSA business rules as published on the FSA website. Therefore a victim/ witness has, in practice, no redress but, worse, believe they have. FOS staff are not licensed themselves and are therefore not properly capable of being supervised or meeting the purpose for which they were set up—"you need to go to law to get redress" is a common response, as is "we have no obligation to report to the FSA [if we see something wrong]", as well as " we are not set up to establish the truth of a matter". FOS do not refer breaches of the business rules to the FSA; and the FSA tell FOS to "hold the evidence 'for now' ", while the FSA call centre tells Joe Public that the breaches are reportable. Joe Public's complaints to the FSA get logged; get frozen and then an outsourced supplier contacts Joe Public to ask whether Joe Public is happy with the Complaint handling. Behind the scenes both operate the same way, talking to others and eliciting evidence that supports inertia, that they refuse to provide to Joe Public.

1.3. There is no intrinsic value add in these edifices. There is however serious public damage in terms of public confidence, as the public, who are not stupid, know their time is being wasted and that massive spend, as the recently purported £22 million spend on IT by the FSA, is no more than a rear guard action to prop up crumbling self serving edifices. It is the case of the emperor with no clothes, with the fear, "if they go, what is left that one can point to for redress?"

1.4. The situation is the same for insurers; lawyers; auditors and accountants; all prioritize new product manufacture and sale and regard and operate a customer base as an income stream to be worked ("sweating the assets");

1.5. The practice of "revolving doors" is endemic. Law enforcers, and those in a position to influence a decision to prosecute, have to take into account that the prosecution by them of those who may be a potential source of employment to them, will render the likelihood of such a move reduced, if not extinguished. A bank provides a disincentive for a law enforcer to prosecute on two accounts, first, the prospect of being "out walleted"; second, the prospect of loss of opportunity for employment for the staff of that law enforcer. This creates a culture of rewarding failure (omitting to prosecute) and complicity with dishonesty (those who ought properly to be prosecuted). In turn this creates poor morale amongst career civil servants and a defeatist attitude.

1.6. The UK market has, since at least circa 2005, gained a reputation for having taken de-regulation so far, that foreign capital is not safe: in particular debt financed balance sheets with no resilience and the absence of "checks and balances" cause the flight of capital. This is one step worse than new capital not coming in.

1.7. This problem is exacerbated by the approach of the "policemen", the auditors. These have the approach that "banks are big boys" and that no duty is owed; relying on the fact that a bank will be "reluctant" to "pull", causing reputational damage to itself. "Easy money" allows risk to be transferred to banks, with no one any the wiser, without the diligence, for instance, of a fund raising or public offer.

1.8. Ministers have received mis-briefings that there is something special about the capital markets and their audit. There is not. The principles of independence, specialist expertise and experience (rather than training on the job), agreeing estimates to underlying records, assessing the resilience of the balance sheet all refer to any audit regardless of whether a bank, retail, distributor or wholesale or not.

1.9. The U.K. is years behind other countries in policing (as opposed to so-called "self regulation"). The self regulation bubble has burst, delayed by the hopeless attempts to deny the depth of the effect of the 2008 burst, and that at that time, there was not the solid base from which to attempt to stabilize, let alone grow.

The effect has been to give Ministers a problem, with no informed path to the repair. Worse, information flows have reflected vested interests, and have not been the result of prior consultation by those with the evidence of what it is like to be Joe Public, minding their own business, and possibly serving the UK public market as executive director, with explicit covenants to that market.

1.10. Those who have suffered are those whose pensions capital has been dissipated and for whom UK Plc directors can do nothing to provide compensation. The response of the law enforcers, as the FSA, was to jail executive directors, as they did in 2005 with the AIT directors, who had been bullied by their sponsor into pre close statements they could not properly make, and bullied into not resigning, whilst letting the sponsor off the hook. This event is an accurate reflection of FSA policy, as stated publicly: "we cannot take on the banks as they will outwallet us in the courts, we go for the small people". The statement on money is wholly untrue, since the cost of timely prosecutions (ie not after the event) is trivial compared with the devastation of failing

to do it, leaving a wasteland in its wake and no entrepreneur inclined to add fighting the City and regulators in order to just stand still and keep out of prison.

Credibility of the FSA successor will not be established in public eyes until there is proper examination of these events, as well as AIM crashes. This is a market that was explicitly set up to avert checks and balances, and the result of lobbying, under the banner of reduced red tape.

1.11. This lack of proper attention is manifest not just in the FSA, that is known to have regular compliance visits or even a permanent presence in the banks, but also the FRC. The FRC advertises promoting the interests of so-called "stakeholders", which it lists on its web site. Notably they exclude the executive directors on whom UK Plc depends to function, and who are the people who are jailed when there is a prosecuted failure to maintain proper records, including those emanating from the supply chain (auditor, lawyer, sponsor/financial adviser), which the directors may or may not know about or even be able to control.

1.12. As concerning, is the little known fact that FRC audit inspections are carried out "after the event" and not live, while the audit itself is being carried out. This is a spectacular omission as compared with other inspections of labour at work; teachers; doctors; car mechanics; driving test instructors; each of whom must be a fully accredited, paid up, licensed and examined person, with the examiner already experienced in the same field.

1.13. The effect is that the FSA has a presence inside the banks monitoring live, but not doing what the FRC believes it is doing, but in fact after the event, when it is too late, and maybe with the right FRC people or maybe not, maybe doing the right thing and checking the licensing credentials and experience of those carrying out the audits or maybe not, and whether the auditors being inspected can accurately describe the end to end process of Suspicious Activity Reporting; or the modelling behind the manufacture of derivatives and hedge products and the interdependence of the balance sheets of the banks/insurers including internationally, taking the effect of international money markets into account.

1.14. There has been no quantative impact assessment carried out of the effect of the auditors licensing bodies having a policy of disciplining auditors on process and not substance, or even the effect of their investigation staff deluding themselves that process is capable of separation from substance.

1.15. Similarly there has been no quantified assessment of omitting to prosecute live crime in auditors defaults, but leaving it to "after the event". By then the auditor/assurance purveyor has acted to, effectively, close the business in which there has been a default (or knowingly irreparably damaged it) and/or succeeded in turning the default into an insured event (as professional negligence); or hired a lawyer to turn the default into a disciplinary fine with no other come-back.

1.16. There has been no quantified assessment of spurious attempts by vendors to characterise assurance reporting (non audit) as something else and restricted in some way; no methodology for circumventing the blockage created by restricted covenants in Limited Liability Partnerships (LLPs) membership agreements, ceding control to internal lawyers, and separating knowledge in the heads of the defaulters from those mounting the defence; and a plethora of financing arrangements enabling pre emptive remedies, designed for protection, to be used in reverse to ward off fatal risks, including those in existence on the incorporation of LLPs. These devices are now routinely used including by risk shift from auditor to those audited, in exchange for an audit certification.

1.17. There has been no quantified assessment of the approach of enforcers that they will "do things better in the future", burying their own defaults of the past, and in many cases "losing the papers", and those knowledgeable moving on; choosing to move, or the work being disclosed as having been given to transient labour without trace. This is a common practice compounding the intrinsic problems, by depriving the enforcer from the build up of skill and expertise they would otherwise gain but which a transient third party is paid to acquire.

1.18. There has been no quantified assessment of the dilution of licensing by-laws requiring licensees to report financial and other defaults to the licensing bodies; those bodies hiring lawyers to deflect these obligations; and the by-laws themselves being relegated to statements of belief on public websites. A "statement of belief" is a state of affairs in existence in the head of the person who purports that belief, and is not a ready substitute, in the eyes of Joe Public at least, for omitting to take those mandatory steps that would precipitate prosecution.

1.19. There has been no quantified assessment of the prolongation of the agony before deferred prosecutions are finally buried; attempts at diving up the spoils of crime, to the perceived victims, together with the dogged determination of SFO directors consecutively to put the SFO above Parliament and the judiciary, including by attempts to replace class actions, by out of court actions by them, following prosecutions and making payments to victims; or even the SFO continuing to be led by those who have not succeeded whilst at HMRC and/or who believe that the SFO can be run without a CEO, and they can, with impunity, bury the previous CEO's commitment to prosecuting to provide relief to victims of white collar crime; and/or who believe that returns required by them by court order to a dead-line can be ignored with similar impunity and no one, not even the court, will hold them to account.

1.20. There has been no quantified assessment of unhappy mid ranking and senior staff in all walks who face the stark choice of keeping quiet and meeting family life style expectations, or moving job loaded with the burden of the knowledge, or knowing there is no job to move to, so they have to "put up and shut up". The phenomena applies to partners in law firms; bankers told at 40 years of age that they are over priced, as what they do can be done by a 28 year old and there is no premium for experience; or call centre workers selling investment product knowing it is not in the interest of the public to buy, the equivalent of investment banks' wealth managers promoting equity swaps with all the bundled risk that of the punter.

This is now full circle from the days stock brokers kept the good opportunities for some and sold the rest to the retail public. At the time, a call to the DTI and from the DTI, would solve much; now there is a contractor who has no enduring obligation, or an answering machine and a response, "we only prosecute as the Insolvency Service" and in cases of fraudulent trading and/or administration. Plainly that cannot be regarded as either a timely or a sufficient response.

2. What have been the consequences of the above for (a) consumers, both retail and wholesale, and (b) the economy as a whole?

2.1. The Consumer Protection laws give front line protection by mandatory prosecutions, that, in themselves, facilitate civil relief: if an unprosecuted offender is fighting prosecution, the victim cannot practically secure civil relief.

2.2. The front line are: police; trading standards; SFO; FSA; DTI/BIS (DPP); OFT (as was); and any other body with prosecuting powers. Prosecution is mandatory and not discretionary, ie it cannot be prevented unilaterally by any of these bodies asserting "we prefer to focus on education and improvement", "we believe XXX enforcer should run with this", "we provide guidance where to go" and/or securing contrary evidence with a view to discrediting the victims and instead of focussing on the event, or otherwise creating a false account about which the victim knows nothing. If the front line fails, the victim will get no relief. Enforcers know this and hire externals to undertake Customer Satisfaction Surveys, and re-deploy front line enforcers, to give Customer Feedback and a steer to the next Complaints body, report to each other secretly, and the person responsible moves on. Victims die or become bankrupt or permanent disability or simply give up, in particular over periods of years.

2.3. Insurers have chosen to drop out of the picture, marketing instead litigation products in which they can secure up to 49% of the spoils of a transaction managed through the courts, off balance sheet, and secured on the capital assets of the victims. Those with an insurance policy, are met with a blockage of lawyers working for the insurers, to turn down claims and defend the insurer, when finally held to account in court on the six year dead line; the relief promoted by FOS, who say they can do nothing, but in fact assist the insurers by agreeing to accept "evidence" that is kept from the victims, until at least, FOS has turned the victims down.

2.4. Citizens Advice, the provision of which is a statutory obligation of local authorities, has now been turned into a purchasing exercise by local authorities, who choose not to recognise the obligation to provide this fall-back or back-stop service, substituting merely an exercise to "let a contract". There is no quantified assessment of the calamity caused in the City of London, impacting Westminster also, by the Mayor and Commonality of the City (Corporation) of London pulling the plug on the Citizens Advice Bureau, losing in one fell swoop all its dedicated and underpaid staff, who assumed the problems of the victims and led them through the jungle they faced, and thereby dropping all the cases they were running with including over years, causing mayhem in their wake including in the courts. Court clerks say "we are not legally trained, we cannot tell you which form to fill in." Personal Support Units (volunteers), where they exist, will help you find the form, but will not say whether it is the right one or not.

2.5. Trading Standards are disproportionately small compared to the prosecutions for licensing breaches they are required by law to prosecute; Corporation of London has a team of three and one part timer to deal with the whole of the City of London. This compares with the £22 million the FSA is reported on spending on IT alone, apart from the cost of its palatial accommodation that has not been earned, judging by what it has achieved, and now houses secretaries who are too busy to undertake what they perceive as menial work, as collect letters on market abuse from those attending the FSA to deliver to them, having incurred the cost and time to get there.

2.6. This builds a picture that it has now become wholly impossible to separate retail sales; wholesale sales; product manufacture; identify who licenses what and who is accountable for what and against which published standards. It shows that without:

2.6.1. impact assessment;

2.6.2. quantified data sourced and collated from at least the licensing bodies;

2.6.3. open recognition that law enforcers are separate bodies with infrastructures and operations that do not readily lend themselves to integration;

2.6.4. recognition that failures by local councils funded locally (police, trading standards, citizens advice etc), "micro" failures, cannot be repaired at a national macro level;

2.6.5. recognition that "regulators" cannot replace enforcers, are not competent to do so, and, in fact, act to circumvent the rule of law, the authority of Parliament and the operations of the court, fuelled by those identifying "tribunals" as a source of lucrative business, all parties emboldened by the limited liability partnership act. The effect is that fines are now regarded as a routine cost of business for an auditor, whereas this previously was the preserve of nomads and investment banks operating close to the wire;

it follows that the creation of competitive and deflecting "tribunals"; enforcers being allowed to bury the past and promise better for the future, against more budget; and "deals" that effectively circumvent the courts, are approached that are doomed to failure and can never be either fair or be seen to be fair. This includes by those most vulnerable whose money and investments create and support the financial market, and who have seen their life's savings, post war advancements in welfare and their grandchildren's futures diluted or disappear, graphically as a vortex of water down a plughole, while the shift of capital towards those "working the system" to their own benefit forges on unabated, and youth are compelled to start adult life loaded with debt and worry for safeguarding their elders. This, in economics jargon, is called a market failure.

2.7. At a macro level, the position is a very simple one; in 2000 lobbying forces persuaded Parliament to create the Limited Liability Partnership Act 2000. This artificially attempted to incorporate (auditors, lawyers, others), limiting future liability, including on a "tax free" basis (colloquialism), whilst keeping out fatal and contingent liabilities that had not come home to roost. It sought in effect to protect individual partners/members from personal culpability and liability, creating a glaring mismatch with legal directors under the Companies Act, with personal liability, and whose every move, such as a decision to resign, provides an important signal to the market.

It sought to convert uninsurable defaults to those matters that could be argued by a non party, without knowledge, to a default that was insured and arguable ("professional negligence"). It sought to allow trading in risk and audit certificates; and was permissive of incorporation after distribution of assets, and other devices, to "wipe the slate clean" and start over. It excluded for those incorporsting all forms of parity with those on whom it purported to report (sponsors reports, due diligence on launch, audit disclosures, fundraising diligence). It was permissive of secrecy over details of appropriations/remuneration/members agreements and no requirement for audit per se of the pre incorporation period.

2.8. Crucially these LLPs were allowed to audit those who had been compelled to go through the rigours of a public flotation that they themselves had not been through, requiring opening their books to auditor, sponsor, lawyer, initial investors and explaining the source of the goodwill they were putting to market and describe in whom it was vested; exposing insurance agreements; contract terms; CV's of members; severance/retirement terms; members agreements; and committing to quarterly reporting with full accountability in law for members and senior staff. LLPs are allowed to merge (now cross border, effectively), without public diligence on the merger; members are allowed to move job, indemnified by those left for their defaults, no address for service of claim form certain that the likes of the SFO will not prosecute under the Bribery Act 2010 or POCA, as they are required by law and Ministry of Justice guidelines to do.

2.9. Financing products have flourished, manufactured by these players, uncurtailed alarmingly by having to get FSA licensing authority for these risk shift products. Instruments sold includes those involving the use of the courts pre-emptively, in reverse to that which the law intended, currently a civil abuse and not a crime, as the courts are always in "catch up" mode, requiring authorities to extend the existing law. They include those in which there are parallel activities outside the court and inside, with those inside used to secure leverage for those outside.

2.10. The result is that it makes no sense to approach these developments as a series of problems, rather there is a compelling approach to treat them as an intertwined and interdependent set, that must be accompanied by live experience/evidence which tests each of these processes to the point of exhaustion. It mandates eliciting evidence from those best placed to give it and not those purporting to represent others, in particular to the exclusion of the victims. It may require frank admission that to date there has been no enquiry into the adverse effect of lobbying, which, combined with revolving doors, raises the difficult and perplexing question of who it is who is governing.

This market failure is the one space that the government uniquely occupies. The Commission will succeed as far as it can identify the first hand evidence and give voice to the evidence of those who otherwise are voiceless, including in spotting the next train predicted to crash, as, for example, the effect of liberization of litigation financing, without concurrent authorities on abuse starting to emerge, highlighting the measures banks resort to when caught out, including by interference in their customers civil reliefs in which they otherwise play no part.

3. What have been the consequences of any problems identified in question 1 for public trust and in, and expectations of, the banking sector?

3.1. Simply, the public see the banks as thieves. Withdrawing free banking and personal bankers and using off shore call centres with access to private data says it all. If Joe Public had an alternative for banking, savings, insurance, local authority services, they would take it like a shot. If the staff of these places had an alternative, they may well do the same; anecdotal personal evidence shows the outflow where there is a choice.

3.2. The public has written off the banks and properly resents have to pay to reward them for their unfettered addiction to greed and lack of stewardship or regard for whose money and risk it is, simply if X wants to speculate, the risk should be confined to X, with a health warning on the packet; unless the one way flow of private capital can be reversed and the public compensated, attempts to restore confidence are doomed to failure. The public have repeatedly been proved right, as shown by "kicking into the long grass" plans to separate different business areas and inertia in stopping revolving doors policy. Joe Public does not want a government ruled by the banks, but there is no one to listen, let alone hear.

3.3. Trivially simple steps are repeatedly over looked. For example BIS has it within its gift to ask any licensed person to assist it without pay beyond out of pockets, including steps to ensure parallel running of tasks with permanent staff, to retain the knowhow, so that BIS itself is a centre of forefront of thought, as respected as the Inland Revenue was thirty years ago. It does not do it. BIS can grovel (it would have to) and incentivise early retirees to come back and help it, this time treating them with the respect and accolade they deserve and taking the benefit of their evidence and experience. It does not do it. The cheque book can be taken from Buying Solutions and burned. It does not happen. Anyone hoping to move function with their tasks not completed and records capable of retrieval, could be invited not to start. It does not happen. A straw poll could be carried out of small to medium accountants (to, say, 50 staff) to assess the barriers to entry into the audit market, the effect of polarisation and the deskilling from the time audit requirements were eased. It does not happen.

The result is that there is no fresh supply chain into the market, uncontaminated by the past. This coincides with barriers to entry for new solicitors and barristers, whilst existing legal businesses charge outrageous hourly rates for outdoor clerks, their secretaries and their taxis, previously known as the post room staff, and use advertising legal assistance to artificially inflate statistics (source: CAB), whilst attempting to "switch sell" to a customer paid service.

3.4. Sacred cows are capable of open challenge, as, for example, rolling the FRC into BIS, with staff mainstream civil servants, or asking licensing bodies to poll members before responding and to provide statistics routinely. Without such measures, what will happen has no preparation, courts are plastered with warnings that staff are protected by security from rudeness, aggression etc—nowhere does it say that victims of what some of them get up to are equally protected: the sadness, is that this is known, and aspects were reported to Cameron Scott on 24 May 2007, now on the FRC website. Cameron Scott has left the FRC having signalled BIS's website for the prosecution of LLPs. Lawyers from the FRC say they destroyed his files and blame the service level agreement with the ISP for delays in restoring those records held electronically.

3.5. These points are not complex but are important as it is wholly unclear that there is much room to manoeuvre apart from a systematic analysis with real evidence and devoid of vested interests.

4. What caused any problems in banking standards identified in question 1?

4.1. Unfettered addiction to greed; the predictable and predicted (by the DTI staff) failure of self regulation; revolving doors; the impact of lobbying; consultations without evidence (eg from civil servants taking early retirement, executive directors, jailed directors, those who have chosen to leave the SFO; FRC etc, licensing bodies who have not provided statistical data, graduates and school leavers who cannot find work, those let down by their local authorities or made homeless by them and cannot fight back); the failed attempt to prop up the 2008 mini crash, that the man in the street could predict was going to fail; the lack of post event investigation; specific case examples on current re possessions; data on the impact of statutory obligations to provide a service being turned into a purchasing exercise by local and central government bodies; the effect of the LLP Act; the effect of liberalization of litigation financing; the effect of the plethora of unlicensed unregulated financial instruments with which the courts have not caught up; a demoralized public; fear of long term depression; inability to pay food electricity travel.

The Commission requests that respondents consider (a) the following general themes:

— the culture of banking, including the incentivisation of risk-taking;

4.2. It does not happen that traders who take risk have not got the tacit approval of their firm; the traders are merely the ones who can get caught out when it goes wrong.

4.3. There are moral and ethical issues of allowing scapegoats, and as many views will be expressed as people asked. The buck always stops with the man at the top and the auditor who failed to test the control environment or understand the transactions before him and was willing to sign off in the knowledge that the resilience of the balance sheet depended on the resilience of the other banks in the system: that is the same as an assurance report which says "we know it will crash, just a matter of when" and when caught out, saying it was a liquidity problem: plainly if the response to a hole is to pour money in, that is not going to work because the hole will never be plugged. Illiquidity is a feature of being insolvent; "solid" receiveables can be turned to cash, receiveables from those that cannot pay cannot—the auditor's job is to know the difference and not to say that the interdependence of the banks means they cannot collapse.

4.4. These problems will never end until the audit certificate says what the auditor has done, rather than the current practice of not reporting on what he has not done; says who has done it; who was inspecting; and what licence the person held and what for. Banks are large with many silo and matrix structures, and most will

admit that no single person inside the bank will have an end to end view of transactions. The auditor by contrast must have the end to end view, and must report, that the bank survives only if the other banks do; if that is the case. The truth in fact may be that they do not know.

— the impact of globalisation on standards and culture;

4.5. Progress comes from abroad; Europe had auditors signing their own name years before the UK, the UK still hides the identity of the second partner on public company audits—if they cannot own up to who they are, how can the public have confidence that they exist or that do anything beyond signing off on an exceptions based risk report purged of those items purportedly disposed of? Australia required a statement of independence from its auditor; we do not. Canada requires assurance reporting to be backed by some forensic accreditation. We do not.

4.6. Financial statements have increasingly become unwieldy with literate and numerate reporters having to pay others to read them and the financial information buried beneath mountains of impenetrable notes and policies—this compares with the single question from fund managers, "is it going to fall over? How is the cash doing?"

4.7. VAT inspections, previously a key way untoward transactions were revealed, have lost their bite, since VAT merged with the Inland Revenue to become HMRC. Now returns are reviewed to see if they look like last time, rather than, what do they relate to? HMRC is self financing and this dilution in effectiveness means that problems are not detected as source by those in the best position to blow the whistle.

4.8. Global toxic products are as destabilizing as domestic ones; speculation in food prices on the global market is the same toxic effect as LIBOR rigging. The FSA has wrongly said it cannot prosecute such cases under FSMA 2000 because the default itself is not a "quoted security". FSMA 2000 is about all the inputs that flow collectively to create asymmetric market information, without exclusions. For example the parallel in a public company is the information flowing into a company's board: if a case of market abuse is being brought (knowingly/recklessly misleading including by omission etc), the case will examine the whole flow of information, not just the statement that was/was not made. Any "rigging" of a price or information flow is caught, that affects the public market or the price at which trades occur and the legislation had been described as the simplest around, with no effect because law enforcers choose not to enforce it; employ lawyers to find reasons not to; or choose not to enforce against the hand that feeds them (the case for the FSA whose staff wages are paid by levies on the banks etc). This leaves the banks (and insurers) in an unassailable position with the "policeman" committed to not upsetting the apple-cart, and heads of enforcement leaving in turn for lucrative posts in law firms and accountants.

— global regulatory arbitrage;

4.9. It is open to the FSA to not give permission for such transactions; the decision to set the FSA aside and create AIM, with the NOMAD the decision maker, was bound to fail, and has. This is because the NOMAD makes his money on public offering/fundraising/re purchases/M&A, and apart from seeing his clients safely out of the investment and not being seen to resign, or to blame when the bubble bursts in any one case, has no continuing concern save their own reputation.

4.10. Global regulatory arbitrage will go wrong if there is already something unsound; it will turn into a disaster if there is asymmetric information, ie the market is not fully informed. All disasters must be independently investigated and not by the licensing or regulatory body; the rush to enter deferred prosecution agreements or prosecute directors and not the city firms responsible creates an environment with no accountability and no opportunity to learn.

"Arbitrage" is a loaded term; if the arbitrage is itself the product being sold (like tax mismatch products devoid of commercial risk), the product warranty on launch ought to spell out the risks, and be authorised by the FSA even if the float is on AIM and left to the NOMAD. It is a financial product and the public must be protected. It was predictable that the mere existence of AIM would at once create opportunistic public offerings that wrappered product outside FSA product vetting; on launches not vetted by the new issues team.

Once that has finally failed, another more resilient equivalent will emerge, leaving all enforcers and the courts lagging behind by a factor of eight or more years. This delayed "catch up" together with the need to overcome the learning hurdle and a reticence to admit the extent of the failure, creates a "dragging" effect before repair, compounded by the eroded skill and experience base of the law enforcers. It has been left to the senior judiciary to complain that restructuring the police is a big problem for the courts: however this is like the little dutch boy putting his finger in the dyke to stop the torrent of water or bandaging the wrist of someone dying of suffocation. Ultimately unless the FSA/its successor is staffed by those with police prosecution experience, and independent from the levies, it can never have bite in stopping criminal activity or, indeed, in assuring ministers that the exercise is no more complex that prosecuting a hit and run, only fought in ways which are much more sinister.

It can be proved by modelling that the impact of the above, other factors constant, is to lengthen the economic cycle making short term recovery instruments less effective, if not cosmetic.

— the impact of financial innovation on standards and culture;

4.11. Evidence is available from this witness to be provided live; briefly innovation has become synonymous with circumventing law and rules and those profiting effectively positioning themselves above Parliament and the courts. The applicable standard is a ruthless and callous addiction to greed unfettered by any licence or respect for fellow human beings; and without any thought of whose assets are being taken or used including against the rightful owner. Until there are regular prosecutions of those at the top, and LLPs routinely blacklisted in the courts, as those who issue a cheque to the courts that bounces, the rule "it is what you can get away with" and co-operation between players will always win.

— the impact of technological developments on standards and culture;

4.12. technology (beyond photocopying and scanning and email) has increased the gap between those who have and those who have not. Victims cannot access the courts for relief as case authorities, forms with guidance, transcriptions, bundles production etc are all expensive and beyond reach and the standard methodology in the court to "progress a case" rather than to "get it right", together with penalising a loser for the fact of the loss whether procured honestly or dishonestly, transferring burden unfairly, means that there is less of a level playing field than previously, when clerks willingly explained what to do;

4.13. workflow products has destroyed the work of FOS, as multiple people handle an electronic file, none of who know the case or have any responsibility beyond filing. A proud announcement "we have cleared the backlog" merely means the file has been closed yet without regard to whether the claim was rightly and honestly resolved or not. This is mere manipulation of statistical data that helps no one, including FOS;

4.14. shared services in the courts guarantees that files from different courts are handled by clerks trained in just one, timescales are prolonged, and final judgments can remain unprocessed for 1.5 years, whilst non parties have a field day in deflecting antics and collateral attacks, enabled by those inside, not necessarily informed of the true and complete picture. So called orders are produced by clerks purportedly emanating from members of the judiciary whose authenticity is not assured and when challenged, are deflected. Properly every such incident must be investigated; in practice it does not happen. Technology per se cannot be to blame for documents, evidence, or so called orders that are not proper for one reason or another.

— corporate structure, including the relationship between retail and investment banking;

4.15. retail and investment banking should not be in the same group, nor should retail be vulnerable to collapse in the event of the failure of the investment bank (loans upward for example).

4.16. Progress up the management chain needs to be of those servicing the customers and not those "working the system" in practice there is evidence this can include by covering on financial crimes, theft, money laundering, mixing of client monies etc masked by internal lawyers, possibly hoping it will all go away, if delayed long enough, over months and years ie the victim is set up to be the problem.

— the level and effectiveness of competition in both retail and wholesale markets, domestically and internationally, and its effects;

4.17. International operations have become impossible to navigate for retail customers, with foreign accounts dealt with separately; probate unwieldy and call centres neither where the money is not the customer and agents uninformed. Banks with overseas operations and who default block communications, sever relations, introduce strangers hire lawyers serially, alienate customers from money, investments and records, and go into courts to write off all trace of the account. This appears "run of the mill".

— taxation, including the differences in treatment of debt and equity; and

4.18. Undisclosed debt and financial dependencies are a bigger issue than debt equity ratios; relaxation of rules for insurers, begs the question of what they were doing to need relief. Where the answer is "speculating", more questions need to be asked.

— other themes not included above;

4.19. the responsibility of the auditor and their independence

and (b) weaknesses in the following somewhat more specific areas:

— the role of shareholders, and particularly institutional shareholders;

4.20. Fund managers will make decisions based on management; if discord they will back the incumbents. These are governed by terms of the trusts they represent with limitations on what they can do beyond buy, sell, recommend etc. They do not like shocks and have no interest in non executives or regulators.

— creditor discipline and incentives;

4.21. Evidence is that creditors with a fatal or reputationally devastating claim will be the subject of wiping out tactics rather than paying their due and being held accountable.

— corporate governance, including

4.22. the term is a misnomer; it was previously simply risk management;

— the role of non-executive directors

4.23. non executives are directors as any director with personal liability set out in the Companies Act; few are prepared to assume the responsibility as they carry 90% of the risk, with 10% of the information. Non executives depend entirely on the executives, and attempts to split them, "as though" they were an overseeing function only, and not fully liable under the Companies Act, are misguided.

The situation is different to say, Germany, where there is an executive board and a supervisory board.

Non executives must have had at least five to ten years experience as an executive director in order to be credible and able to "punch their weight" in supporting the business. Retired audit partners are not credible as non executive directors and have neither the experience nor the credentials to serve. Regretfully, there are regular instances of partners retiring and after a period joining the board of those they audited. That simply cannot be right.

Investors (fund managers) do not tend to object because they are more interested in the business and the executives, unless they wish to complain on pay for example or other issue dealt with by a non executive committee.

—the compliance function

4.24. this depends on how it is being used; where the compliance team is used to ward off the FSA, it is meaningless, where to bring rigour, it is useful. Must be linked with the auditors to work best; if Joe Public complains to them, they will say "tell the business, we are back office."

—internal audit and controls

4.25. often bullied; not respected; a source of reliable data and analysis; can miss the point (eg in the courts where the internal auditors audit fee remission data to death, yet do nothing to audit the irregularities of those seeking to use the courts for relief the courts cannot give, and pay money to do it);

—remuneration incentives at all levels;

4.26. Emotive but not the highest priority: earnings in LLPs are not disclosed and are much more damaging because the LLPS sign off on the audits and diligence reports of the banks;

— recruitment and retention;

4.27. Only experience is that by 40 years of age bankers are out, it seems;

— arrangements for whistle-blowing;

4.28. Harmful to the whistleblower usually. This cannot be properly considered without assessment of PIDA (public interest disclosure act), which does not set out to expose the wrongdoing, so the effect of stifling the (potential) whistleblower continues. Enough time has passed for Joe Public to realize that whistleblowers are not de-stabilisers, but those who have experienced wrong doing and have chosen to act to meet their obligations and protect others. Possibly the most valuable source of evidence to the Commission if it can be harnessed and voiced.

— external audit and accounting standards;

4.29. Very low down the food chain; law firms in their scramble for the goodwill of the banks will not hold back on making their clients assets available to the banks without authorisation.

— the regulatory and supervisory approach, culture and accountability;

4.30. Continues in silos and not co-ordinated; issues with loss of records; misuse of evidence; over reliance on contractors; early retirement and staff attrition. FRC over dependent on lawyers rather than accountants.

4.31. FSA lawyers pull the strings in the background and actively stop directors receiving the information and records that would enable them to prepare proper accounts and notify the markets; this strangle hold over the business by internal lawyers is manifest in the local authorities; FSA; BIS; SFO; FRC as well as the LLPs insurers and banks—these in turn appoint their own lawyers creating layer on layer on layer, that then gets laundered in the courts in contravention at least of POCA. Whole proceedings occur without the underlying point being defended ever emerging until after conclusion. All those in the process prioritize defending their own actions rather than admitting their own errors and correcting them. Senior civil servants in the courts refer to the reluctance of "the court" to admit its own errors, watch judiciary interfere in the orders of their seniors and refer to the state of the British justice system, in terms which are enlightening.

— the corporate legal framework and general criminal law; and

4.32. In arrears, given the picture painted above. White collar crime in the civil courts is rife, affecting all courts. There are no published statistics.

— other areas not included above.

4.33. Route for civil relief for victims, where there has not been a prosecution, and for all aspects of human rights arising (autonomy, privacy, family life, right to a fair trial, right not to be falsely imprisoned by being taken to court improperly or forced into servitude and working for no pay by improper proceedings).

4.34. Support for MPs constituency offices in plugging the gaps, now a chasm.

5. What can and should be done to address any weaknesses identified? To what extent are such weaknesses subject to remedial corporate, regulatory or legislative action, domestically or internationally?

5.1. Stop the work to dilute the Companies Act immediately;

5.2. Investigate AIM failures and the role of the auditor/NOMAD;

5.3. Intervene in court cases (MoJ) where there is a principle to be established;

5.4. Accelerate steps to protect routine banking retail business;

5.5. Investigate the use of the courts post LLP Act plus the required steps to subject LLPs to the same rigour as a Plc; be ready to debar abusers from the courts;

5.6. Attempt to establish the extent of banks activities in mixing of client monies and other unauthorised transactions of the retail businesses and the risks they are exposed to from the intertwined capital structure with other (investment) business; investigate law firms selling off shore banking/trust arrangements and where sanctions are (ie offshore bank marketing via UK lawyer, does the FSA know?)

5.7. Elicit evidence on small accountants, barriers to entry and the new auditor supply chain;

5.8. Make recommendations on the importance of reviving respect for the civil service and the management of any essential suppliers (without pay), whilst lost experience from early retirements/not keeping up to speed with new instruments of risk shift/elimination, is rebuilt;

5.9. Establish supply chains of statistical/empirical data from licensing bodies and their licensees as well as others (the courts);

5.10. Openly recognise that the "system" depends on proper records being maintained by the executive director, the "lynch pin", City firms (the rest) are the "suppliers" and that, further, the rest must be support not be players in their own right, ie independent, if there is to be rigour and prosperity and that there must be opportunity for new entrants and fresh uncontaminated blood, school leavers and graduates, as well as small firms not squeezed out.

6. Are the changes already proposed by (a) the Government, (b) regulators and (c) the industry sufficient? Respondents may wish to refer to the Financial Services Bill and the Government's proposals for the Banking Reform Bill. They may also wish to refer to proposals by the Bank of England and the Financial Services Authority on how the Financial Policy Committee, Prudential Regulation Authority and Financial Conduct Authority will operate in practice.

6.1. No for the reasons given. Law enforcers cannot be funded from fines and levies of those they are required to hold to account. Statutory functions, as audit or legal notary/due diligence work cannot properly give the auditor take home pay that exceeds the civil service pay structure. Once these are out of line, greed takes over, with wholly predictable results including the massive shifts of capital we have witnessed.

7. What other matters should the Commission take into account?

7.1. First and foremost taking live evidence from those best to give it, unfiltered;

7.2. Second viewing the problem within the wider context and recognising interdependencies;

7.3. Third identifying real case facts that have not been prosecuted, and establishing why it went wrong;

7.4. Fourth holding enforcers to account on the back log and refusing to hear submissions on why it will all be better if more budget is released;

7.5. Fifth deciding where empirical data should be called for;

7.6. Sixth identifying quick wins and pushing ahead with those recommendations while the Commission is still live;

7.7. Seventh identifying supply side constraints and cases where intervention is the sole instrument for repair; reserve all posts to long term committed civil servants;

7.8. Eight, proactively intervene in the courts and develop the common law in particular in regard off balance sheet litigation funding, financial instruments such as pre emptive remedies used tactically in reverse and proceedings brought by non parties to secure relief the court cannot give at the expense of others. Tighten access to exclude lawyers and other intermediaries as far as possible. Check all financing contracts and identity of parties and non parties before allowing access (similar to the work of the Border Agency). Be ready to ban firms from access. Monitor so called "settlements" for evidence of bullying and coercion and remain open minded to the US model where out of court communications are made known to the court so unreasonable behaviour and unlawful leverage is fully exposed.

2 September 2012