NEW ZEALAND LAW SOCIETY

NZLS EST 1869

Insolvency Practitioners Bill: Supplementary Order Paper No. 45

24/8/2018

Insolvency Practitioners Bill, Supplementary Order Paper No. 45

1 Introduction

1.1 The New Zealand Law Society (Law Society) welcomes the opportunity to comment on Supplementary Order Paper (SOP) 45, which amends the Insolvency Practitioners Bill 141-2 (Bill).[1]

2 Overview

2.1 The SOP proposes to change the regulatory framework set out in the Bill to a positive licensing regime with a co-regulator model, focusing on insolvency practitioner competency and integrity. Briefly summarised, under the proposed regulatory framework:

- A licence will be required to act as an insolvency practitioner.[2]
- The Registrar of Companies is the overarching or supervisory regulator, and will be responsible for setting minimum standards of conduct and for accrediting and monitoring accredited bodies that will be the frontline regulators.[3] The frontline regulators will be responsible for licensing and complaints and discipline. The Registrar can, however, step in to undertake regulatory functions of accredited bodies.
- The Registrar will maintain a public register of licensed insolvency practitioners.

2.2 This framework is consistent with the type of model the Law Society has supported in previous submissions on proposals to reform regulation of insolvency practitioners. The Law Society supports the objective of the proposed framework, which is to promote quality, expertise and integrity and insolvency practitioners' compliance with statutory duties.

2.3 We have examined the SOP to identify areas of potential overlap between the existing regulatory framework for lawyers and the proposed regulation of insolvency practitioners. In our view there are no regulatory overlaps of significant concern but, as discussed in this submission, some issues warrant further consideration before the legislation for insolvency practitioner regulation is enacted.

3 Lawyers practising as insolvency practitioners

The regulation of lawyers

3.1 There are few lawyers who practice as insolvency practitioners; the great majority of insolvency practitioners have accounting or finance backgrounds. Under the proposed regime, lawyers wanting to act as insolvency practitioners will have to become a member of an accredited body. The question is whether lawyers who also act as insolvency practitioners will need to be co-regulated by the Law Society, in addition to an accredited body. (As explained in the **attached** Schedule 1, the answer to that question will depend on the nature

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1 The SOP, introduced on 28 June 2018, shows amendments to the Bill that are being proposed by the Minister for the purposes of consideration in Committee of the Whole House. The SOP has been referred to select committee for public consultation.

2 An insolvency practitioner is defined in the SOP as acting as a liquidator (insolvent company), administrator, receiver or trustee (under Part 5 of the Insolvency Act 2006).

3 Such as RITANZ (Restructuring Insolvency & Turnaround Association of New Zealand) or CA ANZ (Chartered Accountants Australia & New Zealand).

of work undertaken, and whether it is "legal services" under the Lawyers and Conveyancers Act 2006 (LCA).)

3.2 In short, for the reasons set out in Schedule 1, the Law Society's view is that:

(a) Where a lawyer acting as an insolvency practitioner provides legal services to an insolvent company, those services will be "regulated services". In such cases, unless there is an amendment to the LCA, the Law Society will have a regulatory role (and such regulation will be appropriate). In practice, complaints about the provision of legal services would continue to be made to the Law Society. A party may also complain about the behaviour of a lawyer insolvency practitioner to an accredited body. The Law Society is comfortable that the two regulatory regimes will fit together well, and the Law Society will liaise with any appointed accredited bodies to ensure co-operation and assistance in relation to complaints (to the extent that the Law Society is able to share information under section 188 of the LCA).

(b) In contrast, where a lawyer insolvency practitioner is not providing legal services to the company, but is instead undertaking other aspects of the insolvency practitioner role, such as recovering and realising assets, then the Law Society does not consider that these aspects of the role will need to be (co-)regulated by the Law Society. They will be regulated by an accredited body.

4 Some issues for consideration

4.1 The Law Society has identified some issues, discussed below, for further consideration before the proposed framework for insolvency practitioner regulation is enacted, and recommends that the committee seek advice from officials.

"Fit and proper" criteria for insolvency practitioner licensing (clause 22)

4.2 The Law Society submits that consideration should be given to an initial qualification and/or "fit and proper person" exemption for lawyers. Lawyers are subject to a comprehensive regulatory regime designed to protect the interests of clients (features of the regime are set out in Schedule 2, **attached**). This exemption would minimise regulatory compliance costs, which are invariably passed onto consumers, and be administratively efficient.

4.3 The following general comments are also made in relation to the "fit and proper person" criteria for insolvency practitioner licensing:

- There is no statutory provision in the SOP equivalent to section 41 of the LCA, setting out potentially relevant matters to the determination of whether an individual is a fit and proper person.
- There are "ongoing competence" requirements (clause 26), but no specific ongoing "fitness" requirement, which is notable, given that the duration of a licence is up to 5 years. There does not appear to be any scope for annual renewals and disclosure of any issue that may impact an individual's fitness to hold a licence.
- Clause 29 provides the grounds on which a licence may be cancelled, including that the person is no longer a fit and proper person to hold a licence. Given the apparent absence of a statutory test for the criteria relevant to the "fit and proper" assessment, it is not clear how a cancellation on "fit and proper" grounds will be determined.

- Clause 34 provides that the Registrar may prescribe conditions that attach to licences. The Law Society has previously submitted about the need for supervision for insolvency practitioners with limited experience.[4] The Law Society assumes that the conditions to be prescribed by the Registrar will address this point (along with the minimum standards for licence set out in clause 35).

"Membership" of a professional body

4.4 A liquidator of a solvent company does not have to be a licensed insolvency practitioner, but there are defined limits on who can act; the definition includes "a member" of the New Zealand Law Society (clause 80(1)(a)). This clause will need to be amended to refer to a "lawyer" (as membership of the Law Society is not relevant to the regulation of lawyers).

4.5 In addition, we understand that the New Zealand Institute of Chartered Accountants and the Institute of Chartered Accountants in Australia amalgamated to become Chartered Accountants Australia and New Zealand (CA ANZ), so clause 80(3)(a) will need to be amended accordingly.

Legal privilege

4.6 The Registrar has powers of compulsion in relation to information (Part 4, subpart 5), but there is no specific recognition of legal privilege. It is preferable that this is addressed, and appropriate measures put in place for the protection of legally privileged material.

Multiple accredited bodies: Part 4, subpart 4 accreditation

4.7 Part 4, subpart 4, provides for the accreditation of bodies that can issue licences and carry out other regulatory functions. The Law Society notes that if it is possible for more than one accredited body to regulate insolvency practitioners, and each accredited body can establish an appropriate disciplinary framework, there is the potential for inconsistencies to arise between the disciplinary approaches taken by accredited bodies. The committee may wish to seek further advice from officials on this point.

Information sharing

4.8 Clause 86 provides for an accredited body to share information with the Registrar. There does not appear to be any provision enabling accredited bodies to share information between themselves.

4.9 In addition, it is not clear what would happen if an insolvency practitioner was not granted a licence by one accredited body, and then attempted to obtain a licence from another. Sharing of information between accredited bodies may prevent practitioners shopping around for licence approval.

Summary of recommendations

4.10 The Law Society recommends that the committee:

- consider an initial qualification and/or "fit and proper person" exemption for lawyers, as discussed at paragraph 4.2;

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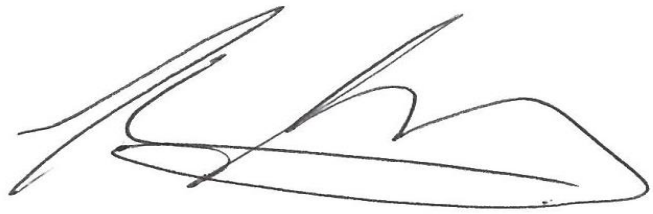
[4] Insolvency Practitioners Bill: NZLS 11.10.10; Insolvency Working Group, Report No. 1: NZLS 6.10.16 (available at http://www.lawsociety.org.nz/__data/assets/pdf_file/0005/105593/l-MBIE-Corporate-Insolvency-Review-6-10-16.pdf).

- seek advice from officials on the "fit and proper person" criteria for insolvency practitioner licensing (paragraph 4.3);
- amend the clause 80(1)(a) definition of "solvent company liquidator" (paragraph 4.4);
- amend the clause 80(3)(a) definition relating to the "New Zealand Institute of Chartered Accountants" (paragraph 4.5);
- address the position of legally privileged material in relation to the Registrar's powers of compulsion, and insert measures to protect such material;
- seek advice from officials on the potential for accredited bodies to adopt inconsistent disciplinary approaches (paragraph 4.7); and
- seek advice from officials on a potential amendment enabling accredited bodies to share information between themselves (paragraph 4.8).

4.11 The Law Society would appreciate the opportunity to appear before the committee in respect of this submission.



Kathryn Beck
President
24 August 2018

Schedule 1: Insolvency practitioners' role, and "legal services"

Schedule 2: Regulatory regime for lawyers

Schedule 1: Insolvency practitioners' role, and "legal services"

The ordinary role of insolvency practitioners

An insolvency practitioner generally acts as the agent of an insolvent company. The insolvency practitioner is appointed by the court, shareholders, or a creditor and acts (in most cases) as a liquidator, receiver, or administrator. Less formal engagements also arise—often where a significant creditor exercises a contractual right (for example, the appointment of an insolvency practitioner as an investigating accountant).

Among other things, insolvency practitioners are routinely called upon to:

- consider whether to make claims against debtors, directors, shareholders, advisers, or other third parties against whom the insolvent company or insolvency practitioner may have a claim;
- consider whether to disclaim property;
- decide whether to accept or reject creditor claims; or
- enter into and document new arrangements with counterparties.

None of these acts are commonly understood to be legal work performed by insolvency practitioners. Indeed, whenever carrying out these acts give rise to a legal need, the usual course is for the insolvency practitioner to instruct a lawyer. That said, a material amount of the work undertaken by insolvency practitioners can have a legal flavour.

Are the activities of lawyer insolvency practitioners 'legal services' regulated by the LCA?

- The LCA defines 'legal services' to mean '… services that a person provides by carrying out legal work for any other person'.
- 'Legal work' is relevantly defined to include:
    - the reserved areas of work;
    - advice in relation to any legal or equitable rights or obligations; and
    - preparation or review of any document that creates or provides evidence of legal or equitable rights or obligations, or creates, varies, transfers etc. any legal or equitable title in any property.
- 'Reserved areas of work' are defined in the LCA to include legal advice in respect of proceedings and appearing as an advocate before the courts.
- A lawyer providing legal services is providing 'regulated services' under the LCA.

Insolvency practitioners, whether they are lawyers or not, are commonly involved in aspects of 'legal work'. In particular, they are involved in the preparation of documents that create rights or obligations. Is this 'legal work' carried out for 'any other person', as required in the definition of 'legal services'?

Insolvency practitioners will usually be concerned with their personal legal liability or that of the company that they are administering. In the Law Society's view:

- If a lawyer insolvency practitioner advises herself, then she is not providing legal services to 'any other person'.

- If a lawyer insolvency practitioner provides advice to the company she has been appointed to, then she is carrying out legal work for another person, her principal, and therefore will be providing 'legal services' under the LCA.

It follows, in the Law Society's view, that:

- Where a lawyer, acting as an insolvency practitioner, provides legal services to an insolvent company, those services will be 'regulated services'. In such cases, unless there is an amendment to the LCA, the Law Society will have a regulatory role in respect of the lawyer insolvency practitioner (and such regulation seems appropriate).
- In contrast, where a lawyer insolvency practitioner is not providing legal services to the company, but instead undertaking other aspects of the insolvency practitioner role, such as recovering and realising assets, then the Law Society does not consider that these aspects of the role will need to be (co-)regulated by the Law Society. They will be regulated by an accredited body.

Schedule 2: Regulatory regime for lawyers

1 The fundamental obligations imposed on all lawyers by section 4 Lawyers and Conveyancers Act (LCA) include the following:

a to be independent in providing services to clients; and

b to act in accordance with all fiduciary duties and duties of care owed by lawyers to their clients.

2 The fiduciary obligations which lawyers owe to their clients exceed the duties of other professional or occupation groups, including financial advisers.

3 Rule 3 of the *Lawyers Conduct and Client Care Rules* (RCCC) states that a lawyer must always act competently. Accordingly, a lawyer who provides legal services to an insolvent company must at all times do so competently.

4 The RCCC comprises a detailed set of rules of conduct and client care which are binding on all lawyers.

5 Rule 3.8 RCCC requires each lawyer to ensure that the lawyer's practice establishes and maintains appropriate procedures for handling complaints by clients with a view to ensuring that each complaint is dealt with promptly and fairly by the practice.

6 As required by the LCA, the Law Society maintains a Lawyers Complaints Service which operates on a user-friendly basis. Complaints are considered by Standards Committees comprising lawyers and at least one lay person. Standards Committees are able to impose a wide range of orders, including orders to:

a reduce or cancel fees;

b pay compensation;

c rectify at the lawyer's own expense any error or omission; or

d pay a fine.

A complainant may apply to the Legal Complaints Review Officer (an independent Government-appointed person) to review a Standards Committee decision.

7 The Law Society operates a comprehensive financial assurance scheme. Compliance with trust account rules is monitored and enforced by a team of Law Society inspectors.

8 The Law Society maintains a fidelity fund which reimburses clients in the event of any theft.

9 In order to be admitted as a lawyer, a person must obtain a law degree (which involves at least a four-year study course), undertake the prescribed law professionals course and satisfy the Court that he or she is a fit and proper person to be admitted as a barrister and solicitor.

10 The Law Society has a continuing legal education division which, among other things, conducts travelling and webinar seminars. The seminars cover a wide range of topics.

11 Rule 3.9 RCCC requires a lawyer to undertake continuing education and professional development necessary to ensure an adequate level of knowledge and competence in his or her fields of practice. Further, each lawyer must undertake at least 10 hours of Continuing Professional Development each year.