
CHAPTER 13

**The Regulation of
Insolvency Practitioners**

13.1 Introduction

13.1.1 Among the issues the Review Group was asked to consider was the licensing and/or regulation of insolvency practitioners in Ireland. Current figures from the CRO indicate that there are 1,220 liquidators carrying out a total of 4,541 liquidations between them. Most liquidators are engaged in a single liquidation, with a relatively small proportion engaged in multiple liquidations.¹ Only 80 individuals are liquidators to ten or more companies. It is difficult to ascertain the average duration of liquidations or even the amount of funds held in liquidations although it should be noted that all liquidators of liquidations of more than two years' duration are required to file accounts of receipts and payments in the CRO. In addition to liquidators, the regulation of insolvency practitioners would also extend to examiners and receivers. The Group approached the issue of whether a licensing system and/or regulation should be introduced in Ireland with an open mind.

13.2 Approach of the Review Group

13.2.1 The Review Group received a number of submissions on the regulation of insolvency practitioners generally and of liquidators in particular. Most submissions call for statutory or statute-backed licensing for insolvency practitioners. There is also some support for utilising recognised professional bodies in a regulatory capacity as in the UK. The Group notes that many of the calls for regulation come from what might be termed "suppliers" to the market, and because of this submissions were the subject of rigorous scrutiny.

13.2.2 The Revenue Commissioners also made the case to the Review Group for licensing insolvency practitioners and for a bonding system to cover all liquidations, not just court appointed ones.

13.2.3 In the course of the Review Group's deliberations on mitigating the effects of strike-off for creditors², considered in Chapter 15, the Group came to the conclusion that the lack of a State-funded public interest liquidation service gave rise to a number of problems, which would otherwise be dealt with by such a service, and could exacerbate the consequences of other problems such as strike-off. Accordingly, the Review Group recommends that it be charged with considering the establishment of such a service in its second work programme 2002 to 2003.

13.3 Regulation and competition

13.3.1 In approaching the issue of regulation, the question posed by the Review Group was whether competition alone was a sufficient regulator of insolvency practitioners. The Group is aware that a regulatory framework, with consequent establishment of a standard with which practitioners must comply, and restriction of the right to practise, could increase the costs of a winding-up.

13.3.2 The broader issue of regulation versus competition has been, and continues to be, the focus of examination by the OECD.³ It is the case that all OECD countries regulate the activities of certain occupations, either directly or by delegating regulatory powers to professional associations. Typically, these regulations govern matters such as entry into the profession, the conduct of members of the profession, the granting of exclusive rights to carry out certain activities and (often) the organisational structure of professional firms. In many countries concerns have been raised that professional regulation has the direct or indirect effect of restricting competition in the market for professional services, raising costs and limiting variety and innovation.

1 An example of the scale of such multiple-liquidators is seen in *Re CB Readymix Ltd. Cahill v Grimes*, High Court July, 2001 (Smyth J) where the respondent, an engineer, was disqualified from acting as a liquidator, receiver or examiner of a company for seven years under s 160 of the 1990 Act. In the course of the judgment Smyth J cited the respondent as being "on his own averment liquidator of some fifty companies." It should be noted that this decision is under appeal.

2 The Review Group considered the situation of creditors in the context of strike-off of companies for failure to file annual returns with the CRO.

3 See OECD paper DAF/FE/CLP(2000) 2.

- 13.3.3 Concerns arise that regulation restricts competition more than is appropriate or necessary, raising the price and limiting innovation in the provision of professional services. In addition, where a professional association is delegated certain regulatory powers, such as the power to discipline its members, concerns arise that professional associations may use these powers as a tool to restrict entry, fix prices and enforce anti-competitive co-operation between its members. In the absence of regulation, however, consumers of a service may be unable to assess the quality of the service being provided to them. The OECD report concluded that as a general rule regulation of professional markets should address market inadequacies using means which least restrict competition.
- 13.3.4 Sophisticated commercial purchasers of professional services are in a position to assess their own needs and to assess the services they purchase and consequently have less need for regulation of professional services. This is particularly true in the case of receivers who are almost invariably appointed by financial institutions to act on their behalf in the realisation of security granted by companies to be applied in repayment of monies owing. Different considerations apply, however, to both liquidators and examiners. When a liquidator or examiner is needed for reasons of insolvency that company can hardly be said to be operating at its most efficient. In the event of liquidation, corporate or institutional shareholders may be able to look after their own interests. It is, however, the case that regulation should focus on the need to protect small consumers and there is a strong case to be made that the interests of small creditors and shareholders are in need of greater protection. After all, liquidators of companies are fiduciaries who are in control of other persons' money.
- 13.3.5 When a company is being wound up, the beneficial owners of the company's assets (its creditors and, if solvent, its shareholders) are thought entitled to the legitimate expectation that the person charged with the orderly realisation and distribution of assets in accordance with law possesses the necessary professional expertise to comply with what are, by any standard, sophisticated legislative provisions. There are certain functions that it is reasonable to assume can only be competently performed on a consistent basis by persons with appropriate knowledge and experience. For example, the State could not countenance persons who have no formal medical qualification offering their services to the public on the grounds that the public can choose to avail of their services or those of a qualified medical practitioner.
- 13.3.6 The Review Group considered whether there was an alternative to regulation through information disclosure. The argument would be that a liquidator would be obliged to provide information on his training and experience and this would, of itself, facilitate an informed choice. The Group concluded, however, that this did not protect small creditors or shareholders sufficiently, as they would not usually be in a position to significantly influence the choice of liquidator. Moreover, unless creditor and shareholder consent is unanimous, can it ever be right that a majority (whether bare or qualified) can agree to the appointment of an insolvency practitioner who lacks the necessary formal qualifications?

13.4 Issues arising in the proposed regulation of insolvency practitioners

- 13.4.1 The submissions received on the regulation of insolvency practitioners were more concerned with standard-setting than with citing specific issues where liquidations, receiverships or examinerships had not worked effectively. Since no nationwide historical survey which would have led to the compilation of empirical data on these specific issues has occurred to date, the Review Group had of necessity to rely to some extent on the experience of its members in the legal and business worlds and in public administration as well as on the submissions received. However, with regard to liquidators, for example, the perception available to the Group (inter alia from the Revenue Commissioners) is that currently, while the majority of liquidators act in an appropriate manner, concerns can arise about the following issues:

- (i) Failure by the liquidator to complete the liquidation, or the taking of an inordinate amount of time to complete the liquidation.
- (ii) Liquidators who appear to take on too many cases.
- (iii) Liquidators who appear to act in the directors' interests rather than in an independent fashion.
- (iv) Failure to comply with the reporting requirements of the Companies Acts.
- (v) Seeking fees in excess of what appears reasonable.
- (vi) Lack of particular knowledge and skills required to undertake the role effectively.

13.4.2 While the circumstances listed above would arise only in a limited number of cases the absence of a guaranteed level of professional expertise can in itself give rise to misgivings about professional competence.

13.4.3 The recent High Court decision in *Re CB Readymix Ltd; Cahill v. Grimes*⁴ illustrates just how badly wrong a liquidation can go. In that case Smyth J stated he was satisfied that the particular liquidator, in respect of whom a disqualification order was sought, had:

"(a) Failed to act in an impartial manner. (b) Destroyed the books and records of the company. (c) Failed to act in the interests of the creditors of the company and, in particular, of the Revenue."

Smyth J also stated that he was satisfied and found as a fact that:

"...the respondent has, notwithstanding being well seasoned as a personal litigant, sought to justify a course of conduct which displays a most serious lack of commercial probity. To seek, as the respondent sought in this case, to argue that 'the books and records were not destroyed, they were just dumped' displays a sense of gross negligence or total incompetence, and on the facts a complete failure to appreciate the gravity of the action taken."

Smyth J disqualified the respondent from being concerned in the management of a company as a liquidator, receiver or examiner for a period of seven years. The Review Group is conscious of the dangers of generalising from the particular. Nevertheless, it is the case that the liquidator in that case was not regulated by, or a member of, the recognised accountancy bodies⁵ or the Law Society of Ireland.

13.4.4 The Review Group accepts that a greater degree of regulation of insolvency practitioners is in the public interest. Unlike the UK and most other common law jurisdictions Ireland does not have a State-funded public interest liquidation service.⁶ The McDowell Report recommended against the establishment of such a service. It was pointed out that:

"For historical reasons of economy and scale, the Oireachtas did not provide, when enacting the Companies Act, 1963, any parallel to the functions of the Official Receiver in Britain. The function of liquidations and the enforcement of the law relating to insolvency was left in private hands, assisted by the supervisory role of the High Court's judges and officers. The result has been that there is little tradition or experience in the public enforcement by public officials of the civil or criminal law relating to serious non-registration type breaches of the Companies Acts."⁷

13.4.5 The cost of such a service to the Exchequer, relative to the size of the Irish economy, appears to be the primary factor against the establishment of a state-funded public interest liquidation service. If such a service was in existence, the Review Group considers that it may be easier to establish a regulatory and supervisory regime for insolvency practitioners. However, the Group considered that because of the McDowell Report's relatively recently reached conclusion, the focus would, in the first instance, be upon considering the possibility of improving the regulatory system, short of recommending such a large-scale change. This is a matter that the Group believes should be considered in its second programme.

⁴ High Court, 20 July 2001 (Smyth J). It should be noted that this decision is under appeal.

⁵ See 13.8.5.

⁶ The Report of the Government Advisory Committee on Fraud December 1992 made the point that no qualifications were necessary to act as receiver, liquidator, or examiner and recommended that receivers, liquidators and examiners should be licensed and bonded. That Committee noted that: "A licensing system for insolvency practitioners was introduced in the United Kingdom in the 1986 Insolvency Act. Since the introduction of that Act there is a general view that the quality of those appointed and also the quality of their work has improved dramatically."

⁷ At para 2.3.

13.4.6 Although the Companies Acts are clear as to the duties of liquidators they are silent as to appropriate qualifications. It is clear that for appointment as a voluntary liquidator one needs at least to enjoy the confidence of the company's creditors (s 267 of the 1963 Act). Sections 300 and 300A of the 1963 Act set out the circumstances in which a person is disqualified from appointment as a liquidator (s 300 of the 1963 Act specifies that a body corporate cannot be appointed as a liquidator). The Companies Acts do not set out any professional qualification as necessary to be held by a liquidator, receiver or examiner.⁸ Nor is delegated regulation by a recognised professional body of these occupations provided for as applies for example to the regulation of auditors by recognised accountancy bodies (ss 191 and 192 of the 1990 Act). It should, of course, be recognised that professional standards and codes of conduct apply to liquidators and other insolvency practitioners who are members of professional bodies.

13.5 Regulation – general principles and issues

13.5.1 As a general principle, the Review Group accepts that all liquidators, examiners and receivers should be:

- (i) competent to undertake insolvency work and knowledgeable of the Companies Acts;
- (ii) independent of the parties and able to act impartially;
- (iii) insured or bonded against loss through fraud, or malpractice;
- (iv) subject to some form of oversight and monitoring both generally and in relation to individual cases to assure continuing competence and the propriety of actions and decisions;
- (v) knowledgeable about the nature and scope of the duties to be performed and, where necessary, specialised in the business of the debtor;
- (vi) diligent, meticulous and scrupulous in their work, and possessed of a sense of urgency in the performance of their duties; and
- (vii) able to assess risk, and conduct their affairs in a cost-effective way.

The Group believes that the justification for requiring insolvency practitioners to possess such skills is because their work will involve them in situations where they are required to realise and distribute assets that are beneficially owned by others, whether creditors or shareholders.

13.5.2 The Review Group considers it essential that, through an accountancy or other qualification or degree or through experience, a liquidator is able to demonstrate a competence in the legal, accounting and business issues likely to be involved in an insolvency. In the absence of such demonstrable competence, there can be no rational confidence that a person will be able to exercise properly the powers conferred on him or to discharge his statutory and common law functions, duties, responsibilities and accountabilities. The Group accepts that this indicates the likelihood of a need for an insolvency qualification for liquidators where knowledge and practical understanding is tested by study, examination and experience.

13.5.3 Ideally, authorisation or licensing should follow from attainment of a professional qualification and the maintenance of probity and professional standards. This in turn suggests monitoring or supervision by a regulatory body. The regulatory body may be a government department or agency; a separately constituted body; a professional body (or bodies); or a combination, provided that their respective roles, duties and responsibilities are clearly spelled out. It is particularly important where a professional body is involved in the regulation of insolvency practitioners that independence from its members is clearly demonstrated through its constitution, mechanisms and processes and through its staff. This may require a legislative framework or statutory supervision – rather than involvement in individual matters – by a government department/agency or separately constituted body to give assurance of that independence.

⁸ Section 237 of the 1990 Act permits the Minister to make regulations stipulating who shall not be qualified for appointment as liquidator, receiver (and by extension, examiner). No such regulations have been made.

13.6 Regulation in other jurisdictions

- 13.6.1 In some jurisdictions, e.g. Australia, Canada and the USA, registration and regulation of insolvency practitioners is the function of government: the UK has a statutory framework requiring authorisation/licensing of office holders, with the power to grant, and remove, authorisations/licences delegated to recognised legal and accountancy bodies within that framework. Finland does not have an authorising/licensing system but an independent regulator oversees the administration of cases.
- 13.6.2 It is instructive to consider how the Insolvency Service in the UK operates. The Service operates principally in England and Wales. It administers compulsory individual and corporate insolvencies, pursues fraud and misconduct through prosecution and disqualification, regulates the private sector insolvency profession, and manages insolvency funds. Under the UK Insolvency Act 1986, only *authorised* persons may act as insolvency practitioners. Persons are authorised on the basis of experience and competence, they are subject to regulations and must hold a security bond for the proper performance of their duties. Authorisation may be granted by the Secretary of State or by a professional body recognised by the Secretary of State which regulates the conduct of its members and may withdraw licences. The seven recognised professional bodies (RPBs) in Great Britain account for some 95% of all authorisations. The bodies currently recognised are:
- (i) the Institute of Chartered Accountants in England and Wales;
 - (ii) the Insolvency Practitioners' Association;
 - (iii) the Law Society of England and Wales;
 - (iv) the Institute of Chartered Accountants of Scotland;
 - (v) the Association of Chartered Certified Accountants;
 - (vi) the Institute of Chartered Accountants in Ireland; and
 - (vii) the Law Society of Scotland.
- 13.6.3 On foot of a review of the insolvency practitioner regulation, an Insolvency Practice Council has been established composed of five lay members and three insolvency practitioners. The Council has an agenda setting and review role in relation to ethical and professional standards within the insolvency practitioner profession.
- 13.6.4 There is much to be said for the British system where, in the main, insolvency practitioners are members of recognised professional bodies. Above all, this recognises that insolvency practitioners come to specialise in this area of work from a professional background either in accountancy or law. It also has the advantage that the persons concerned are subject to the professional and ethical standards of their own professional bodies.

13.7 Objectives of regulation

- 13.7.1 The Review Group believes that there are four key arguments that support better regulation of liquidators in Ireland. First, the stakeholders of companies being wound up, in receivership or under the protection of the courts have a right to expect that the person responsible for protecting their interests and distributing their money will have received formal training in law or accountancy. Second, where there is no recognised professional standard, creditors and other relevant persons may have difficulty in making an informed choice about liquidators. Third, the consequences of poor insolvency administrations may impact severely on a large number of persons, including secured and unsecured creditors, directors, employees and shareholders. However, not all of the affected persons have any direct influence on the selection or supervision of the liquidator. Protection of the interests of those persons supports a system of regulation of liquidators. Finally, a system of regulation provides a mechanism to address the maintenance of professional independence and the integrity of all liquidators.

- 13.7.2 The Review Group believes that a system for regulating insolvency needs to have the confidence of the general public, creditors, shareholders and of the courts. That requires the setting of clear standards for the regulatory body and that these are maintained through systems of accountability and openness and of oversight on behalf of the general public. The Review Group is conscious that neither independence within the body nor oversight of it requires multilevels of bureaucracy imposing substantial costs on insolvency practitioners (and therefore on creditors) or on government.
- 13.7.3 A regulatory framework providing for the setting, testing and monitoring of standards should provide for: (a) greater confidence in the capability of liquidators to undertake the administration of insolvencies; (b) greater confidence in the proper exercise and discharge of powers; and (c) greater assurance against abuse and misuse of the system. The key principle is that a regulatory framework should provide assurance as to the necessary level of competence of those administering insolvencies, to ensure the efficiency, effectiveness and integrity of, and confidence in, the insolvency system.
- 13.7.4 Ideally, the regulatory framework should provide for:
- (i) establishing professional and ethical standards and guidance for insolvency practice;
 - (ii) setting requirements as to suitability (fit and proper), competence and integrity of office holders and as to continuing professional education/experience;
 - (iii) setting requirements as to insurance or bonding;
 - (iv) monitoring liquidators' conduct, competence and compliance with legislation, standards and other requirements, and investigating complaints;
 - (v) taking effective action in relation to incompetent or dishonest office holders, including investigating and reporting suspected fraud or other offences or misconduct and/or having the power to institute proceedings. In some jurisdictions, the regulatory body has power to intervene by way of, for example, applying to the court where it has serious concerns about the administration of a case.

13.8 Regulation – developments in Ireland

- 13.8.1 It is worth noting that present statutory provisions on insolvency designed to deal with "scorched earth" situations⁹ are contained in s 251 of the 1990 Act. This section relates to companies which are not being wound up but which are insolvent and the court is satisfied that the insufficiency of assets is the reason why they are not being wound up. Section 251 applies to such companies several sections of the 1963 and 1990 Acts which relate to companies being wound up. This section was amended by s 54 of the 2001 Act. That amendment provides, inter alia, that s 251 of the 1990 Act will now also apply to s 149 of the 1990 Act (restriction of directors) and provides for the Director of Corporate Enforcement to apply to court for restriction under any of the sections which apply. There is also an amendment introduced by s 53 of the 2001 Act which relates to the supervision of receivers and which will also make the Director aware of cases where applications pursuant to s 54 would be appropriate. With regard to a suitable regulatory framework, there are two important recent developments of particular relevance to the question of the regulation of insolvency practitioners.

The Director of Corporate Enforcement and the 2001 Act

- 13.8.2 The 2001 Act establishes on a statutory basis the Office of the Director of Corporate Enforcement. The Director has been given the powers formerly assigned to the Minister under the Companies Acts to: (a) initiate and undertake company investigations; and (b) prosecute on a summary basis all breaches of the Companies Acts by companies, directors and other parties. Part V of the 2001 Act deals with Winding-Up and Insolvency. It

⁹ A "scorched earth" situation arises where the company directors so deplete a company's assets as to result in there being insufficient assets left even to justify the winding-up of the company. See the McDowell Report at para 4.42.

amends a number of existing company law provisions concerning insolvency and winding-up. It aims to address the "phoenix syndrome" whereby companies go out of business leaving substantial debts, yet their directors immediately start new enterprises doing the same business without having to account for their previous failures. The powers necessary for the Director to discharge his role in respect of the supervision of insolvency practitioners are also provided for in Part V of the Act.

- 13.8.3 Section 48¹⁰ of the 2001 Act requires persons to notify the Registrar of their appointment as liquidator of a company within 14 days of such appointment. The Registrar must forward a copy of such notification to the Director. Section 50¹¹ provides that the Director may apply to the court for company directors, officers, liquidators, receivers or examiners to be brought before the court with a view to assessing damages where any such person has misapplied or retained any property of the company or has been guilty of a breach of duty or trust in relation to the company. Section 52¹² requires a receiver to file a statement with the Registrar as to whether, in his opinion, the company is solvent at the end of the receivership and the Registrar is required to copy every such statement to the Director. This is intended to allow the Director to monitor the state of companies that have undergone receiverships. (Receiverships often precede liquidations.) Section 52 also provides for a requirement that the Registrar inform the Director of the appointment of receivers notified to the CRO. This is intended to allow the Director to discharge his general supervisory function in respect of receivers. Section 53 empowers the Director to require a receiver to produce his books and answer any questions in relation to them or to the conduct of a particular receivership or receiverships.¹³
- 13.8.4 Similarly, s 57 of the 2001 Act empowers the Director to require a liquidator to produce his books and answer any questions in relation to them or to the conduct of a particular liquidation or liquidations. These sections will allow the Director to investigate complaints or allegations of misconduct against receivers and liquidators. Section 56 imposes a requirement on liquidators of insolvent companies to make reports to the Director in a form to be prescribed and to make applications for the restriction of the directors of such companies, unless relieved of that obligation by the Director in specific cases. Pursuant to the Act the report of the liquidator will include information on the circumstances in which the company became insolvent and the extent to which the action of the directors lead to the insolvency. This information will allow the Director to determine if an application for restriction under s 150 of the 1990 Act should be made to court in respect of directors of such companies. Where the Director decides it is appropriate to make such an application, it will be the responsibility of the liquidator to do so.
- 13.8.5 Section 58 of the 2001 Act requires a disciplinary committee or tribunal of a prescribed professional body whose members conduct liquidations or receiverships to notify the Director where it finds that the member has not maintained proper records or where it suspects that the member may have committed an indictable offence under the Companies Acts. This provision is to allow the Director to discharge his general supervisory role in respect of liquidators and receivers and also his role of investigating offences under the Companies Acts. It is understood that the bodies initially prescribed under this section will be those recognised by the Minister under s 187 of the 1990 Act, whose members may qualify for appointment as auditors. These bodies are:
- (i) The Institute of Chartered Accountants in Ireland (ICAI).
 - (ii) The Institute of Certified Public Accountants in Ireland (ICPAI).
 - (iii) The Association of Chartered Certified Accountants (ACCA).
 - (iv) The Institute of Incorporated Public Accountants Ltd (IIPA).
 - (v) The Institute of Chartered Accountants in England and Wales (ICAEW).
 - (vi) The Institute of Chartered Accountants of Scotland (ICAS).

10 Amending s 278 of the 1963 Act.

11 Amending s 298 of the 1963 Act.

12 Amending s 319 of the 1963 Act.

13 Amending s 323 of the 1963 Act.

Given that some solicitors act as liquidators (and could act as receivers) the Review Group recommends that the Law Society of Ireland should be a prescribed professional body. The Review Group further recommends that s 58 be extended to include persons appointed as examiners under the 1990 Amendment Act.

The Oversight Board to supervise accountancy bodies

13.8.6 The second major development of relevance is the proposed establishment, on foot of the July 2000 report of the Review Group on Auditing,¹⁴ of a statutory Oversight Board to supervise the accountancy bodies.¹⁵ The Oversight Board will have statutory responsibility for:

- (i) the recognition of accountancy bodies, including the amendment of the conditions of recognition;
- (ii) the approval of each body's constitution and amendments thereto;
- (iii) the approval of and requiring changes to each body's ethical code and professional rules;
- (iv) working with the accountancy bodies and other parties on the development of auditing and accounting standards and practice, including in particular the approval of auditing practice notes and bulletins;
- (v) making arrangements for examining the validity of material departures from accepted accounting standards and practice by PLCs;
- (vi) supervision of the performance of each recognised body in the area of monitoring (quality review), including the approval of the body's annual monitoring plan and the power to undertake an independent review of an auditing practice;
- (vii) supervision of the investigation, discipline and appeals arrangement within each body, including the power to obtain access to documentation and to explanations from each of the recognised bodies in respect of its exercise of its delegated supervisory duties;
- (viii) sanctioning each accountancy body where supervisory failures occur, e.g. by way of private admonition, public censure and/or financial penalties up to £100,000 (€126,973.81) in addition to costs;
- (ix) arranging for the supervision of individually authorised auditors by the recognised accountancy bodies;
- (x) the transmission and receipt of confidential information to/from specified authorities as far as is legally possible and subject to appropriate safeguards;
- (xi) acting as a specialist source of advice to Government and other parties on auditing and accounting matters;
- (xii) the approval of regulatory/business plans, the development of performance indicators and determining and evaluating the content of the annual report which each of the recognised bodies should be required to submit to the Board.¹⁶

13.9 Regulation and standard setting

13.9.1 With regard to liquidators, examiners and receivers, the Review Group believes that there is an argument to be made for seeing how effectively the Director can apply the supervisory powers being accorded to him under the 2001 Act and for reviewing this in due course. However, this raises the question of establishing *a priori* standards for those who undertake insolvency work.

14 The Review Group on Auditing was chaired by Senator Joe O'Toole. That group was set up by the Minister on foot of the recommendation by the Public Accounts Committee (PAC) of Dáil Éireann in December 1999 that the Department of Enterprise, Trade and Employment should establish a Review Group to examine in detail a number of matters, including auditor independence, the auditing of financial institutions and the role of the external auditor in ensuring statutory compliance. The background to this was the finding by the Comptroller and Auditor General that evasion of DIRT (Deposit Interest Retention Tax) was pervasive. The Minister established a Review Group on Auditing with 12 terms of reference, dealing with self-regulation in the auditing profession as well as with the issues raised by the PAC Report.

15 The Government has since approved the drafting of legislation to give effect to the recommendations of the Review Group on Auditing. The "Oversight Board" will be called the Irish Auditing and Accounting Supervisory Authority (IAASA).

16 Report of the Review Group on Auditing July 2000 p 126, recommendation 8.2. It is important to note that the Review Group on Auditing recommended overall "that the recognised accountancy bodies should continue to regulate their members within a reformed framework of supervision comprising some persuasive external influence."

13.9.2 Section 55 of the 2001 Act sets out the onus for the recognised accountancy bodies to report to the Director company law offences (which come to the body's attention) committed by their members while acting as liquidators or receivers. The recognised accountancy bodies are:

- (i) The Institute of Chartered Accountants in Ireland (ICAI).
- (ii) The Institute of Certified Public Accountants in Ireland (ICPAI).
- (iii) The Association of Chartered Certified Accountants (ACCA).
- (iv) The Institute of Incorporated Public Accountants Ltd (IIPA).
- (v) The Institute of Chartered Accountants in England and Wales (ICAEW).
- (vi) The Institute of Chartered Accountants of Scotland (ICAS).

Similarly, there is a requirement in the 2001 Act for these bodies to report to the Director instances where, on the basis of a disciplinary investigation of a member acting as auditor, they have reasonable grounds for believing that an indictable offence under the Companies Acts has been committed. The Review Group recommends that s 55 be extended to include members acting as examiners.

13.9.3 The Group understands that the forthcoming legislation setting up IAASA will place an onus on these bodies to report to IAASA on all disciplinary investigations. This would include offences under the Companies Acts committed while a member of a recognised accountancy body was acting as auditor, liquidator or receiver. Thus, IAASA could, in principle, be the supervisory board for insolvency practitioners as well as for accountants and auditors or at least could be the supervisory body for accountants and auditors when these act as insolvency practitioners. In the view of the Review Group this approach provides a strong protective mechanism for creditors.

13.9.4 Given the establishment of IAASA and the intention to supervise members of the recognised accountancy bodies more effectively on foot of legislation to give effect to recommendations in the Report of the RGA, it is likely that the penalties applied by the disciplinary committees will be more stringent than those applied in the past. Notable among these penalties is the serious penalty of withdrawing a practising certificate for a period of time. While it is clearly a very serious matter to be disqualified from acting as an insolvency practitioner it is, in the opinion of the Review Group, an even more serious matter to be disqualified from practising as an accountant or auditor because of fraud or malpractice in carrying out a liquidation if that is one's primary occupation. Even short of this degree of penalty, the Group has been informed by one of the accountancy bodies that complaints, particularly of inaction, are often enough in themselves to precipitate action by a respondent short of bringing the respondent before a disciplinary hearing.

13.9.5 This raises the core issue of whether the functions of liquidator, receiver and examiner should be restricted to persons with a qualification from one of the recognised accountancy bodies. There is an inherent logic to this, particularly with regard to s 55 of the 2001 Act. After all, if an individual is not a member of a recognised body (especially if he is not a member of any professional legal or accountancy body), there is less likelihood of the offence being detected and the Director notified. Creditors and members of a company should be mindful that, in principle, it would be better to choose a liquidator who is a member of a recognised body. It is also relevant to point out that in the UK members of the Law Societies, as well as of accountancy bodies, can be recognised as insolvency practitioners. Similarly in Ireland it would be appropriate, if we go down the road of recognised professional bodies, that the Law Society of Ireland should be one of these.

13.9.6 The recognised accounting bodies already have both ethical guidelines and practice guidance for members involved in insolvency practice.¹⁷ The ICAI is the biggest single recognised professional accountancy body in Ireland. The Institute's Handbook SIP gives guidance as to best practice to be adopted by insolvency practitioners

¹⁷ See, for example, Statement 2 and Section S Statements of Insolvency Practice (SIP) of the Handbook for members of the Institute of Chartered Accountants in Ireland (ICAI).

having regard to relevant legislation. SIP already apply in Ireland (being a modified version of those applying in Northern Ireland and the rest of the UK) even in the absence of a system of State regulation of insolvency practitioners.

- 13.9.7 It is further noted that whilst in the UK (generally speaking) an individual must be a member of a recognised professional body in order to practise as an insolvency practitioner he must also hold a qualification in insolvency, achieved on foot of examination. In Ireland, if the right to practise as a receiver, liquidator or examiner is to be restricted to members of recognised professional bodies it would seem to be an appropriate *quid pro quo* that these bodies should be required by the Minister to devise a specialised standard/qualification in insolvency practice in order to practise as such.
- 13.9.8 The Review Group believes that the appropriate route to take with regard to regulating liquidators, examiners and receivers is to provide for regulation through the medium of recognised professional bodies (RPBs) and recommends accordingly. An indicative list of RPBs would be composed of the six accountancy bodies, identified at 13.9.2 above, and the Law Society of Ireland. It should be noted that the Group believes that a facility should be provided whereby recognition could be granted to other professional bodies,¹⁸ where appropriate, by IAASA. In return for this those bodies should be required to devise an examinable standard for the specialisation of insolvency practitioner within their professions. The Minister and/or the Director should facilitate the development of this standard and IAASA should be involved in monitoring the regulation by the accountancy bodies (and the Law Society of Ireland) of their members when acting as liquidators, receivers or examiners in the same manner as it will monitor members of the recognised accountancy bodies when acting as auditors. Provision for this (and for inclusion of the Law Society of Ireland among recognised bodies for the purpose of regulating liquidators, receivers and examiners) should, if feasible, be included in the Bill currently being drafted to establish IAASA. Arrangements would have to be made not to exclude from their livelihood, persons currently practising as liquidators, receivers or examiners.¹⁹ On balance, the Review Group concludes it is preferable that a licensing system on the lines set out above should be introduced sooner rather than later. For a creditor or member of a company involved some additional costs might arise through professionalisation of the function of insolvency practitioner. The trade-off would be that all insolvency practitioners and their regulators will be subject to supervision by IAASA.
- 13.9.9 As previously noted, there is an argument for waiting to see how the exercise of the Director's powers impacts on the conduct of insolvency practitioners and for awaiting the outcome of this Group's likely future consideration of a State-funded public interest insolvency service it may be premature to implement. Hence all of the recommendations in this chapter at this point of time. Indeed, strong views in this regard were expressed by members of the Group in the course of discussions on the matter. The introduction of such a system would set standards to be followed prospectively. This is more desirable than the retrospective establishment of standards on a piecemeal basis in a primarily court-based, sanction-focused context. The Review Group also believes that the introduction of such a system would assist in providing a powerful incentive to the relevant professionals to adopt, and act in accordance with, the highest standards. In a sense the introduction of such a system should be seen as complementary to the powers to be exercised by the Director. In any event, the efficacy of the powers for regulating liquidators, receivers and examiners being accorded to the Director will need to be reviewed after they have been in operation for some years. In the circumstances, the Review Group concluded that there should be no delay in introducing a system which it believed likely to be of benefit. While the Review Group accepts that the introduction of such a regulatory system may, in certain instances, prove to be a disincentive to the appointment of any liquidator to an insolvent company, it concluded, on balance, that the

18 For example, organisations such as ICSA (whose members have for some time been involved in the conduct of members' voluntary liquidations) might well apply for and be considered suitable for inclusion in this regard.

19 For example, members of ICSA who currently carry out members' voluntary liquidations.

absence of a liquidator was no worse than an unqualified liquidator. Either way there will remain a significant number of cases where no one is willing to act as a liquidator to a company which is hopelessly insolvent, i.e. devoid of resources to pay the liquidator. While this is a separate issue from the issue of regulation, the Group believes that it is an issue of some importance, which merits consideration in a future programme of the Review Group.

13.10 Bonding and indemnity insurance

- 13.10.1 The Review Group also considered the issue of bonding or indemnity insurance for insolvency practitioners. At present there are no statutory requirements for insolvency practitioners to obtain, or maintain, professional indemnity insurance. It is arguable that insolvency practitioners, like other professionals, have an incentive to maintain arrangements which would enable them to meet possible liabilities in order to protect their own assets. From this perspective there would be no need to regulate for these matters. However, the contrary view is that some professionals may choose to protect their interests not by taking out insurance, but by declining to hold any significant assets in their own names. As a consequence, the substance of any recovery for personal liability may be limited in the event that there is a successful action. The Review Group concluded that there is a legitimate need to regulate for some kind of compensation mechanism. The question then arising is whether bonding or professional indemnity insurance offers a better compensation mechanism.
- 13.10.2 As a general principle, issuers of performance bonds would, in most circumstances, require the person whose performance they are guaranteeing to provide them with a secured counter-indemnity. For example, a bank issuing a bond may require the insolvency practitioner concerned to provide security in the form of mortgages over property or third party guarantees which the institution may enforce in the event of the bond being called on. At present in Ireland, the High Court determines the level of security to be given by a liquidator on his appointment.²⁰ The court usually delegates the fixing of the amount of such security and the time within which it is to be entered into to the Examiner. The accounting requirements of official liquidators and their obligation to lodge all funds to a specific branch of the Bank of Ireland are also provided for by court order. Other liquidations are not covered by bonds.
- 13.10.3 By contrast, the level of professional indemnity insurance cover is limited primarily by the amount of the premium a practitioner is required to pay. This is liable to provide a greater level of protection in terms of quantum than bonding, even though claimants may have to bring a successful court action in order to obtain the benefit of professional indemnity insurance. In addition, non-court liquidations would be covered by professional indemnity insurance. The recognised professional bodies have professional indemnity rules applying, e.g. for the ICAI the professional indemnity insurance regulations are set out in the rules of professional conduct and apply to members in practice and to authorised firms. Under these regulations "a firm must: (a) take such steps as may reasonably be expected of it to secure that it is able to meet claims against it arising out of professional business; (b) arrange cover for itself which meets the limits specified."²¹ By insisting that liquidators, examiners and receivers must be members of or regulated by existing RPBs or the Law Society of Ireland then all such persons could readily be obliged to have in force professional indemnity insurance.²² The Review Group accordingly recommends that insolvency practitioners should be required (whether by statute or the internal requirements of their RPBs) to have sufficient professional indemnity cover.

²⁰ See s 228(a) of the 1963 Act and Rules of the Superior Courts Orders (Order 74, Rules 31 – 33).

²¹ See Regulation 510 Rules of Professional Conduct of the ICAI.

²² In relation to solicitors, to the extent (if any) that existing professional indemnity insurance policies do not envisage the solicitor acting as a liquidator, examiner or receiver, the Law Society of Ireland might be required to insist that solicitors who act as such effect appropriate insurance cover.



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13.11 Summary of Recommendations

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13.11 Summary of recommendations

- The Law Society of Ireland should be a prescribed professional body. **(13.8.5)**
- Section 58 of the 2001 Act should be extended to include persons appointed as examiners under the 1990 Amendment Act. **(13.8.5)**
- Section 55 of the 2001 Act should be extended to include members acting as examiners. **(13.9.2)**
- The appropriate route to take with regard to regulating liquidators, examiners and receivers is to provide for regulation through the medium of recognised professional bodies (RPBs) and the Review Group recommends accordingly. On balance, the Review Group concludes that it is preferable that a licensing system on the lines set out above should be introduced without delay. **(13.9.8)**
- RPBs should be required by the Minister to devise a specialised standard/qualification in insolvency practice in order to practise as such. **(13.9.8)**
- Insolvency practitioners should be required (whether by statute or the internal requirements of their RPBs) to have sufficient professional indemnity cover. **(13.10.3)**

