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Implementation of the Insolvency Practitioners Regulation Act 2019: licensing of insolvency practitioners – proposed minimum standards and conditions

Introduction

The New Zealand Law Society (Law Society) welcomes the opportunity to comment on the *Implementation of the Insolvency Practitioners Regulation Act 2019: Proposed minimum standards and conditions for the licensing of insolvency practitioners*, November 2019 discussion paper (discussion paper).

The comments below on the proposed minimum standards and conditions for insolvency practitioners are based on the Law Society's experience of the Lawyers and Conveyancers Act 2006 regulatory regime and are made on behalf of lawyers who act as insolvency practitioners.[1]

The Law Society's responses to the consultation questions are set out below.

Number of hours

Q1: Do you agree that non-CPP (Certificate of Public Practice) holders should be required to have a higher amount of insolvency experience than CPP holders?

1.1 Yes, but not in the case of lawyers who are practising on their own account. The Law Society submits that a lawyer who is a non-CPP holder but who is entitled to practice as a lawyer on their own account should not be required to have a higher amount of insolvency experience than CPP holders. In order for a lawyer to be able to practice on their own account, a lawyer must:

a have obtained a law degree (which involves at least four-years' full-time university study);

b have completed the prescribed law professionals course;

c satisfy the High Court that he or she is a fit and proper person to be admitted as a barrister and solicitor;

[1] The great majority of insolvency practitioners have accounting or finance backgrounds, and only a few lawyers undertake insolvency assignments or act as insolvency practitioners. Some lawyers also accept appointments as liquidators in relation to solvent liquidations.

d hold a current practicing certificate; this involves satisfying the Law Society that the lawyer is a suitable person to do so, having regard to:

i the nature and extent of the lawyer's legal experience;

ii how the lawyer intends to practice;

iii the areas of law in which the lawyer intends to practice; and

iv any other matters that the Law Society considers relevant; and

e have completed the prescribed Law Society education programmes for a lawyer to practice on their own account.[2]

1.2 It follows that lawyers who are entitled to practice on their own account have met similar minimum education, professional experience, and fit and proper person requirements as CPP holders in their respective profession. The Law Society therefore considers that lawyers who are entitled to practice on their own account should not be required to have a higher amount of insolvency experience than CPP holders.

Q2: Do you agree with the proposed 1,000 hours of experience over 5 years for CPP holders?

2.1 The Law Society agrees that 1,000 hours of experience over five years for CPP holders is a reasonable level of minimum experience. The experience requirement means that a CPP holder could meet the minimum experience requirement by completing an average of 4.17 hours a week of insolvency work over a five-year period.[3] The proposed minimum experience requirement strikes an appropriate balance between requiring practitioners to have a minimum level of insolvency experience at a senior level while at the same time allowing practitioners to work in other professions, practice areas, or to work part time.

Q3: Do you agree with the proposed 2,000 hours of experience over 5 years for non-CPP holders?

3.1 The Law Society agrees that 2,000 hours of experience over five years for non-CPP holders (excluding lawyers entitled to practice on their own account) is reasonable. A non-CPP holder could meet the minimum experience requirement by completing an average of 8.33 hours a week of insolvency work over a five-year period.[4] Again, this minimum experience requirement is an appropriate balance between ensuring non-CPP holders have enough insolvency experience at a senior level while at the same time allowing non-CPP holders to work in other professions or practice areas.

Work on insolvency engagements

Q4: Do you think the calculation of required hours should be limited to work on "insolvency engagements" as defined in the Act? Or, do you think the calculation should include other types of insolvency–related work? If so, what types of work should be included?

4.1 Limiting the calculation of hours to "insolvency engagements" under the Insolvency Practitioners Regulation Act 2019 (IPRA) is too restrictive. Insolvency practitioners (and lawyers) undertake other types of insolvency–related work such as providing advice on

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2 A lawyer practising on own account must have satisfied the statutory requirement s in s30 of the Lawyers and Conveyancers Act 2006 and r12 of the LCA (Lawyers: Practice Rules) Regulations 2008.

3 Assumes a professional would have four weeks annual leave per year (i.e. (1,000 hours / 5 years) = 200 hours per year; 200 hours / 48 weeks = 4.167 hours per week).

4 Assumes a professional would have four weeks annual leave per year (i.e. (2,000 hours / 5 years) = 400 hours per year; 400 hours / 48 weeks = 8.333 hours per week).

business restructuring (including creditors' compromises) as an alternative to insolvency, or in the case of lawyers:

a providing advice and opinions on restructuring and insolvency law, voluntary administrations, liquidations, receiverships, creditors' compromises, and personal insolvency;

b providing legal advice in relation to directors' duties when a company is in the 'twilight zone'; and

c representing clients in insolvency-related litigation and claims for breach of directors' duties.

4.2 The Law Society therefore considers that other types of insolvency–related work should be included in the calculation of required hours. Legal experience in relation to restructuring and insolvency law is valuable experience that lawyers who are insolvency practitioners should be able to count as part of their minimum required hours. The Law Society recommends the following additional insolvency-related work is included:

d providing advice and opinions on restructuring and insolvency law, voluntary administrations, liquidations, receiverships, creditors' compromises, and personal insolvency;

e providing legal advice in relation to directors' duties when a company is in the 'twilight zone';

f representing clients in insolvency-related litigation and claims for breach of directors' duties; and

g other types of insolvency-related work such as providing advice on business restructuring as an alternative to insolvency.

Senior experience

Q5: Should the minimum standards require a practitioner's experience to be at a senior level?

5.1 Yes, the minimum standards should require a practitioner's experience to be at a senior level (defined in the discussion paper as being at manager, director or partner level).

Q6: What are your views on the matters which the Registrar considers are likely to be relevant in deciding whether experience is at a senior level? Should other matters be considered?

6.1 An activity-based assessment is appropriate in assessing whether experience is at a senior level. In addition, references could be sought from individuals who are suitably qualified to comment on an applicant's level and depth of experience.

General experience

Q7: Do you agree the minimum standards should require a practitioner to have at least five years of general insolvency experience?

7.1 The proposal that insolvency practitioners have at least five years of general insolvency experience is too onerous for lawyers who take occasional insolvency assignments. The proposed requirement could exclude some lawyers who take occasional insolvency assignments from becoming licensed insolvency practitioners.

7.2 The Law Society submits that lawyers who meet the proposed minimum number of hours of insolvency experience should be exempt from any requirement to have at least five years of

general insolvency experience or alternatively should be required to have at least five years of general commercial legal experience.

Alternative pathway

Q8: Do you agree that accredited bodies should have the discretion to waive some or all of the minimum standards in relation to experience, to recognise the special circumstances of particular applications?

8.1 Yes, accredited bodies should have the discretion to waive some or all of the minimum standards in relation to experience, if an accredited body is satisfied that the person is otherwise competent to act as an insolvency practitioner.[5] This is vital to ensure there are clear alternative pathways into the insolvency practitioner profession for competent practitioners whose experience may not fit neatly within the strict regulatory criteria. Clear pathways of this type ensure a more diverse profession with a consequent deeper and broader range of expertise and experience.

Qualifications

Q9: Do you agree that the minimum standards should not require any formal qualifications or completion of specific courses?

9.1 The Law Society agrees with the discussion paper that introducing a requirement in relation to qualifications at this time could unnecessarily restrict the licensing of insolvency practitioners. As indicated in the consultation paper, the Registrar may consider requiring qualifications or compulsory courses in the future. This appears entirely appropriate and provides a mechanism to address any future regulatory concerns which may emerge.

Insurance

Q10: Should the minimum standards require licensed insolvency practitioners to hold professional indemnity insurance?

10.1 Yes, it is appropriate that licenced insolvency practitioners hold professional indemnity insurance to ensure that stakeholders are protected in the event of any negligence by a practitioner.

Q11: Do you agree with the proposal to allow accredited bodies (and individual practitioners) to assess the amount of insurance that is required, or do you have feedback on another option, such as the Registrar setting the specific dollar amount of insurance?

11.1 The Law Society agrees with the proposal to allow accredited bodies (and individual practitioners) to assess the amount of insurance that is required. A minimum specific dollar amount of insurance would be a 'one size fits all' condition without any regard to the nature and scale of the insolvency practitioner's business activities. If a large specific dollar amount of insurance was set that was disproportionate to an insolvency practitioner's business activities, it may deter some professionals and lawyers from becoming licensed insolvency practitioners.

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[5] For example, see r12(3) of the LCA (Lawyers: Practice Rules) 2008 provides an alternative pathway for lawyers who do not meet the strict regulatory criteria. It is expected that the accredited bodies would develop appropriate criteria to determine applications through this pathway.

Overseas practitioners

Q12: Should the minimum standards require Australian applicants to be registered liquidators and provide evidence of continuing experience?

12.1 Yes, the proposal requiring Australian applicants to be registered liquidators and provide evidence of continuing experience is sensible.

Rules and code of ethics

Q13: Do you agree that all licensed insolvency practitioners should be required to comply with their accredited body's rules, code of ethics and applicable standards?

13.1 Yes. Insolvency practitioners should be required to comply with their accredited body's rules, code of ethics and applicable standards. In addition, lawyers who are also insolvency practitioners must also comply with their own professional standards as set out in the Lawyers and Conveyancers Act (Lawyers: Conduct and Client care) Rules 2008.[6]

Practice review

Q14: Should insolvency practitioners be subject to practice review requirements set by accredited bodies?

14.1 Yes, as the discussion paper observes, practice reviews are an important aspect of the licensing system, as they monitor whether practitioners have quality control systems in place to ensure compliance with their legal and ethical requirements.

Q15: Do you have any comments on how practice reviews should be carried out?

15.1 No.

Reports and notifications

Q16: Should licensed insolvency practitioners be obliged to provide reports and notifications to the accredited body?

16.1 Yes, insolvency practitioners should be obliged to provide reports and notifications to the accredited body.[7]

Q17: Do you agree with the matters we have identified which may be subject to reporting and notification conditions?

17.1 Yes, the matters proposed in the discussion paper are appropriate.

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6 All lawyers are required to comply with the LCA (Lawyers: Conduct and Client care) Rules 2008 ("Rules"). The obligations in the Rules are subject to other overriding duties, including duties to the courts and the justice system. (See: *Preface* to the Rules)

7 See for example the requirement on all lawyers to disclose, as soon as practicable, information about any matter that might affect the lawyer's continuing eligibility to hold a practising certificate (r.9). Lawyers must also make an annual declaration that no matter which may affect their suitability to practise has arisen.

Insurance

Q18: Should licensed insolvency practitioners be subject to insurance conditions set by accredited bodies?

18.1 Yes, it is appropriate that insolvency practitioners have appropriate professional indemnity insurance for the nature and scale of the licensed practitioner's business activities.

Q19: Should we consider any other mandatory conditions?

19.1 No other mandatory conditions are necessary.

Conditions to which a licence may be subject

Q20: What (if any) special considerations apply to solvent company liquidations?

20.1 No special considerations should apply to solvent company liquidations. Section 68 of the IPRA expressly allows a licensed insolvency practitioner, lawyer, qualified statutory accountant, or member of a professional body recognised under section 69 of the IPRA to act as a solvent company liquidator. While section 22(3) of the IPRA provides that conditions may be imposed on licensed practitioners carrying out solvent company liquidations, it is inappropriate to impose any conditions on licensed practitioners when they would not otherwise apply to other professionals permitted to undertake solvent company liquidations.

Q21: In what circumstances (if any) would it be appropriate to limit the types of engagement a licensed insolvency practitioner could work on?

21.1 It would be appropriate to limit the types of engagement a licensed insolvency practitioner could work on where an accredited body had concerns about a practitioner's experience, capability or capacity to undertake a particular kind of insolvency engagement (e.g. a receivership or a voluntary administration).

Other

Q22: Should we consider any other discretionary conditions an accredited body may apply?

22.1 It would be sensible to provide for a condition requiring supervision for insolvency practitioners with limited experience.[8] Appropriate supervision arrangements would enable insolvency practitioners to gain wider experience in a safe way. (Supervision may also be relevant to the Alternative Pathway process discussed above at Q8.) An appropriate condition for a practitioner with limited experience could also be to require that practitioner to take appointments jointly with another licensed practitioner to ensure proper oversight on assignments.

Ongoing competence

Q23: Do you agree with the proposed ongoing competence requirements?

23.1 The Law Society agrees that maintaining ongoing competence within the insolvency profession is important. However, the proposed ongoing competence requirements – a minimum of 120 hours of continuing professional development (CPD) over a three-year period – is a considerable professional commitment. Imposing that very high CPD requirement may deter

[8] See previous NZLS submissions on the Insolvency Practitioners Bill: submission dated 11.10.10; and on the Insolvency Working Group, Report No. 1: submission dated 6.10.16 (available at http://www.lawsociety.org.nz/__data/assets/pdf_file/0005/105593/I-MBIE-Corporate-Insolvency-Review-6-10-16.pdf).

some people from becoming licensed insolvency practitioners, particularly lawyers who may undertake only occasional insolvency appointments.

23.2 We acknowledge that practitioners who belong to an accredited body that is a member of the International Federation of Accountants (IFAC) will naturally need to comply with their accredited body's ongoing competence requirements. It remains to be seen whether there will be an accredited body that is not a member of IFAC. For practitioners who belong to an accredited body that is not a member of IFAC, in the Law Society's view the proposed minimum 120 hours CPD over three years is disproportionate and will be a deterrent to some practitioners. For those practitioners, the Law Society considers that a minimum requirement of 20 hours per year (60 hours over three years) relating to insolvency practice would be an appropriate level of CPD training.

Q24: Do you agree that the minimum standards should set a minimum of verifiable training that must relate to insolvency practice? What should be the minimum per year?

24.1 The Law Society agrees that a minimum amount of verifiable training that relates to insolvency practice should be completed. A minimum of 20 hours per year relating to insolvency practice is an appropriate amount of training.

Personal insolvency creditor proposal trustees

Q25: Should different minimum standards be introduced for trustees or provisional trustees appointed under subpart 2, Part 5 of the Insolvency Act 2006? What should these minimum standards be?

25.1 The Law Society considers that different minimum standards for trustees or provisional trustees are not required. Corporate insolvency work is generally more complex than acting as a trustee or provisional trustee under subpart 2, Part 5 of the Insolvency Act 2006. Moreover, High Court approval is required for a proposal approved by creditors under subpart 2, Part 5 of the Insolvency Act 2006.[9] It follows that the High Court has oversight of personal creditor proposals and who is appointed trustee.

Q26: Is it appropriate to limit by way of conditions the type of insolvency engagement a licensed practitioner may undertake? For example, should an insolvency practitioner who meets the experience requirements in relation to corporate insolvencies only be licensed to carry out corporate insolvencies?

26.1 Generally, an insolvency practitioner who meets the requirements in relation to corporate insolvencies should be licensed to carry out both corporate insolvencies and act as a trustee or provisional trustee under subpart 2, Part 5 of the Insolvency Act 2006. A practitioner who does not meet the requirements to carry out corporate insolvencies should be prohibited or limited from undertaking such engagements.

26.2 An accredited body should retain a discretion to impose a condition that an insolvency practitioner be prohibited or limited from undertaking a particular type of engagement (e.g. a voluntary administration) if it has concerns about the practitioner's competence or capability in relation to that type of engagement.

[9] Section 333 of the Insolvency Act 2006.

Q27: Are there other types of insolvency engagements where different minimum standards should apply?

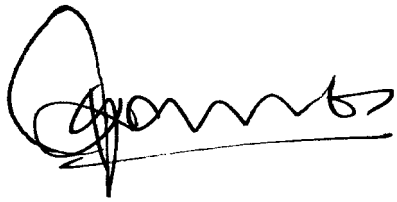
27.1 No, there are no other types of insolvency engagements where different minimum standards should apply.

Fit and proper person

The Law Society submits that accredited bodies should be encouraged to incorporate appropriately truncated processes into their "fit and proper" assessment in respect of lawyers. This is because lawyers are already subject to a comprehensive "fit and proper" requirements under the Lawyers and Conveyancers Act 2006 regulatory regime, to protect the interests of clients. Limiting the compliance burden faced by lawyers at this stage of the process would minimise regulatory compliance costs, which are invariably passed on to consumers, and be administratively efficient.[10]

The Law Society hopes these comments are helpful to the Ministry. If further information or discussion would assist, please do not hesitate to contact Charlotte Walker, Senior Solicitor Regulatory (charlotte.walker@lawsociety.org.nz).

Yours faithfully



Tim Jones
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[10] See NZLS submission dated 24.8.18 on the Insolvency Practitioners Bill-SOP 45, available at https://www.lawsociety.org.nz/__data/assets/pdf_file/0003/125823/Insolvency-Practitioners-Bill-SOP-45-24-8-18.pdf.