

Mental Health Policy

1. Introduction

- 1.1 This policy sets out the Society's approach to solicitors with mental health issues. The purpose of this policy is to encourage such solicitors to voluntarily seek appropriate treatment and to only require disclosure where there is a material mental impairment that affects the solicitor's capacity to engage in legal practice.
- 1.2 The Society will treat solicitors with mental health issues fairly and sensitively. The Society is not concerned with those who are effectively managing a mental health issue and there is no requirement to disclose in this instance. Solicitors are not required to disclose mental health issues which have no impact on their capacity to engage in legal practice.
- 1.3 The Society appreciates that legal practice can place significant stresses and pressures on solicitors. There are a number of dedicated organisations and services that provide care and assistance for those experiencing mental health issues. Along with family and close friends and health practitioners, the following organisations can play an important role in ensuring these stresses and pressures do not affect a solicitor's capacity to engage in legal practice:-
- LawCare;
 - Beyondblue – the national depression initiative, providing comprehensive online information on the signs and symptoms of depression and anxiety and how to help someone;
 - The Black Dog Institute – a not-for-profit, educational, research, clinical and community-oriented facility offering specialist expertise in depression and bipolar disorder;
 - The Tristan Jepson Memorial Foundation – the Foundation's objective is to decrease distress, disability and the causes of depression and anxiety in the legal profession.
- 1.4 Where disclosure to the Society is required, this policy reflects the Society's obligations to treat disclosed information confidentially and to perform its functions without discrimination. Disclosure will not necessarily result in a finding that a solicitor is not fit to practice. The privacy of solicitors with mental health issues and the confidentiality of information disclosed will be protected in accordance with relevant laws.
- 1.5 This policy is a guide. It does not impose binding obligations or rights. It clarifies the Society's position about mental health as a suitability issue concerning fitness to practice.

2. Background

- 2.1 There are a number of dedicated organisations and services that provide care and assistance for solicitors experiencing mental impairment issues. This policy provides guidance on the particular role of the Society in relation to material mental impairment.
- 2.2 Mental impairment includes mental illness, an impairment caused by force or other inorganic means and an impairment of mind caused by a disease of the body.
- 2.3 Mental impairment is a suitability issue within the *Legal Profession Act 2007* when it has the effect prescribed by s9(1)(m); “the person is currently unable to satisfactorily carry out the inherent requirements of practice as an Australian Legal Practitioner”.
- 2.4 The Society considers that the inherent requirements of practice are set out at rules 3 and 4 of the Australian Solicitors Conduct Rules 2012 (ASCR):-
- “3. Paramount duty to the court and the administration of justice
 - 3.1 A solicitor’s duty to the court and the administration of justice is paramount and prevails to the extent of inconsistency with any other duty.
 - 4. Other fundamental ethical duties
 - 4.1 A solicitor must also:
 - 4.1.1 act in the best interests of a client in any matter in which the solicitor represents the client;
 - 4.1.2 be honest and courteous in all dealings in the course of legal practice;
 - 4.1.3 deliver legal services competently, diligently and as promptly as reasonably possible;
 - 4.1.4 avoid any compromise to their integrity and professional independence; and
 - 4.1.5 comply with these Rules and the law.”
- 2.5 An inherent requirement is not merely a common or usual one. Rather it must be a permanent and inseparable element, quality or attribute of practice as an Australian Legal Practitioner (see e.g. Kirby J. in *X v Commonwealth of Australia* [1992] HCA 63 at [150 -1]). Rules 3 and 4 of the ASCR are such elements or qualities.
- 2.6 Not all cases of mental impairment are suitability issues. The Society adopts the phrase material mental impairment for circumstances where a mental impairment meets the criteria of s9(1)(m) of the Act and so may be considered by the Society when granting, renewing, amending, suspending or cancelling a practising certificate. This is a clear reflection of the Society’s obligation to act in the interests of the public in exercising its regulatory responsibilities.

- 2.7 Equally important, however, is the Society's educative role in ensuring the legal profession is aware of, and appropriately addresses, issues of concern to the profession and to consumers of legal services.
- 2.8 This policy notes these objectives, outlining responses to material mental impairment that are appropriately graduated to ensure that the ability of solicitors, who may have (or have had) a material mental impairment, to practice is not unnecessarily restricted.

3. Legislative framework

- 3.1 Material mental impairment is relevant to Society functions in a number of areas.

Grant or renew a practising certificate

- 3.2 Under s51(1) of the Act, the Society may grant a practising certificate. Subsection 51(4)(b) provides that the Society must not grant a practising certificate unless it is satisfied that the applicant is a fit and proper person to hold the certificate.
- 3.3 Subsection 51(5)(b) provides that the Society must not renew a practising certificate if it is satisfied that the applicant is not a fit and proper person to continue to hold the certificate.
- 3.4 Subsection 46(2) provides that the Society, in considering whether or not the person is, or is no longer, a fit and proper person to hold a practising certificate, may take into account, amongst other matters, "any suitability matter" relating to the person.
- 3.5 "Suitability Matters" are dealt with in s9 and include subsection 9(1)(m), whether the person currently is unable to satisfactorily carry out the inherent requirements of practice as an Australian legal practitioner.

Matters previously disclosed

- 3.6 Subsection 46(4) provides that matters that have been previously disclosed in an application for admission to the legal profession and were determined not to be sufficient for refusing admission cannot be taken into account as a ground for refusing to grant or cancelling a practising certificate unless later disclosures demonstrate the matter is part of a course of conduct that may warrant refusal and cancellation.

Amend, suspend or cancel a practising certificate

- 3.7 Under ss60,61 and 62, the Society may amend, suspend or cancel a practising certificate where it believes a ground exists to do so. Under s60(a) it is a ground that the holder is no longer a fit and proper person to hold the certificate.

Prohibit multi-disciplinary partnership with certain persons

- 3.8 Under s.158(2), the Society may apply to the Supreme Court for an order prohibiting a multi-disciplinary partnership from having a partner who is not a fit and proper person to be a partner.

Suitability Reports and Health Assessments

- 3.9 The Act provides, in ss87-91, for health assessments and reports on those assessments to assist the Society to determine whether a person is fit and proper to hold a practising certificate.
- 3.10 Under s87(2), the Society may require a person to undergo a health assessment if, under s87(1), it believes on reasonable grounds that the person currently is unable to satisfactorily carry out the inherent requirements of practice as an Australian legal practitioner

Confidentiality and Privacy

- 3.11 Limits on the use of health assessment reports are provided under s91. The Act also, under s92, imposes confidentiality obligations in relation to reports provided to the Society.
- 3.12 Information provided to the Society is handled under the Society's Privacy Policy and in accordance with the Information *Privacy Act* 2009 as well as the Act.

Non-discrimination

- 3.13 The Society complies with all relevant human rights and non-discrimination requirements.

4. Policy and Guidelines

- 4.1 There are three common ways in which mental impairment comes to the attention of the Society:

- 4.1.1 Solicitors raise mental impairment issues in direct approaches to the Society.
- 4.1.2 Applicants disclose mental impairment issues when applying for the grant/renewal of practising certificates.
- 4.1.3 Mental impairment issues arise in relation to complaint handling and other regulatory activities performed under the Act.

4.2 Direct approaches to the Society

- 4.2.1 There is no requirement for solicitors to disclose where a condition is managed and has no material impact on the solicitor's capacity to engage in legal practice. However, direct approaches to the Society provide a good opportunity for solicitors to raise possible mental impairment issues before they start to negatively affect the solicitor's capacity to engage in legal practice and/or lead to complaints against the solicitor.
- 4.2.2 The Society may suggest the solicitor seek advice from an external agency, such as those mentioned in 1.3 above.

4.2.3 Such a suggestion is not binding on either the Society or the solicitor. Confidentiality and privacy obligations are set out in 3.12 and 3.13 above.

4.3 Grant/renewal applications

4.3.1 Solicitors may raise mental impairment with the Society when they apply for the grant and/or renewal of practising certificates.

4.3.2 This application process provides another opportunity for the Society to liaise with applicants on the professional management of any material mental impairment which the applicant may have, or may have had.

4.3.3 Whether an applicant is a fit and proper person to engage in legal practice is one of a number of questions that are relevant to the Society's consideration of an application.

4.3.4 The possible material mental impairment of an applicant is explicitly relevant to the Society's consideration of applications as a "suitability matter". Suitability matters are those which the Society may take into account when considering whether or not an applicant is, or is no longer, a fit and proper person to hold a practising certificate. Suitability matters include whether the solicitor currently has a material mental impairment (see 4.3.7 below).

4.3.5 The particular circumstances of each application will be relevant to the Society's decision to exercise its legislative power to consider suitability matters.

4.3.6 Unlike most suitability matters listed in the Act, the question of whether the solicitor currently has a material mental impairment may be professionally relevant to the solicitor's capacity to engage in legal practice rather than their conduct or character.

When will a solicitor fall within s9 (1)(m) in relation to mental impairment?

4.3.7 The Society will generally consider a solicitor currently has a material mental impairment (i.e. falls within s9(1)(m)) if they have a medical condition that:

- is characterised by significant disturbance of thought, mood, perception or memory; and
- that without management has adversely affected and will continue to, or is likely to continue to, adversely affect the solicitor's capacity to engage in legal practice such that the practitioner is currently unable to satisfactorily carry out the inherent requirements of practice as an Australian Legal Practitioner.

4.3.8 Disclosures made by the solicitor could provide the Society with reasonable grounds to believe that the solicitor may have a material mental impairment that may result in them not being a fit and proper person to engage in legal practice or hold a practising certificate. See the section below on "Suitability Reports and Health Assessments".

Society responses following consideration of possible material mental impairment

4.3.9 After considering all relevant information, the Society may:

- take no further action;
- seek an undertaking or impose a condition on or amend the solicitor's practising certificate; or
- refuse to grant/renew, or suspend/cancel the solicitor's practising certificate.

4.3.10 Unless deciding to take no further action, the Society will generally discuss possible responses with the solicitor (in the presence of the solicitor's support person or legal representative if the solicitor wishes) in an attempt to negotiate agreed future action that will adequately protect the public interest.

No further action

4.3.11 The Society will generally take no further action if satisfied the solicitor:

- does not have a mental impairment, or
- has a mental impairment which does not affect their being fit and proper to engage in legal practice, or
- has a material mental impairment but:
 - the impairment presents a low risk to consumers or others; and
 - the impairment is adequately controlled; and
 - the solicitor has a good record of compliance with treatment.

Seeking undertakings or imposing conditions

4.3.12 The Society will generally seek undertakings or impose conditions if satisfied that:

- the undertaking or condition would likely result in the solicitor being fit and proper to engage in legal practice but not without it; and
- the solicitor is likely to comply with the undertaking or condition.

4.3.13 The Society will generally seek undertakings rather than impose conditions as undertakings are not recorded on the face of the practising certificate or in the register of legal practitioners.

Imposing conditions

4.3.14 The Society may impose a condition where:

- the solicitor refuses to provide an undertaking which the Society considers to be necessary; and/or
- the Society considers it necessary for the protection of consumers.

Undertakings or conditions

4.3.15 Reasonable or relevant undertakings/conditions may include (but are not limited to) the solicitor:

- attending an appropriate health practitioner or other support service (that may be specified) for treatment;
- authorising the Society to communicate with the treating health practitioner or support service;
- using their best endeavours to provide reports from the treating health practitioner or support service at specified intervals;
- complying with a treatment plan recommended by the treating health practitioner;
- abstaining from alcohol, drugs and/or gambling;
- undergoing specified screening tests;
- limiting the nature/extent of their legal practice as specified (work part-time, engage in supervised legal practice or practice as an employee, etc.);
- authorising the Society to communicate with a specified person about the solicitor's legal practice (employer, supervisor, mentor, etc.);
- undergoing a further health assessment at a specified interval, or intervals.

Time periods for restrictions

4.3.16 Restrictions and compliance monitoring will generally be applied for three years unless the Society considers a different period appropriate.

4.3.17 The Society may reduce the nature/extent of restrictions and/or monitoring (at the solicitor's request) if the solicitor:

- demonstrates compliance with restrictions; and
- provides a supporting report from a health practitioner.

Non-compliance with restrictions

4.3.18 When a solicitor does not comply with restrictions, the Society may consider increasing the nature/extent of the restrictions or monitoring or prohibiting the solicitor from practice.

4.3.19 The Society will attempt to discuss potential non-compliance action with the solicitor before taking that action.

Suspending or cancelling, or refusing to grant or renew a practising certificate

4.3.20 The Society will generally refuse to grant/renew or will suspend/cancel a practising certificate if:-

- an undertaking/condition would be unlikely to result in the solicitor being fit and proper to engage in legal practice; or
- the solicitor is unlikely to comply with the undertaking/condition.

4.3.21 Circumstances in which practising certificate decisions may be appropriate include (but are not limited to) where:

- material mental impairment is severe;
- the solicitor denies their material mental impairment despite clear medical advice to the contrary;
- there has been material and/or repeated non-compliance with treatment plans, undertakings and/or conditions;
- the Society considers it necessary in the public interest.

4.4 Complaints-handling and other regulatory activities

4.4.1 The Society may become aware that a solicitor may have a mental impairment either in performing its regulatory functions or from performance of regulatory functions by the Legal Services Commission or other regulators.

Suspension or deferral of compliance or enforcement activity

4.4.2 When the Society gains such an awareness it may suspend or defer any compliance or enforcement action relating to the Solicitor until it has determined whether the Solicitor has a material mental impairment.

4.4.3 Regardless of the Society's determination, the existence of a material mental impairment will not necessarily preclude the Society from taking appropriate compliance or enforcement action.

If the solicitor does not have a material mental impairment

4.4.4 If the Society determines the solicitor does not have a material mental impairment, the Society may commence or resume any suspended or deferred compliance or enforcement action.

If the solicitor does have a material mental impairment

4.4.5 If the Society determines the solicitor does have a material mental impairment, the Society may:

- take the material mental impairment into account; and
- discuss any cancelled or deferred compliance or enforcement action with the solicitor;

before commencing or resuming such action.

Interaction with disciplinary activities

4.4.6 As soon as the Society becomes aware that a solicitor may have a material mental impairment, the Society will:

- notify the Commissioner that the solicitor may have a material mental impairment;
- request any relevant information held by the Commission;
- provide relevant information to the Commission if there is a disciplinary investigation or proceeding on foot.

5. Suitability Reports and Health Assessments

5.1 When determining a solicitor’s suitability to hold a practising certificate, the Society may consider whether a mental impairment may result in the solicitor not being a fit and proper person to engage in legal practice. The Society may require a health assessment to assist it to make this determination.

5.2 Each health assessment decision must be based on the individual facts and circumstances of each case.

General principles

5.3 In managing health assessments, the Society will:

- properly protect the public interest while supporting mentally impaired solicitors to practise, or to continue to practise, where possible;
- treat mental impairment as a health issue rather than a professional standards issue;
- encourage solicitors to voluntarily seek appropriate health care;

- treat solicitors with mental impairments fairly and sensitively;
- protect the privacy of mentally impaired solicitors as far as possible while properly protecting consumers.

When will a health assessment be required?

5.4 The Society will generally require a solicitor to undergo a health assessment when:

- It believes on reasonable grounds that the solicitor may have a mental impairment that may result in him or her not being a fit and proper person to engage in legal practice; and
- There is insufficient probative information available to enable the Society to determine what (if any) restrictions on engaging in legal practice would be likely to result in the solicitor being a fit and proper person to engage in legal practice, despite the impairment.

What are reasonable grounds?

5.5 The Society will generally consider:

- information provided to the Society by or on behalf of the solicitor;
- information obtained by the Society in the course of performing functions under the Act;
- information provided to the Society by a local or interstate regulatory authority
- information provided to the Society by the courts;
- information provided to the Society by the Police, Director of Public Prosecutions or any other relevant public agency;
- publicly available information obtained by the Society.

What is a mental impairment that may result in a solicitor not being a fit and proper person to engage in legal practice?

5.6 See 4.3.7 above.

Reports requested before health assessment

5.7 To help determine whether a health assessment is required, the Society may request a solicitor provide a report (at the solicitor's expense) from a treating health practitioner.

5.8 The Society will generally require the report to include:

- the health practitioner's qualifications;
- the nature and extent of the mental impairment;

- the extent (if any) to which that impairment may result in the solicitor not being a fit and proper person to engage in legal practice;
- the treatment the solicitor is receiving to manage that impairment;
- the solicitor's compliance with that treatment;
- recommendations (if any) of practising certificate conditions the Society could impose, or undertakings the Society could seek, that should enable the solicitor to be fit and proper to engage in legal practice, including duration and means of monitoring compliance; and
- whether the health practitioner considers disclosure of the report may be prejudicial to the solicitor's mental health or well-being.

5.9 The Society will generally not pursue such a report if the treating health practitioner considers providing the report would materially damage their therapeutic relationship with the solicitor. Requiring a health assessment would be appropriate in those circumstances.

Health assessment process

Selection of health assessor

5.10 The Society may seek advice from the Royal Australian and New Zealand College of Psychiatrists or the Australian Psychological Society on an appropriate specialist to conduct a health assessment.

Disclosure to the health assessor

5.11 The Society will usually disclose to the health assessor:

- a copy of any available reports by health practitioners; and
- a summary of any other relevant information available.

Informing the solicitor

5.12 Having decided to require a health assessment, the Society will provide the solicitor with an information notice outlining:

- the name and qualifications of the health assessor;
- the date, time and place for the assessment (noting that multiple appointments may be needed in reaching such assessment);
- the solicitor's right to seek review of the Society's decision to require a health assessment;

- the health assessor's obligation to provide a copy of the report to the solicitor or (if disclosure may be prejudicial to the solicitor's mental health) to the solicitor's nominated medical practitioner;
- the restrictions on the use, including admissibility, of the report; and
- the applicable confidentiality obligations.

Society responses following receipt of report

5.13 See 4.3.9 to 4.3.21 above.