LAW INSTITUTE VICTORIA

Mental Health and Disclosure Requirements for Applicants for Admission to the Legal Profession

POSITION PAPER

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1. Introduction

Currently applicants seeking admission to the Victorian legal profession must disclose mental health conditions according to the guidance set out in Practice Direction No. 2 of 2012 (the Disclosure Guidelines).[1] The Disclosure Guidelines are based on relevant provisions in the *Legal Profession Act 2004* (Vic)[2] and the common law,[3] discussed further below.

Since 2009, the LIV has made numerous submissions regarding the requirement to disclose mental health conditions during the admission process.[4] In these past submissions the LIV raised concerns that the Victorian approach to regulating entry to the legal profession might adversely be impacting on prevalence rates of depression and anxiety among lawyers by inadvertently creating a barrier to seeking treatment.

This Position Paper has been developed by the LIV in light of anticipated changes to admission requirements under the *Legal Profession Uniform Law Application Act 2014* (the Uniform Law).

The following sections consider changes to relevant legal requirements under the Uniform Law and developments in equal opportunity law and conclude that under the Uniform Law, the Victorian Board of Examiners (the Board) should discontinue its practice to require applicants for admission to make disclosures about mental health conditions. The case for discontinuing the Board's current requirements on mental health conditions is further supported by contemporary understandings about mental illness and disability, discussed in section 5 below.

Recommendations for changes to the Board's policies and procedures are set out in section 7 below.

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[1] See Practice Direction No 2 of 2012, *Disclosure Guidelines for Applicants for Admission to the Legal Profession*, esp Part 7 (Disclosures about Capacity) and Part 3 (e), available at http://www.lawadmissions.vic.gov.au/quick_links/practice_directions_and_notices/.

[2] Whether a person currently has a material mental impairment is a suitability matter (*Legal Profession Act 2004* (Vic), s 1.2.6(1)(m)) which must be considered by the Board of Examiners in deciding whether or not to recommend that a person is a fit and proper person to be admitted (s 2.3.3).

[3] See eg *re B (a solicitor)* [1986] VR 695 at 699; *XY v Board of Examiners* [2005] VSC 250.

[4] LIV submission to Board of Examiners, *Practice Direction No.4 of 2009 – requirement to disclose a material mental impairmen*t (December 2009), LIV submission to National Legal Profession Reform Taskforce, *Mental Capacity: A New Approach* (August 2010), LIV Discussion Paper, *Therapeutic Model for Disclosure* (February 2011), LIV Submission to Board of Examiners, Law Admissions Consultative Committee - *Disclosure Guidelines for Applicants for Admission to the Legal Profession* (May 2011), available at http://www.liv.asn.au/For-Lawyers/Sections-Groups-Associations/Practice-Sections/Submissions.

2. Overarching principles for assessing the relevance of mental health status

The LIV's approach to critically assessing the Victorian regulatory model has been guided by a number of overarching principles, which we believe are central to understanding the proper role of regulation affecting people experiencing mental illness. These principles include:[5]

- A human rights based approach – drawing on the United Nations *Convention on the Rights of People with Disabilities* and the *Charter of Human Rights and Responsibilities 2006* (Vic), interference with human rights (such as the right to privacy) should be least restrictive to achieve the regulatory aims pursued (in this case, the protection of clients of law practices);[6]
- A focus on prevention – whereby any interaction with the regulatory system should allow for positive encouragement to promote personal health and wellbeing and encourage those who might be unwell to seek treatment. This can only be achieved under a therapeutic approach and not one which includes intensive scrutiny and cross examination, which could exacerbate ill health;
- Onus of disclosure – is problematic where applicants are required to disclose mental health conditions when diagnosed, thereby creating a disincentive to seek treatment and further, because of issues relating to stigma, and perceptions about potential discrimination and use of health information;
- Privacy of personal information – including that the collection, use and disclosure of health information complies with relevant laws;
- Procedural fairness – making clear that there is no presumption of incapacity by reason of disclosure of mental illness;
- Non-discrimination – any person seeking admission to practise law must not be unlawfully discriminated against based on physical or mental impairment where they are otherwise eligible for admission;
- Current assessment of fitness – the need to draw a distinction between a person's underlying capacity on the one hand, and their current state of health on the other; and
- Protection of the public – from the damage that could be caused by an unsuitable person handling their affairs, where suitability depends on a person's conduct (which may or may not relate to their mental health) and not simply their mental health status.

Based on anecdotal feedback from law graduates and PLT providers, the LIV continues to be concerned that the Board's current approach might inadvertently adversely affect the mental health of applicants for admission by creating additional stress, stigma and a barrier to seeking treatment. Further, we suggest that developments under both the Uniform Law and under equal opportunity laws support changes to both the Disclosure Guidelines and the Board's processes to ensure that applicants for admission are not judged on their health status but rather on their ability meet the inherent requirements of being a lawyer.

[5] See further LIV Discussion Paper, Therapeutic Model for Disclosure (February 2011).

[6] We note that the Uniform Law specifically overrides the *Charter of Human Rights and Responsibilities 2006* (s 6) and provides that the Board is not a public authority under the *Charter* (s 6(3)).

3. Changes under the Uniform Law – 'Inherent requirements of practice'

Disclosure requirements relating to mental health conditions could vary depending on the content of new Admissions Rules to be made by the new Legal Services Council.

Under the *Legal Profession Act 2004* (Vic), (the current Victorian Act), whether a person currently has a material mental impairment is a suitability matter (s 1.2.6(1)(m)) which must be considered by the Board of Examiners in deciding whether or not to recommend that a person is a fit and proper person to be admitted (s 2.3.3). Section 1.2.6(1)(m) provides statutory authority to the Board to discriminate against applicants on the basis of mental impairment where the Board considers that the impairment has a direct bearing on the applicant's ability to practise law.

The new Uniform Law requires applicants to be fit and proper persons to be admitted, but does not list suitability matters. We understand that it is anticipated that new Admissions Rules will be made by the new Legal Services Council (under s 420). Under s 421, the Admission Rules "may require the disclosure of matters that may affect consideration of the suitability of an applicant for admission". Section 17 (2) requires the designated local admitting body have regard to the matters specified in the Admission Rules and has a further broad discretion to have regard to any matter relevant to the person's eligibility or suitability for admission, however the matter comes to its attention.

Draft Legal Profession National Rules, released for consultation in 2010, included "whether the person is currently unable to carry out satisfactorily the inherent requirements of practice as an Australian legal practitioner" (Draft Rule 1.2.2 (m)) as a suitability matter. This provision reflects the provisions of the (former) Standing Committee of Attorneys-General's second edition of the Legal Profession - Model Bill, implemented in s 9(m) of the *Legal Profession Act 2004* (NSW).

The concept of 'inherent requirements' originates from international labour and human rights law.[7] Australian anti-discrimination and workplace laws include the concept of 'inherent requirements' in the context of an exception, so that a discrimination claim will generally fail if the action taken by the employer is because the employee is unable to meet the inherent requirements of the particular position.[8]

The term 'inherent requirements' is not defined in legislation but has been considered in case law. The High Court has found that an 'inherent requirement' is something that is 'essential to the position'[9] and not 'peripheral'.[10] The court also found that the context surrounding the employment is relevant, as well as the person's physical ability to perform the task.[11] Further, the inherent requirements must be in respect of 'a particular job'. The term 'a particular job' in article 1(2) of the *ILO 111 Convention* has been construed to

[7] See, e.g. *Convention (No. 111) concerning Discrimination in respect of Employment and Occupation*, opened for signature 25 June 1958, 362 UNTS 5181 (entered into force 15 June 1960) ('*ILO 111 Convention*'): 'Any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination' (article 1(2)).

[8] See, e.g. *Disability Discrimination Act 1992* (Cth), s 21A (DDA), the *Australian Human Rights Commission Act 1986* (Cth), s 3(1)(c) ('AHRC Ac't) and the *Fair Work Act 2009* (Cth) s351 ('FWA').

[9] *Qantas Airways v Christie* (1998) 193 CLR 280, 294 [34] (Gaudron J).

[10] *X v The Commonwealth* (1999) 200 CLR 177, 208 [102] (Gummow and Hayne JJ).

[11] See *Qantas Airways Limited v Christie* (1998) 193 CLR 280; *X v Commonwealth* (1999) 200 CLR 177.

mean ‘a specific and definable job, function or task’ and its ‘inherent requirements’ are those required by the characteristics of the particular job.[12]

The essential requirements of a particular job include that an employee (or prospective employee) can successfully perform their duties. Assessment of whether they can perform their duties might require assessment of health information regarding whether the person can *safely* carry out their duties (noting that anti-discrimination laws do not override obligations under occupational health and safety laws).[13] Under anti-discrimination laws, employers are under an express legal obligation to make reasonable adjustments to accommodate a worker with a disability (including a mental illness).[14] An employer does not have to provide the adjustment where the worker would not be able to perform the essential requirements of the job even after the adjustments are made.

In contrast to anti-discrimination and workplace laws, assessment by an admitting body of whether an applicant for admission “is currently unable to carry out satisfactorily the inherent requirements of practice as an Australian legal practitioner” lacks the specificity of an assessment against a particular job or position within an organisation. Legal practice varies greatly depending on the context in which a lawyer works, whether in a small, medium or large firm, in government or corporate practice, or the community legal sector.

It is unclear whether the ‘the inherent requirements of practice’ has the same or similar meaning to the ‘fit and proper person’ test expounded upon by Pagone J in *Frugtniet v Board of Examiners*.[15] According to Pagone J, the fit and proper person test requires applicants to have “the personal qualities of character which are necessary to discharge the important and grave responsibilities of being a barrister and solicitor”. Following the Frugtniet judgement, the ‘inherent requirement of practice” might be said to include “high standards of honesty and ethical behaviour… when advising clients, acting for clients, certifying documents, and making presentations to courts, governments, other professionals, and so on”.

If the ‘inherent requirements of practice’ are the same as the fit and proper person test, then it is unclear whether the Uniform Law continues to provide specific authority to inquire into an applicant’s mental health status.

Specific authority to inquire into an applicant’s mental health status might arise if a health assessment power is included in the Admission Rules (based on Part 2.5, Div 3 of the *Legal Profession Act 2004* (Vic)). The LIV does not support admitting bodies being conferred powers to require health assessments, for reasons set out below.

[12] International Labour Organisation, *General Survey: Equality in Employment and Occupation*, (1988), [126]. See also: *Qantas Airways Ltd v Christie* (1998) 193 CLR 280, [72] (McHugh J).

[13] See, e.g. ss 21 and 24 of the *Occupational Health and Safety Act 2004* (Vic).

[14] See *Disability Discrimination Act 1992* (Cth), s 5 and *Equal Opportunity Act 2010* (Vic), s 20.

[15] [2002] VSC 140.

4. Developments in equal opportunity law

The US Department of Justice recently concluded that attorney licensing systems in Louisiana and Vermont violate the *Americans with Disabilities Act 1990*. In correspondence to the Louisiana bar,[16] the Department of Justice concludes that the Court's processes for evaluating applicants to the Louisiana bar, and its practice of admitting certain persons with mental health disabilities under a conditional licensing system, discriminate against individuals on the basis of disability by:

(1) making discriminatory inquiries regarding bar applicants' mental health diagnoses and treatment;
(2) subjecting bar applicants to burdensome supplemental investigations triggered by their mental health status or treatment as revealed during the character and fitness screening process;
(3) making discriminatory admissions recommendations based on stereotypes of persons with disabilities;
(4) imposing additional financial burdens on people with disabilities;
(5) failing to provide adequate confidentiality protections during the admissions process; and
(6) implementing burdensome, intrusive, and unnecessary conditions on admission that are improperly based on individuals' mental health diagnoses or treatment.

The Department of Justice notes that 'questions based on an applicant's *status* as a person with a mental health diagnosis do not serve the Court's worthy goal of identifying unfit applicants, are in fact counterproductive to ensuring that attorneys are fit to practice, and violate the standards of applicable civil rights laws'.[17] The Department of Justice suggests that the Court should properly safeguard the administration of justice by ensuring that all attorneys licensed in the State of Louisiana are competent to practice law and worthy of the trust and confidence clients place in their attorneys by asking questions related to the *conduct* of applicants.

The LIV is concerned that the Disclosure Guidelines and the Board's current processes similarly discriminate against applicants for admission in Victoria and suffer from some of the shortcomings identified by the US Department of Justice above. This is highly undesirable for the legal profession and those seeking a future career in it. As a profession, we should be seen by the general community as promoting proper respect for the rights and interests of all people, including those among our ranks (or potential ranks) who have suffered illness or injury, mental or otherwise. We should be role modelling the implementation of reasonable adjustments to accommodate lawyers with disabilities including mental illness.

Section 36 of the *Equal Opportunity Act 2010* (Vic) ('*EOA*') prohibits the Board from discriminating against applicants for admission on the basis of disability, by refusing to confer admission or subjecting them to any other detriment. 'Other detriment' would include the requirement for applicants who have (or have had) a mental illness to disclose private health information, which constitutes unfavourable treatment (because applicants without a disability are not required to provide private health information). 'Disability' includes a 'mental or psychological disease or disorder' (s 4(1)). Section 37 provides an exception, whereby the Board may set reasonable terms in relation to admission, or make reasonable variations to those terms, *to enable* a person with a disability to practise law. Section 37 is framed to allow the Board to dispense with admission

[16] See correspondence titled 'The United States' Investigation of the Louisiana Attorney Licensure System Pursuant to the Americans with Disabilities Act (DJ No. 204-32M-60, 204-32-88, 204-32-89)', at http://www.ada.gov/louisiana-bar-lof.pdf.

[17] Ibid 1.

requirements that the applicant cannot meet because of their disability; that is, to allow what might be termed ‘positive discrimination’. Section 37 does not otherwise authorise discrimination to exclude applicants for admission.

As suitability matters are not dealt with in the Uniform Law, it is doubtful whether the statutory authority exception (under s 75 of the *EOA*) will continue to apply. It also raises questions about whether the rule making power (in s 426 of the Uniform Law) would authorise the making of discriminatory rules within the proposed Admissions Rules, i.e. a rule that places the Board’s practices outside the bounds of equal opportunity laws.

Further, we suggest that developments in equal opportunity law, and specifically the *EOA* provisions discussed above, may override any previous disclosure requirements arising under common law relating to fitness and mental health status.

Even if the *EOA* does not fetter the inherent jurisdiction of the court to regulate entry to the profession, we suggest that a contemporary understanding of mental illness necessitates a shift in thinking about the relevance of a person’s mental health status to whether they are a ‘fit and proper person’ to practise law.

5. Contemporary understandings of mental illness and disability

Assessment of mental capacity and whether this renders a person unfit to practise forms part of the protective jurisdiction of the court.[18] Exercise of this aspect of the protective jurisdiction is, however, extremely rare[19] and is subject to evolving understanding about mental illness and mental capacity.

Since 2007,[20] there has been growing awareness in the Australian legal profession that lawyers are more likely than the general population to experience depression and anxiety.[21] Most significantly, the Brain and Mind Research Institute reported in 2009 that almost a third of solicitors and one in five barristers surveyed suffered from clinical depression.[22] These studies, which reflect international experience, [23] indicate that systemic factors are affecting prevalence of mental health conditions among lawyers. Mental health can no longer simply be conceived as an individual health issue, but must be recognised more broadly as both a workplace and profession-wide issue.

The LIV has responded to studies on lawyer mental health in a number of ways, including through a project funded by the Legal Services Board Grants Program *Mental Health and the Legal Profession: A Preventative Strategy.* The final report of the project, released on 11 September 2014, sets out detailed proposals for the introduction of a preventative health and wellbeing strategy for the Victorian legal community. Proposals are informed by research on existing legal and medical profession health programs and literature on lawyer personality traits and causes of distress in lawyers, consultations with members of the legal and medical community and evaluation of the Vic Lawyers' Health Line pilot.

The Victorian legal community health and wellbeing strategy, launched in September 2014, seeks to promote mental health and wellbeing and manage depression and anxiety within the legal community. The LIV's approach to developing a health and wellbeing strategy for the Victorian legal community has been grounded in its philosophy that mental health is a health issue. When mental health is understood as a health issue, it is possible to take steps to prevent serious health issues from developing. The strategy operates across a therapeutic continuum, recognising responsibilities of the individual lawyer, their close network of family and friends, employers, educational institutions and jurisdictional stakeholders for lawyer wellbeing.

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[18] See, e.g. *New South Wales Bar Association v Evatt* [1968] HCA 20;(1968) 117 CLR 177 and *Re B (a solicitor)* [1986] VR 695, 699.

[19] Brooking J observed in *Re B (a solicitor)* [1986] VR 695, 699, that "Mental unfitness to practice the law does not seem to have formed the basis of any reported application to strike off the roll either in England or in Australia".

[20] Beyond Blue: The National Depression Initiative, *Annual Professions Survey: Research Summary,* April 2007.

[21] For an overview of the major depressive illnesses and anxiety disorders, see http://www.beyondblue.org.au/the-facts.

[22] See Kelk, Norm, Georgina Luscombe, Sharon Medlow and Ian Hickie (2009), *Courting the blues: Attitudes towards depression in Australian law students and legal practitioners*, Sydney: Brain & Mind Research Institute, University of Sydney (the Brain and Mind Study).

[23] See, e.g. WW Eaton et al, "Occupations and the prevalence of major depressive disorder", (1990) 32 *Journal of Occupational Medicine* 1079; GAH Benjamin et al, The prevalence of depression, alcohol use and cocaine among United States lawyers', (1990) 13 *Journal of Law and Health*, 240.

The profession's evolving understanding of mental health reflects broader social, legal and policy shifts in the area of mental health and disability, which seek to support people with mental illness to participate in meaningful work.

For example, the *Convention on the Rights of Persons with Disabilities*[24] (the Convention) marks a paradigm shift in approaches towards understanding persons with disabilities as subjects with rights,[25] including the right of persons with disabilities "to work, on an equal basis with others; this includes the right to the opportunity to gain a living by work freely chosen" (Article 27). The Convention recognises that "disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others."

Under employment and equal opportunity laws, job applicants and employees are not required to disclose that they have a disability. An employer is entitled to ask questions about a person's health status if it is relevant to whether they are able to *safely* carry out the essential requirements of the job.[26] If an employee fails to disclose a pre-existing injury or illness that might reasonably be expected to affect the person's ability to perform the normal duties of a job (when specifically asked by the employer), the person might be precluded from receiving workers' compensation if the condition recurs or gets worse on the job.[27]

The *Fair Work Act 2009* (Cth) provides that an employer must not take adverse action against a person who is an employee or prospective employee because of the person's physical or mental disability. In *Grant v OPP*[28] the Federal Circuit Court found that employers must give proper consideration to medical reports when managing employees with depression and anxiety in the workplace.

The Australian Human Rights Commission has published the following fact sheet about mental illness, which seeks to address common myths and misconceptions about mental illness:[29]

FACT 1: People with mental illness can and DO work	People with mental illness successfully work across the full spectrum of workplaces. Some people disclose their mental illness and some do not. Most importantly, people with mental illness can succeed or fail, just like any other worker. Examples of prominent people with mental illness who openly discuss and reflect on their mental health issues and have developed successful careers include: Dr Geoff Gallop – Former WA Labor Premier

[24] *Convention on the Rights of Persons with Disabilities and its Optional Protocol* (A/RES/61/106), adopted 13 December 2006, opened for signature on 30 March 2007.

[25] As per Vickery J in *Nicholson & Ors v Knaggs & Ors* [2009] VSC 64.

[26] See *Occupational Health and Safety Act* 2004 (Vic).

[27] *Workplace Injury Rehabilitation and Compensation Act* 2013, s 41.

[28] *[2014] FCCA 17.*

[29] Australian Human Rights Commission, Workers with Mental Illness: a Practical Guide for Managers, see https://www.humanrights.gov.au/publications/2010-workers-mental-illness-practical-guide-managers.

	Craig Hamilton – ABC Sports Commentator Olivia Newton John – Entertainer Pat Cash – Tennis player
FACT 2: Mental illness is treatable	Mental illness can be treated. This means that many people who have mental illness, and are being treated, recover well or even completely. However, because there are many different factors contributing to the development of each illness, it can sometimes be difficult to predict how, when, or to what degree someone is going to get better.
FACT 3: The vast majority of people with mental illness are NOT dangerous	It is far more likely that people with mental illness are victims of violence rather than being violent themselves. Only a small number of people with mental illness are violent and this tends to be when they are experiencing an untreated psychotic episode. This behaviour can be managed through the use of medication.
FACT 4: People with mental illness live and work in our communities	People with mental illness do live and work in our communities. The majority of people successfully manage their illness without it greatly impacting on their home and work life, while others may require support to minimise its impact.
FACT 5: People with mental illness have the same intellectual capacity as anyone else	Having mental illness does not necessarily imply any loss of intellectual functioning. Some symptoms and medications associated with mental illness may affect a person's ability to concentrate, process, or remember information.
FACT 6: People with schizophrenia do NOT have multiple personalities	People with schizophrenia experience changes in their mental functioning where thoughts and perceptions become distorted and are often 'split' from reality. Schizophrenia is not about having 'split or multiple personalities', as is often portrayed in the media.

Based on contemporary understandings of mental illness, the LIV concludes that it is no longer tenable for the legal profession to seek to exclude otherwise qualified applicants from its ranks *solely* on the basis of mental health status. A person should not be considered unsuitable to practise law simply because they have, or have had, a mental illness. There may be periods where, due to illness, the person is unable to work. Lawyers who are unwell should be supported to obtain treatment and to return to work. Only where misconduct or unprofessional conduct issues arise – which may or may not be linked to a person's mental health status – should a person's fitness to practise law come into question.

The question of mental illness and its impact on a person's ability to practice should be dealt with through ongoing regulatory measures, where the situation of lawyers who become unwell and unable to practise can be dealt with on a case by case basis (for example, under the Legal Services Board Mental Health Policy).

6. Moving towards a consistent approach in Victoria and NSW

According to a recent academic article examining the differences in legislation, policy, practice and culture of admitting authorities across Australian jurisdictions,[30] there are significant jurisdictional discrepancies in many aspects of the admission process. The article highlights, for example, that in 2009, 95 per cent of applicants for admission in Victoria made disclosures, so that applicants were 17 times more likely to disclose matters than their counterparts in NSW.[31]

While some discrepancies may have been dealt with through the introduction of the Disclosure Guidelines, which have been adopted by both Victoria and NSW, it seems likely that discrepancies will remain if different disclosure practices and evidentiary requirements continue in each state. While Victoria requires affidavits (and allows a separate affidavit relating to capacity), NSW provides a pro forma admission application form.

Further, we understand that unlike the NSW Legal Profession Admission Board, the Victorian Board of Examiners has adopted a practice of conducting informal meetings with applicants regarding mental health disclosures. While we appreciate that in adopting this practice, the Board is seeking to ameliorate the stress and stigma associated with disclosures and to protect the privacy of applicants, we query the administrative law implications of these meetings and their overall impact on decision-making. We also have ongoing concerns about the lack of mental health expertise among Board members and the stress and burden on applicants required to disclose personal health information outside of a therapeutic setting to persons who may be future professional colleagues, employers, opponents, tribunal members or judicial officers.

The Uniform Law provides an opportunity to move towards a consistent approach in NSW and Victoria, which should extend beyond consistent law and policy, to consistent process.

[30] Barltett, F and Haller, L, 'Disclosing Lawyers: Questioning Law and Process in the admission of Australian lawyers', *Federal Law Review* 41 (2013) 227.

[31] Statistics taken from the Law Admissions Consultative Committee, Submission to Taskforce on National Legal Profession Reform, 19 July 2010.

7. Recommendations

An applicant's health status should not be used as a specific criterion for assessing whether they are a fit and proper person for admission. Rather, the Board should be concerned with the *conduct* of applicants and its bearing on their suitability.

Where an applicant's conduct is being considered, the applicant may or may not choose to provide evidence about their mental health status at the time of the conduct, as part of an explanation of the conduct. We do not, however, believe that the applicant should be required to provide such evidence. Furthermore, failure to provide evidence of mental health conditions should not form part of the Board's consideration of whether there has been full and frank disclosure.

A finding that an applicant is not a fit and proper person to be admitted should not be based on any particular mental health condition or diagnosis, but rather on the basis of the applicant's conduct and their understanding and estimation of that conduct. We therefore suggest that an applicant's mental health status should properly be regarded as irrelevant, while their present understanding and estimation of their conduct will be relevant (as per the Board's Disclosure Guidelines). This approach would avoid the danger of stereotypes or stigma being attributed to people who currently or previously have suffered mental illness.

The LIV therefore submits that the Board should discontinue its practice to require applicants for admission to make disclosures about mental health conditions.

The LIV recommends that the Board implement the following changes:

1. *Disclosure Guidelines*

(a) Delete the following sections, reflecting the position that the Board should no longer require disclosures about capacity:
- Part 7 Disclosures about capacity
- Paragraph (e) under part 3 Relevant principles
- The words "or suffered anything" from the statement provided under part 4

(b) Insert new Part 7, indicating that where the applicant has made disclosures about conduct and they consider that evidence relating to their mental health is relevant to the Board's consideration of their fitness to practice, they may provide reports from an appropriately qualified health practitioner.

2. *Procedures*

Procedures for dealing with disclosures related to mental health should be clear and transparent and set out in a policy or guideline.

Where an applicant elects to provide evidence relating to any mental health conditions in the context of disclosures about conduct, the Board should appoint an independent assessor with appropriate mental health expertise to assess the medical evidence and provide advice to the Board about the relevance of

the evidence to the question of fitness (that is, in the context of assessing the applicant's understanding of their conduct and their estimation of that conduct).

If the Board proceeds to a hearing about the applicant's conduct, the constitution of the Board should include a mental health expert.

The LIV refers further to the proposals set out in our Discussion Paper, Therapeutic Model for Disclosure, provided to the Board in February 2011, a copy of which is attached.