# Draft Admission Rules

## PROPOSED HEALTH ASSESSMENT POWERS

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**Date:** 23 January 2015

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1. A diagnosis of mental illness (a person's mental health status) should properly be regarded as irrelevant for the purposes of determining whether a person is a fit and proper person to be admitted to the legal profession.

2. Where a Board is considering whether particular conduct of an applicant calls into question whether the applicant is a fit and proper person to be admitted to the legal profession, a report from a registered health professional (a health report) might be relevant to that issue

3. Draft rule 9(k) should be amended to include guidance about the meaning of 'whether a person is unable to satisfactorily meet the inherent requirements of practice'. The LIV recommends that guidance should set out that inherent requirements of practice includes 'whether the applicant lacks the mental capacity to make the judgments necessary to meet appropriate professional standards in legal practice or otherwise discharge the important and grave responsibilities of being a barrister and solicitor'.

4. Draft rules 22 and 23 should be amended to incorporate the following safeguards to protect an applicant's rights to privacy, procedural fairness and non-discrimination:

    a. Draft rule 22 should be circumscribed to situations where an applicant's conduct calls into question whether they are a fit and proper person. Draft rule 22 could be circumscribed by limiting the scope of the discretionary power so that each Board may require an applicant to provide a report from a registered health practitioner only where further evidence is required about an applicant's understanding, estimation and insight into disclosable conduct arising under draft rule 9(1) (a) - (j).

    b. Draft rule 22(2) should give primacy to the health report of the applicant's treating health practitioner.

    c. Draft 23(1)(a) should set out matters that should be addressed in a health report. Alternatively, this could be set out in other publicly available guidelines agreed on by the Boards.

    d. Draft rule 23(1)(c) should be amended to reverse the presumption about when a health report will be provided to an applicant. Health reports should routinely be provided to applicants, unless this would pose a serious threat to the life or health of the applicant.

    e. Draft rule 23 (2) should fully protect the confidentiality of health information obtained by the Board, including against an attempt to subpoena the information.

5. Draft rule 16(4) should be amended to clarify that if an applicant chooses to disclose health information in relation to any aspect of their application, this can be done in a separate statutory declaration.

6. Where an admitting body considers a health report as part of its deliberations about whether an applicant is a fit and proper person, the Admission Rules should require the relevant Board to either:

   a. appoint an independent assessor with appropriate mental health expertise to provide advice to the Board about the relevance of the medical evidence to the question of fitness; or

   b. include in its constitution a suitably qualified health professional.

# INTRODUCTION

The Law Institute of Victoria (LIV) welcomes the opportunity to make this submission on the Draft Admission Rules (the Draft Rules). This submission is limited to aspects of the Draft Rules relevant to consideration of mental health during admission.

Since 2009, the LIV has made numerous submissions regarding the requirement to disclose mental health conditions during the admission process.[1] 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.

In October 2014, the LIV released a Position Paper on Mental Health and Disclosure Requirements for Applicants for Admission to the Legal Profession (copy attached). The Position Paper reviews relevant legal requirements under the Uniform Law, developments in equal opportunity law and contemporary understandings of mental illness and concludes that 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.

This submission discusses the appropriateness of proposed compulsory health assessment powers (in draft rules 22 and 23) in light of the LIV's view that an applicant's mental health status alone should properly be regarded as irrelevant for the purposes of determining whether they are a fit and proper person to be admitted to the legal profession.

[1] LIV submission to Board of Examiners, *Practice Direction No.4 of 2009 – requirement to disclose a material mental impairment* (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.

# THE RELEVANCE OF MENTAL HEALTH STATUS TO FITNESS TO PRACTISE

The LIV Position Paper provides an overview of the overarching principles which have guided the LIV's approach to critically assessing the Victorian regulatory model as it relates to mental health. These principles include: [2]

- 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);[3]

- 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, 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 these principles, the LIV's analysis of developments in the *Legal Profession Uniform Law Application Act 2014* (the Uniform Law), equal opportunity law and contemporary understanding about mental illness and disability, the LIV Position Paper recommends amendments to Victorian Practice Direction No 2 of 2012, *Disclosure Guidelines for Applicants for Admission to the Legal Profession* (the Disclosure Guidelines) to reflect that:

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

[3] 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)).

- 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 and should be regarded as irrelevant.

- A finding that an applicant is not a fit and proper person to be admitted should be based on the applicant's conduct and their understanding and estimation of that conduct. An assessment of an applicant's mental health might be relevant to their insight into their conduct.

- Where an applicant's conduct is being considered, the applicant may or may not choose to disclose evidence about their mental health status at the time of the conduct, as part of an explanation of the conduct.

- Applicants should not be required to make disclosures about mental health conditions.

- Failure to provide evidence of mental health conditions should not form part of the Board of Examiners' consideration of whether there has been full and frank disclosure.

These recommended changes to the Disclosure Guidelines are distinct from necessary changes to the Draft Rules, discussed in this submission. As you are aware, the Disclosure Guidelines explain the duty of disclosure on applicants seeking admission to the legal profession. The Admission Rules, in contrast, will have the status of subordinate legislation and will provide the admitting bodies with powers to exercise their statutory functions.

# OVERVIEW OF DRAFT ADMISSION RULES RELEVANT TO CONSIDERATION OF MENTAL HEALTH

The Draft Rules would require the Victorian Board of Examiners (the Victorian Board) and the NSW Legal Profession Admission Board (the NSW Board) to have regard to whether an applicant for admission is currently unable satisfactorily to carry out the inherent requirements of practice as an Australian legal practitioner (draft rule 9 (k)).

Draft Rules 22 and 23 would confer on the Victorian and NSW Boards power to require an applicant to provide a health report and, if the relevant Board is not satisfied with the health report, to require an applicant to undergo a health assessment by a medical practitioner appointed by the Board. Draft rule 23 is based on s2.5.4 of the *Legal Profession Act 2004* (Vic), which confers on the Victorian Board the power to require a health assessment where it believes on reasonable grounds that an applicant may have a mental impairment that may result in him or her not being a fit and proper person to engage in legal practice in this jurisdiction. The Explanatory Notes to the Draft Rules note that 'in Victoria's experience, the provision has been useful in some cases'. NSW currently has no equivalent power. The Explanatory Note suggests that the power would be discretionary and that NSW could choose not to exercise it.

The Explanatory Paper indicates that the Draft Rules are intended to be 'facilitative, rather than prescriptive in their tenor' and that 'while the Rules establish principles, many matters of detail are left to be agreed between jurisdictions, as and when required' (Explanatory paper, p6). Despite this broad intention to be facilitative, the LIV considers it appropriate for Rules requiring applicants to provide health reports or undergo health assessments to be circumscribed to ensure that they are proportionately adapted to meet their purpose and thereby be least restrictive of applicants' rights to privacy and non-discrimination. We elaborate on this further below.

# PROPOSED AMENDMENTS TO THE DRAFT ADMISSION RULES

The Draft Rules require amendment to ensure consistency with the LIV Position Paper and, specifically, to clarify that:

- A diagnosis of mental illness (a person's mental health status) should properly be regarded as irrelevant for the purposes of determining whether a person is a fit and proper person to be admitted to the legal profession (LIV recommendation 1); and

- Where the Board is considering whether particular conduct of an applicant calls into question whether the applicant is a fit and proper person to be admitted to the legal profession, a report from a registered health professional (a health report) might be relevant to that issue (LIV recommendation 2).

The LIV Position Paper comments that the legal 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 (at p11). Based on these 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.

The LIV asserts that 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. The LIV Position Paper recommends that the question of mental illness and its impact on a person's ability to practise 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).

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. A report from a registered health professional might be relevant in the context of particular conduct to assess an applicant's understanding and estimation of that conduct, i.e. their insight into the appropriateness and seriousness of the conduct.

We make recommendations in the following to amend the Draft Rules to grant the Boards power to require health information in this limited context.

## Draft rule 9(k)

The LIV welcomes the new requirement in draft rule 9(k), which requires the Boards to consider 'whether an applicant for admission is currently unable satisfactorily to carry out the inherent requirements of practice as an Australian legal practitioner'. This will change the requirement in Victoria from the current *Legal Profession Act* 2004 (Vic), which requires the Victorian Board to consider whether the person currently has a material mental impairment (s1.2.6 (1)(m)). The shift in terminology to 'inherent requirements' is a positive development because, unlike s 1.2.6(1)(m), draft rule 9 will no longer directly discriminate on the basis of disability.

The LIV is concerned, however, that, without further explanation or definition, the concept of 'inherent requirements of practice' lacks precision and makes it difficult for applicants and health practitioners to provide relevant health information when required to do so.

The LIV Position Paper notes that the concept of 'inherent requirements' originates from international labour and human rights law.[4] 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.[5] 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'[6] and not 'peripheral'.[7] The court also found that the context surrounding the employment is relevant, as well as the person's physical ability to perform the task.[8] Further, the inherent requirements must be in respect of 'a particular job'.

The LIV Position Paper points out that, 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.

The LIV recommends that the Draft Rules should provide guidance on the term 'inherent requirements of practice'. In a 2010 submission to the National Legal Profession Taskforce, the LIV recommended that the Rules should define "inherent requirements", "satisfactorily" and "unable" so that:

a. Assessment of whether a person is "unable" should be based on a capacity assessment which requires evidence of cognitive impairment in addition to evidence about whether the person, by reason of the cognitive impairment, is unable to meet the inherent requirements of practice.

b. "Inherent requirements of practice" should be defined to recognise the requirements of different types of practice, based on practising certificate types and/or relevant conditions imposed.

An explanation of 'inherent requirements of practice' could include the 'fit and proper person' test expounded upon by Pagone J in *Frugtniet v Board of Examiners*,[9] which would require consideration of whether an applicant lacks the mental capacity '*to make the judgments necessary to meet appropriate professional standards in legal practice or otherwise 'discharge the important and grave responsibilities of being a barrister and solicitor*''.[10]

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[4] 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)).

[5] See, e.g. *Disability Discrimination Act 1992* (Cth), s 21A (DDA), the *Australian Human Rights Commission Act 1986* (Cth), s 3(1)(c) ('AHRC Act') and the *Fair Work Act 2009* (Cth) s 351 ('FWA').

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

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

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

[9] [2002] VSC 140.

[10] *Frugtniet v Board of Examiners* [2002] VSC 140 per Pagone J

## Draft rules 22 and 23

The LIV's preferred position is to simply delete draft rules 22 and 23, so that the Boards would not be able to compel applicants for admission to provide health reports or undergo health assessments. This position is consistent with the LIV Position Paper, which argues 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.

The Position Paper notes that there may be periods where, due to illness, the person is unable to work. It asserts that 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 Position Paper recommends that the question of mental illness and its impact on a person's ability to practise 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.

The LIV acknowledges, however, the Victorian Board's view that, in some cases, a mental health practitioner might be able to provide evidence that would assist the Board to evaluate whether an applicant is a fit and proper person in light of particular conduct disclosed to the Board. In these cases, a health report might be relevant as part of an assessment of an applicant's insight into particular conduct which may call into question whether they are a fit and proper person to be admitted to the legal profession.

The LIV therefore recommends a limited power under the Draft Rules authorising the Boards to require an applicant to obtain an expert opinion from a registered mental health practitioner about the applicant's insight into conduct that brings into question whether they are a fit and proper person. A limited power would balance an applicant's rights to privacy and non-discrimination with the public policy objective to ensure that only fit and proper persons are admitted, and ensure that health information can be compulsorily acquired only where it is necessary to assess whether the applicant lacks the mental capacity to make the judgments necessary to meet appropriate professional standards in legal practice or otherwise 'discharge the important and grave responsibilities of being a barrister and solicitor'. The question of whether an applicant lacks this mental capacity would arise only where there is a question arising about their insight into disclosable conduct, and not by mental health status alone.

***Proposed Amendments***

- Draft rule 22: Limiting the scope of the compulsory power

Draft rule 22 should be circumscribed to situations where an applicant's conduct calls into question whether they are a fit and proper person. Draft rule 22 could be circumscribed by limiting the scope of the discretionary power so that the Boards may require an applicant to provide a report from a registered health practitioner only where further evidence is required about an applicant's understanding, estimation and insight into disclosable conduct arising under draft rule 9(1) (a) - (j).

- Draft rule 22(2): Giving primacy to the treating doctor's report

The Admission Rules should give primacy to the health report of the applicant's treating health practitioner, who is best placed to provide evidence about whether the applicant is able to meet the inherent requirements of practice as a lawyer. If the Draft Rules are amended to set out matters that should be

addressed in a health report as per below, this should ensure that the report of the applicant's treating health practitioner deals with the relevant issues.

- Draft 23(1)(a): Setting out matters that should be addressed in a health report

Ideally, the Draft Rules should set out those matters that should be addressed in a health report. Alternatively, this could be set out in other publicly available guidelines agreed on by the Boards. This would provide a framework within which health practitioners would provide an opinion about an applicant's insight into conduct that brings into question whether they are a fit and proper person to be admitted and, as a result, whether the applicant is currently unable satisfactorily to carry out the inherent requirements of practice as an Australian legal practitioner.

- Draft rule 23(1)(c): Ensuring procedural fairness

Draft rule 23(1)(c) should be amended to reverse the presumption about when a health report will be provided to an applicant. Health reports should routinely be provided to applicants, unless this would pose a serious threat to the life or health of the applicant. The right to procedural fairness requires applicants to be notified about any evidence that the Board may use to make an adverse decision. The threshold of 'seriousness' is consistent with the Health Privacy Principles under the *Health Records Act* 2001 (Vic).

- Draft Rule 23 (2): Fully protecting confidentiality of health information

Draft rule 23(2) would make health information available under compulsion of law, which could include a subpoena arising in a civil suit. Health information provided to the Board for the purpose of determining whether an applicant is a fit and proper person to be admitted should not be accessible to any third party for any purpose whatsoever. The Draft Rules should fully protect the confidentiality of health information obtained by the Board and should provide a complete defence to any attempt to subpoena information.

## Draft rule 16(4)

Draft rule 16(4) currently states that 'A person may make any disclosure relating to that person's capacity in a separate statutory declaration from that referred to in subrule (1)'. The LIV considers that without further amendments along the lines recommended in this submission (that would introduce the concept of mental capacity into the Draft Rules), draft rule 16(4) is insufficiently precise and likely to confuse applicants in relation to what is required because the Draft Rules do not use the term 'capacity'. Accordingly, draft rule 16(4) should be expanded and clarify that, if an applicant chooses to disclose health information in relation to any aspect of their application, this can be done in a separate statutory declaration.

# ADDITIONAL MATTERS RELATING TO PROCEDURES

The LIV Position Paper also makes recommendations in relation to procedures for dealing with health information, including that procedures for dealing with disclosures related to mental health should be clear and transparent and set out in a policy or guideline. We are also concerned to ensure that the constitution of the Board enables it to appropriately consider health information in its decision-making about whether an applicant is a fit and proper person.

The LIV recommends that where the Board considers a health report as part of its deliberations about whether an applicant is a fit and proper person, the Admission Rules should require the Board to either:

- appoint an independent assessor with appropriate mental health expertise to provide advice to the Board about the relevance of the medical evidence to the question of fitness; or
- include in its constitution a suitably qualified health professional.

This would assist the Board in its dealings with applicants and to assess the relevance of health information to its decision-making.