“Towards Wellness: Implementing a therapeutic approach to mental health in the Victorian legal profession”

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Abstract:

This paper tells the story of how the Victorian legal profession has sought to meet the challenges arising from alarming statistics published between 2007 and 2010 that suggest that 1 in 3 solicitors and 1 in 4 barristers have or will suffer from a depressive illness during their career. The paper will outline the ‘therapeutic model’ advocated by the Law Institute of Victoria (LIV) to guide a systemic industry response which broadly addresses awareness raising, prevention, provision of services and regulation, within a human rights framework.

The paper:

- provides an overview of literature examining the causes of the concerning rates of mental illness among legal professionals;
- summarises advocacy and steps taken to implement a ‘therapeutic model’ of regulation and prevention in Victoria; and
- introduces the LIV’s Mental Health and the Legal Profession Project, including the pilot Vic Lawyers’ Health Line, launched in April 2012 and scoping for a lawyers’ health program.¹

1. Evidence of a problem: Research on depression and anxiety disorders among legal professionals

1.1 Prevalence of depression and anxiety disorders in the Australian legal profession

Since 2007,² there has been growing awareness in the Australian legal profession that lawyers are significantly more likely than the general population to experience depression and anxiety.³ 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.⁴ The study also found a general reluctance to seek help for mental health issues.³ National average statistics published in 2009 show that 11.9% of the total population used health services for mental health problems (including but not limited to depression and anxiety) in the previous 12 months.⁶ Of these people, three-fifths (58.7%) had a 12-month disorder; and one-fifth (19.8%) had experienced a mental disorder in their lifetime, but had no symptoms in the previous 12 months.⁷ These figures alarmingly suggest that Australian lawyers might be around three times more likely to suffer from a depressive illness or anxiety disorder than other Australians.

The limited Australian research on mental health of lawyers is consistent with international experience, with similar prevalence findings in a number of older American studies.⁸ Similarly, Australian research on law students, which report even higher rates of psychological distress in law

¹ This paper was prepared for the National Wellness for Law Forum 21 – 22 February 2013 and delivered on behalf of the Law Institute of Victoria.
³ For an overview of the major depressive illnesses and anxiety disorders see Appendix 1.
⁵ Brain and Mind Study, p.viii.
⁶ Australian Bureau of Statistics, National survey of mental health and wellbeing: Summary of results, 4326.0, 2007, p.44; http://www.abs.gov.au/ausstats/subscriber.nsf/0/6AF6D2A47F988FCC/A2575E4A40132BD6/$File/43260_2007.pdf. This study was conducted by the Australian Bureau of Statistics (ABS) from August to December 2007. The study collected information from approximately 8,800 Australians aged 16-85 years. According to the categorisation followed by the ABS, the national figures revealed that one in five people suffer from some form of mental illness each year with one in seven having an anxiety disorder, one in twenty an affective disorder and one in twenty a substance use disorder. Almost half of the Australian population (45.5%) experience mental illness at some point in their lifetime.
school than among lawyers, replicate the findings of studies in American law schools going back to the 1950s.

1.2 Causes of depression and anxiety in lawyers

These alarming statistics on mental wellbeing require the legal profession to consider further why its members suffer such high rates of anxiety and depression. Some commentators suggest that the nature of the legal profession, which is adversarial and conflict-driven, together with attributes shared by lawyers, including perfectionism and pessimism, put lawyers at higher risk of depression. This analysis suggests that in order to understand the causes of high rates of psychological distress, we need to consider further the major triggers for anxiety and depression: personal factors (unique to the individual) and external factors.

Understanding the causes of psychological distress, and in particular the high prevalence rates among lawyers, will assist the profession to respond most appropriately. The following provides an overview of some of the research considered by the Law Institute of Victoria (LIV) as it has developed its approach to mental health in the profession.

1.2.1 Personal factors

A review of the psychological literature by the LIV suggests that a person's personality traits, combined with their cognitive strategies (in particular, their coping strategies), impacts on their susceptibility to particular forms of psychological distress. A transactional model of stress broadly suggests that the level of psychological distress experienced by a person will depend on the interaction between life's stressors, a person's personality traits and their coping strategies.

The review also identified that there has been very little psychological research on the personality traits and coping strategies of lawyers as a sub-group of the general population, so that little is understood about the particular susceptibility of lawyers to anxiety and depression. High rates of depression and anxiety among lawyers has, however, led to numerous theories based on observed attributes of lawyers (as distinct from psychological indicators of personality trait and cognitive strategies).

The widely cited book of Susan Daicoff about lawyers and law students found that certain attributes distinguish lawyers from the general population:

- A high need for achievement
- A preference for dominance and leadership
- Competitiveness that can also be at the level of aggressiveness
- Materialism
- Low interest in emotional concerns
- An emphasis on rational analysis, based on a preference for thinking as a decision-making style
- An emphasis on rights, based on preferring a 'rights orientation' rather than what Daicoff describes as an 'ethic of care'.

However, the LIV's review of the literature identified that some other writers have taken some different approaches, commenting on lawyers' internal locus of control (where an individual believes that events are controlled by his or her own actions, rather than external events), the

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9 Brain and Mind Study, p11.
11 As is discussed further below, after receiving funding from the Legal Services Board to advance the development of mental health initiatives for the legal profession, the LIV engaged a Mental Health Project Consultant to conduct a literature review on lawyer personality traits and the susceptibilities towards particular forms of psychological distress.
12 Personality traits are ‘organised mental structures, varying from person to person, which initiate and guide behaviour’: G Matthews et al, Personality Traits (Cambridge University Press, 3rd ed, 2009) p 6.
13 G Matthews et al, Personality Traits, p.282.
cognitive analysis of viewing problems from all sides, also labeled as pessimism, perfectionism, and having high levels of attention to detail:

Lawyers, as a group, are more introverted, more doubt ridden, and more cool and logical than most people. They are less open about their feelings and less inclined to live in the present than most people. Lawyers are competitive, confident (sometimes a kiss away from arrogant), aggressive and achievement-oriented; they can be argumentative.

Michelle Sharpe of the Victorian Bar has observed that “as Daicoff points out ... while the attributes of lawyers identified might be useful, or even desirable, to lawyers professionally, they can be personally detrimental. Obviously, being a predominantly rational, achievement-oriented, competitive and aggressive person can be destructive of interpersonal relationships”.

In the development of a health program for the profession, these factors suggest that any response by the legal profession as a whole must therefore work at the individual level to improve a lawyer’s awareness of his or her own personality and cognitive styles. Resilience training and counselling aim to build up an individual’s capacity to develop more appropriate cognitive strategies to assess and respond to stressors and can be seen as preventative strategies for anxiety and depression. Ideally, professional associations and legal educators should work collaboratively to build awareness of mental wellbeing and adopt therapeutic strategies that teach lawyers self-awareness skills to recognise the symptoms of psychological stress (insight) as well as to develop cognitive techniques and lifestyle strategies for when it occurs and to reduce the risk of it (re)occurring.

Simple lifestyle changes such as regular exercise, maintaining a healthy diet and eating regularly with friends rather than alone at one’s desk, maintaining outside interests other than just the law or culture of the firm or organisation where one works, getting regular sleep and having a routine are all common sense matters that assist in maintaining mental wellbeing. It is also important for people to learn that sometimes things are bigger than each of us and professional medical help is needed in order to get better and that this is not a sign of weakness.

However, a focus on personal factors only would ignore another crucial component of mental wellbeing: external factors, or ‘life stressors’.

1.2.2 External factors

The above research into the psychological literature distinguishes between two different types of life stressors: interpersonal stress (stress generated by conflict between the individual and significant others -- family, friends, peers); and non-interpersonal stress (stress generated by occupation or educational situations; and health problems). For example, research by Amanda Uliaszek et al suggests that of these two types of stress, ‘episodic interpersonal stress is more likely to precipitate a depressive episode than episodic non-interpersonal stress’. Other literature

15 Brain and Mind Study, p. 46.
on work stress highlights that exposure to stressors does not necessarily cause health problems in all people.  

There is a paucity of systematic research into the relationships between the culture of legal practice, work stress and the management of health and well-being among lawyers. At the time of writing, research is underway by Professor Janet Chan at the University of New South Wales, who is conducting a national Health and Wellbeing Survey of Australian Lawyers.  

The key aims of the survey will be to identify risk factors and causes of work stress in different types of practice and locations, assess the influence of workplace cultures and practises on stress levels, and inform senior management at law firms regarding appropriate policies to deal with stress and depression.  

The results of this research will be important to help shape the legal profession’s response.

One form of interpersonal stress experienced by lawyers appears to be workplace bullying. The New South Wales Law Society’s 2002 Remuneration and Work Conditions Survey indicated that bullying behaviour by bosses and co-workers was a serious problem in the NSW legal profession, with over one in five respondents (22%) reporting that they had experienced workplace bullying.  

A report by Professor Maryam Omari in 2010 found similar levels of workplace bullying in legal practices in Western Australia in 2010  

and found that in many cases, there is a fine line between managerial prerogative, operational efficiency, performance driven culture, competitive work environments and workplace bullying.  

The legal profession needs to further consider employer obligations to protect worker health and wellbeing under occupational health and safety and accident compensation laws as it develops a preventative strategy for wellbeing in the profession. Employers and professional associations could work more closely with agencies such as Work Safe to assist and encourage legal employers to implement anti-bullying policies and practices.

There has been some limited research on lawyers at risk of vicarious trauma, which can occur where lawyers are involved in cases with particularly distressing circumstances. Research by Lila Vrkleski found that criminal lawyers, who are often exposed to detailed courtroom testimony, witness conferencing and graphic evidence, had a higher rate of distress and vicarious trauma, depression, anxiety and higher levels of avoidance of certain issues, intrusive thoughts or images and hyperarousal or jumpiness, than lawyers working in conveyancing or academia.  

Here our profession can learn from the experience of other occupations that face day-to-day trauma such as paramedics, police and fire fighters. One strategy could be to introduce psychological “de-briefing” sessions in the workplace for lawyers whose job involves working in highly distressing cases. The efficacy of compulsory single session debriefing has been questioned in its effectiveness at reducing post-traumatic stress disorder, and the legal profession should work closely with mental health professionals to identify who might be at risk and who might benefit from intervention.  

Whatever strategies are implemented, they should extend not just to the lawyers and paralegals directly involved in a distressing case but the judges and other staff in the courts that routinely hear distressing evidence, for example, in rape trials and cases of child sex abuse, grievous assault or murder.

26 See eg Associate Professor M Dollard, *Work Stress Theory and Interventions: From Evidence to Policy - A Case Study*, (PhD, University of South Australia, 2001). This was presented at the National Occupational Health and Safety Commission Symposium on the OHS Implications of Stress in December 2001 and is available at http://www.safeworkaustralia.gov.au.


28 Also see SANE Australia “Stigma Watch” campaign at http://www.sane.org/stigmawatch.

29 M Omari, ‘Towards Dignity & Respect at Work: An exploration of work behaviours in a professional environment’ (Edith Cowan University, 2010) p.13. 21% of respondents to the survey reported that they were bullied at their current place of employment.


1.3 Stigma, perception and misunderstanding

In recent years, Australian society has become increasingly aware of the prevalence of depression and anxiety as illnesses in our community, which can largely be attributed to the work of organisations such as Beyond Blue: the national depression initiative, the Black Dog Institute and the Mental Health Council of Australia. Yet stigma, discrimination and misunderstanding continue to affect the way people respond to mental illness. This is a most unfortunate irony because we are otherwise very tolerant of our friends and family when they are experiencing feelings of sadness or stress over things we can understand and we are generally non-judgmental of people who suffer physical injury or illness.

Stigma surrounding mental illness was recently acknowledged as a barrier to people accessing treatment by the Council of Australian Governments. The Roadmap for National Mental Health Reform 2012–2022 (the National Roadmap), endorsed by all Australian governments on 7 December 2012, acknowledges that “there may be a significant delay between the onset of symptoms and the search for specialised support as a result of limited access to services and the stigma that prevents appropriate help-seeking behaviour”. The Roadmap commits all governments to reducing stigma and discrimination and sets priorities and strategies for implementation.

The fact will also prevail that many people who are suffering a mental illness such as depression do not know that they are unwell. It has been observed in general medical practice that:

People with depression often do not know what is wrong and will sometimes start to develop other symptoms such as headaches, abdominal pain, tiredness and other aches and pains which are the body’s way of signalling that it is not well. This may be the reason they go to see their GP.

It might also take others such as family members, friends or colleagues to recognise that a person is not themselves and potentially suffering from depression. Even then, some people might adopt behaviours that effectively mask their condition.

The Brain and Mind Study suggested that perceptions held by lawyers about mental wellbeing might create a barrier to seeking help, including perceptions about the value and impact of treatment and likelihood of discrimination by employers. Any response by the legal profession should therefore include continuing to raise awareness about depression and anxiety disorders, the importance of seeking treatment and initiatives aimed at reducing stigma, consistent with the National Roadmap.

1.4 Expectations about life in the law

Through its work with law students, graduates, universities and PLT providers, the LIV has become increasingly concerned about the need to manage expectations about life as a lawyer during the transition from education to entry into the profession. University entry requirements mean that generally, law students have graduated from school in the top percentage of their year and anecdotaly, we are told that many students choose to study law primarily because of their high ATAR (previously ENTER) score. Gaining entry into law school is a thing of great excitement, expectation and pride in students and in their families. For many students, a rapid change in life often occurs over a very short period of time which many students may not anticipate.

Studying law opens a potential world of opportunities, with future career options in private law firms, academia, government, in house, not-for-profit organisations, with the courts or overseas.

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34 A Vickers, All about depression, (booklet).
36 In 2011, the LIV undertook the Law Graduates of the Future Survey to gauge the preparedness of law graduates for the practice of law. Under the umbrella of the ‘Law Graduates of the Future’, the LIV prepared two surveys, one for employers, the second for first and second year law graduates. Participants were selected from the LIV’s membership base and were invited to undertake the survey to indicate the extent to which they felt that the education undertaken at university and during Practical Legal Training prepared graduates for their careers in the law. The survey results were discussed at the Law Graduates of the Future Forum held in December 2012.
Once they have commenced their studies, there is pressure on law students to gain clerkships and be admitted to internship programs culminating in pressure to receive an offer of employment and to progress through the profession.

Running in parallel for law students is the sense of professionalism and responsibility of being a lawyer that is imbued during studies, culminating with the gravitas of applying to be admitted to the profession and then being admitted at a ceremony in the Supreme Court, where friends and family come to watch, again with great excitement and expectation. What may not be anticipated is that it is from this point where real work begins, the reality of which is that it can be sedantry, repetitive, stressful, deadline driven and at times isolating and a bit of a hard slog. It involves a whole new set of skills which take time to learn: how to deal with clients and their needs and demands and how to deal with employers and the expectations of bosses and partners. For many, after the initial settling in, a period of deceleration begins and the trajectory of ones’ legal career flattens so that the next promotion may be 5 or 10 years away, or longer.

This period often coincides with other commitments of which young people have had little or no prior experience, such as the expense of running a car, financial commitment to a home mortgage, commitment to personal relationships and marriage, balancing the expectations of personal partners, and for many, the demands and responsibility of having children. What can go out the door are all the other things a person used to do, like playing sport, reading, taking holidays away from the phone, having casual meals with friends, relaxing on the weekend. A lot of store can be built on being a lawyer, but if the reality of actually being a lawyer does not meet that expectation or if people experience difficulty and stress in performance of their role at work, it can have negative consequences for a person’s sense of self and wellbeing.

These issues, among others, were discussed at the Law Graduates of the Future Forum hosted by the LIV in December 2012 and attended by education providers, legal employers and law student representatives. Mental health and wellbeing and disability were topics of specific interest and discussion, and forum participants were keen to meet further to discuss progress. In 2013, a series of confidential one-on-one meetings will be held with education providers to provide provider specific feedback and benchmarking information based on the results of the Law Graduates of the Future Survey and the outcomes of the Forum. The LIV is considering convening an annual forum to discuss progress on issues raised, including mental health and wellbeing.

1.5 The case for action

Traditionally, mental illness has been viewed as a deeply personal matter, to be dealt with by the individual in a private or healthcare setting. Only in recent years has there been recognition and acceptance that it is not just a public health issue but a workplace issue. In addition to a safe and secure home, all people need to a “mentally healthy and supportive workplace”:

Mental unwellness has been, and is seriously underestimated in our community.

Workplaces have a vital role to play in providing supportive environments that promote health and wellbeing and resilience in its people.

With mental ill health starting in our young and surfacing in 75% of this group before they reach the age of 25, hiding behind old outdated clichés and excuses around personal issues not being the domain of workplaces, no longer hold true.

A major finding of the Brain and Mind Study was that “[a]ssisting law students and [lawyers] with psychological distress is a task for legal and educational communities” not just the individuals experiencing psychological distress. Mental health and wellbeing of lawyers therefore requires more than public health and employment responses: it requires a profession-wide response.

37 See eg I Ozols and B McNair, Mental Health, Creating a Mentally Healthy and Supportive Workplace’, (OzHelp Foundation 2007).
38 K. Todd ‘Foreword’ in Ozols and B McNair, Mental Health, Creating a Mentally Healthy and Supportive Workplace’, (OzHelp Foundation 2007).
39 Brain and Mind Study, p.48.
The LIV’s research reminds us that the immediacy of dealing with an acute mental health problem, not to mention managing that problem over a period of time, creates enormous challenges for the individual lawyer, for his or her family and friends, for his or her employer and colleagues within the firm, and potentially for his or her clients. We should not forget the pain, anguish and suffering behind the statistics reported in studies like the Brain and Mind Study and others that is all too easy to forget in our search for ‘solutions’. It is stories of personal tragedy that highlight the fatal consequences of failing to act and which have inspired a groundswell of action across the Australian legal community to meet the mental wellbeing challenge facing the profession, by legal employers, education providers, professional associations and organisations such as the Tristan Jepson Foundation. The challenge for all actors in the legal community, including professional associations, is how best to respond to the research.

2. Responding to the research: Implementing a ‘therapeutic model’ of regulation and prevention in Victoria

2.1 Concerns about the Victorian regulatory approach to mental health

In 2009, the Law Institute of Victoria (LIV) became concerned that the regulatory approach of the Victorian legal profession,\(^{40}\) which had previously received little attention in public debate or research, might adversely be impacting on prevalence rates of depression and anxiety among lawyers by inadvertently creating a barrier to seeking treatment.

The problem, in short, is that mental health of practitioners, and specifically disclosure of mental illness (including past mental illness) is regarded as a regulatory issue. There is justifiable concern, given what is at stake, that only people who have the cognitive faculty and ability to carry out the inherent requirements of the job should be licensed as lawyers to represent clients and appear before the courts. The system of administration of justice depends on lawyers doing their job. The real issue is how that public policy is administered?

In the context of the legal profession, where a lawyer’s reputation is everything, how should the issue of mental illness be dealt with so that lawyers are not putting their main asset, their health, at risk? Is the regulatory policy and the way it is administered appropriately adapted to the social objective it is trying to meet?

As is explained later, because the legal profession is such a highly regulated profession there are both legislative requirements and professional ethical requirements to consider. There are also differences in approach between the bodies charged with the task of administering these requirements. The four stages where the issue is considered are:

(1) Firstly, at the time of admission to the legal profession (where the Supreme Court and the Board of Examiners are involved);

(2) Secondly, annually to obtain a licence to practise (where the Legal Services Board and its delegates\(^{41}\) are involved in the issue of “practising certificates”);

(3) Thirdly, if a practitioner makes a voluntary disclosure on becoming unwell (where the Legal Services Board considers the impact of the disclosure); and

(4) Fourthly, if disciplinary action is triggered because of a complaint about a practitioners’ conduct or failure to comply with regulatory requirements (where again the Legal Services Board and its delegates and potentially the Supreme Court play a role).

\(^{40}\) See further Appendix 2.

\(^{41}\) The Law Institute of Victoria and the Victorian Bar consider disclosure of suitability matters under delegated authority pursuant to s6.2.19 of the Legal Profession Act 2004 (Vic). When exercising delegated functions, the LIV operates through its Professional Standards Department and is subject to strict confidentiality requirements under s6.4.5 of the Act.
A confusing aspect of the regulation of lawyers’ “fitness to practise” (the general framework under which a person’s ability to fulfill the requirements of being a lawyer is assessed, explained further in Appendix 2), is that it embraces not just the assessment of a person’s mental capacity but also their “character”. Lawyers must be “fit and proper persons” to be entrusted with the responsibility of representing clients and this entails an assessment of whether a lawyer is a person of good character. Here we can immediately see a danger of “mental illness” being conflated with questions of character and the potential for reinforcing a negative stigma about mental illness.

The issue of disclosure of personal medical information, generally something attracting a high level of privacy and confidentiality, also affects what is regarded as a person’s basic rights. Justifiable concerns arise about who will receive that information and what use might be made of it and, indeed, will the people considering it have the expertise in mental health to understand what to make of it? Whether people with a mental health condition will be subject to discrimination based on disability is also a potential risk of ill-adapted regulatory policies and procedures. Given that different mental illnesses that can affect people of different sexes, and at different times, the issue of whether the regulatory policies and procedures operate unfairly against people of different sex or age come into question.

Two other considerations have particular importance to the issue of disclosure of mental illness in the legal profession.

The first is the question of what to disclose? How does a person who has suffered a mental illness make an assessment of what is relevant or “material”? The person may have suffered a serious mental illness in the past but be in remission and have been successfully managing the condition for many years. Another person might currently be experiencing a period of being unwell but, again, receiving proper management and treatment and fully capable of doing their job. How do they assess what is relevant and material? It raises the issue, why is it necessary for them to disclose at all if they are managing their health condition and have insight into it. And why should they be put in a situation that they are forced to disclose because they are not in a position to make that assessment? In contrast, another person may have a serious mental illness but never have been diagnosed. Here, while the regulatory requirement would dictate disclosure, the person is not aware that they are sick. A regulatory regime that uses disclosure as its tool for implementation creates a conundrum in that it will end up getting disclosure from those people from whom disclosure is unnecessary and miss out entirely from those who potentially present the greater risk to the system and potentially are at greatest personal risk. It raises the question whether the process of requiring disclosure achieves its regulatory objective?

The second is the risk of not disclosing medical information when asked to do so. Here, an ethical consideration is relevant. Non-disclosure can give rise to concerns about a person’s honesty, itself an independent ground for refusal of admission or for suspension of a practising certificate if it is uncovered that no disclosure was made and it transpires that it should have been.

**EXAMPLE**

A young law graduate seeking admission had a serious mental illness as a child. There may have been no particular cause, but consider that they may have been emotionally affected as a child by their parent’s separation; they may have been the victim of child sex abuse or of physical abuse; they may have suffered an eating disorder; their sibling or best friend may have died. The precise reason that they may have developed a mental illness is irrelevant but it is painful to have to go back through the memory. They have been in remission for many years and their treating psychiatrist no longer considers any ongoing treatment necessary except to make an appointment if symptoms resurface (which they sometimes have - when this has occurred the symptoms have been managed in consultation with the psychiatrist who is very confident in the graduate’s insight into and ability to manage their health condition). Nevertheless the graduate is fearful that if they became mentally unwell in the future these past periods of illness will be brought up and the question will be raised whether they should have disclosed a mental health condition. At the time when they are about to enter their chosen profession they are also concerned that they do not know what use will be made of the information and whether stigma will attach. Will they ever be acting against the lawyer who has considered their application for
admission? Will they ever appear before a judge who read their disclosure affidavit? Will one of the people involved in assessing their admission application be a future employer?

Following input from the LIV’s Human Rights, Disability Law, Health Law and Lawyers with disAbilities Committees, as well as the Young Lawyers Section, the LIV came to the view that a new regulatory approach was needed that was better adapted to encouraging lawyers to actively seek treatment if they were at risk of (or had) mental illness. A therapeutic approach was advocated, which expressly treats mental illness as a health and wellbeing issue and sees regulation focus on whether an individual can fulfill the inherent requirements of being a lawyer. Viewed in this way, there is an important role for the regulators to facilitate and encourage treatment, because for some lawyers, interaction with the regulator presents an intervention opportunity. Further, the approach of the regulators has an important role in reducing stigma often associated with mental illness, by establishing psychological distress and illness as a health issue (and not a character issue).

The observation was made that people in the workforce with a disability were required to learn to negotiate and overcome greater obstacles than those without any mental or physical health condition or injury. That should tell us something about the adaptiveness and capacity of people with so-called “disability”. Rather than seeing people with mental or physical health issues as less able, we should consider that in many respects they are more able than others. For a law graduate with a health condition, for example, we should consider that not only did they successfully achieve the grades to get into law school but they also had the capacity to study at university and pass their law exams and then to satisfy their practical legal training requirements. Why therefore should regulation assume that they may be less able or have less capacity than their peers? Is it appropriate at all that they be subjected to such regulatory scrutiny?

2.2 Overarching principles guiding LIV’s approach to assessing the regulatory model

The LIV’s approach to critically assessing the Victorian regulatory model was, as its later written submissions stated, “guided by a number of overarching principles” which were seen as central to understanding the “proper role of regulation affecting people experiencing mental illness”.

They were based on the central proposition that “monitoring of capacity and health concerns” should be removed from the regulatory and disciplinary framework. Instead a new “welfare-focused body” should be established, external to the regulatory and disciplinary framework, to encourage and support the maintenance of “mental well-being in the profession”.

A core message in this approach was in the language surrounding mental illness. It should properly be understood as an ordinary issue of someone’s “health and wellbeing”, not a question of “character”.

These ideas made up the “therapeutic model” advocated by the LIV for the various stages of the regulatory process.

2.2.1 A human rights based approach

The LIV’s thinking was underpinned by the basic idea that “regulatory policy and the way it is administered should be appropriately adapted to the social objective it is trying to meet”. What this means in practical terms is that it should be tested:

(1) Firstly, on the basis of whether it is effective in doing what it seeks to do - i.e. making sure suitable people are permitted to practice law; and

(2) Secondly, it should do so in a way that has the least impact on people’s basic rights - i.e. making sure people’s medical privacy is respected and they are not to be made to feel

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43 See further LIV submission to the National Legal Profession Reform Taskforce, Mental Capacity: A New Approach (18 August 2010).
stigmatised or humiliated, or caused unnecessary stress and that people are not discriminated against on the basis of a disability.

This approach was informed by human rights principles. In human rights law a particular methodology is used to critically assess whether a restriction on a person’s basic human rights (such as the right to privacy) can be justified as being reasonable in a particular instance. It is called the principle of “minimum impairment” or “proportionality”. After considering the question whether a regulation or policy (or the way it is implemented) actually achieves the public objective that it is aimed at, the principle of “minimum impairment” then asks the question whether it does so in a manner that is the least restrictive of people’s basic rights. If there are other means of achieving the policy objective that are reasonably available and less restrictive of people’s basic human rights then it does not pass the “minimum impairment” test. It need not actually be the least restrictive so long as it falls within a range of reasonable alternatives for achieving the policy objective when considered against the nature and extent of the restriction placed on people’s rights.

Victoria’s regulatory bodies, the Legal Services Board and the Board of Examiners, are subject to particular human rights obligations under the Charter of Human Rights and Responsibilities Act 2006 (Vic) (the Charter). Under s38 of the Charter, it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right. Both the Board of Examiners and Legal Services Board (and LIV and Victorian Bar as delegates) are likely to be public authorities under s4 and therefore have obligations under s38. As such, they must consider a person’s human rights when assessing their application for admission or a practicing certificate. Section 38 has the effect that public authorities must have policies and procedures in place to ensure Charter compliance by staff and decision-makers.

The LIV’s human rights based approach was also informed by the United Nations Convention on the Rights of Persons with Disabilities (the Convention), which was ratified by Australia in 2008. The LIV’s submissions noted that a core foundation of the Convention is that it is based on a social, not a medical, model of disability and is focused on protecting the inherent dignity and rights of people with a disability. The Victorian case of Nicholson & Ors v Knaggs & Ors drew attention to the fact that the Convention:

marks a paradigm shift in approaches to persons with disabilities. It reflects a movement from treating persons with disabilities as objects of social protection towards treating them as subjects with rights, who are capable of claiming and exercising those rights and making decisions based on free and informed consent as active members of society.

Article 1 of the Convention identifies that persons with disabilities include those who have “longterm physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others”, confirming the rights of people with mental illness under international law. The LIV drew particular attention to Article 27 of the Convention, which deals specifically with “work and employment” and recognises the right of persons with disabilities, including mental illness, “to work, on an equal basis with others; this includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities”.

2.2.2 Focus on prevention

The idea of “prevention being better than cure” also permeated the therapeutic approach being advocated. What was advocated was that at each stage that a legal practitioner came into contact with the regulatory process, the opportunity should be taken to remind people of the benefits of

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44 See Charter of Human Rights and Responsibilities Act 2006 (Vic), subs 7(2)(c), (d) and (e) and Kracke v Mental Health Review Board [2009] VCAT 646 at [156] – [161].
45 See R v Oakes [1986] 1 SCR 103 at 138-140; R v Chaulk [1990] 3 SCR 1303 at 1341-1343; R v Sharpe [2001] 1 SCR 45 at [96]-[97]; R (Daly) v Home Secretary [2001] 2 AC 532 at [27] adopting the test whether “the means used to impair the right or freedom are no more than is necessary to accomplish the objective”.
46 [2009] VSC 64.
47 Ibid [13].
good personal health and wellbeing. If positive encouragement is given to seek help if people are feeling stressed or anxious, then there is a better chance that practitioners could stay well and build their resilience. In turn this might reduce the prevalence of mental health issues which first come to light after a matter is brought to the attention of regulatory authorities following a professional complaint or disciplinary inquiry. When this occurs the damage has already been done - to the client and to the practitioner concerned, and to the profession.

2.2.3 Protection of the public

The LIV’s advocated therapeutic model gave full recognition to the “paramount purpose underpinning the regulatory processes of both admission to practice and the issuing of practising certificates each year by the licensing bodies of the legal profession in each Australian jurisdiction, namely, the protection of the public and of the system of administration of justice against persons practising law who are not fit and proper persons”. Habersberger J in *XY v Board of Examiners* stated that “[t]he protection of members of the public from the damage that could be caused by an unsuitable person, for example by a possibly mentally unstable legal practitioner, handling their affairs is one of the main purposes of this part of the [Legal Profession Act].”

Within the legal profession it is well understood, and reiterated by the LIV in advocating its shift in regulatory approach, that the important and grave responsibilities of being a barrister and solicitor encapsulate not simply the duty to the client but an overriding duty to the court and to the administration of justice. The LIV’s submissions noted that “being a barrister and solicitor admitted to practise law carries with it a high responsibility which requires high professional and ethical standards” and that “practitioners must have the cognitive functioning to make judgments to meet appropriate professional standards in legal practice.”

2.2.4 Onus of disclosure

In its submissions about the current Victorian regulatory framework requiring a person to make full and frank disclosure of personal medical information to a statutory body, the LIV argued that the “onus of disclosure”, both on applicants for admission to the profession and for the grant and renewal of annual practising certificates, was “problematic” for a number of reasons:

- It raises particular concerns in the area of mental health and wellbeing, because of the stigma and stress associated with disclosure of mental illness and the perceived fear about its use. Applicants also fear the consequences of non-disclosure, which may be interpreted as dishonesty. Disclosure of health information to a regulatory body does not have a therapeutic purpose and may in fact have a damaging effect.

- The legal practitioner is in the first instance responsible for self-assessing the materiality of their particular health issue, which may or may not be diagnosed. The legal practitioner may be managing well with professional healthcare, so that impairment is not material. Alternatively, the practitioner may not have had their condition medically diagnosed so that they may not be aware of the need to make a disclosure or of what to disclose.

- It may apply unequally to men and women, because mental health raises different issues and concerns for men and women, including different risk factors. While many stressors may be similar in the personal lives of men and women (such as death in a family, relationship breakdown and divorce, loss of job, financial stress and other ill-health and injury), others such as post-natal depression may be gender-specific.

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50 *XY v Board of Examiners* [2005] VSC 250 at [32].
Young people seeking admission to practise are particularly fearful about the use of sensitive health information and how this might impact on future employment as they commence a career in law.\textsuperscript{52}

The LIV submitted that it believed that a new approach to assessment of fitness to practise was needed, which addressed, in particular, the onus of disclosure on applicants, the potential disciplinary implications of non-disclosure and the potential stress and stigma associated with disclosure.

### 2.2.5 Privacy of personal information, including medical information

In its submissions, the LIV also drew specific attention to the need for privacy concerns to be properly addressed, noting that the existing Victorian laws that protected the confidentiality of medical information disclosed to the relevant regulatory bodies. These included:

a. Information contained in health assessment reports to a regulator is protected by s2.5.10 of the \textit{Legal Profession Act}.

b. Health information contained in affidavits of disclosure and statutory declarations is protected under s7.2.15 of the \textit{Legal Profession Act} (confidentiality of personal information).

c. The regulators are subject to the \textit{Health Records Act} 2001 (Vic) and under s10(1) are required to comply with the Health Privacy Principles in relation to health information and Part 5 in relation to access to health information (s18).\textsuperscript{53}

### 2.2.6 Procedural fairness - no presumption of incapacity by reason of disclosure

One of the issues identified by the LIV in its advocacy was that regulation of the assessment of a person’s fitness to practise (both at the stage of admission to the profession and with the issue of practising certificates) was in part mandated by legislation and in part implemented by procedures adopted by the regulatory bodies.

For example, the Legal Profession Act sets out the general test of which the regulatory authorities must be satisfied, namely that a person was “a fit and proper person”; it defines what “must be” or “may be” considered as a “suitability matter” by each body; it defines a “suitability matter” to include “whether the person currently has a material mental impairment”; it further defines “mental impairment” as including “alcoholism and drug-dependence” but otherwise does not define the expression.

The Legal Profession Act also permits the making of “admission rules”, including “procedural requirements for applying for admission to the legal profession” (s.2.3.12), and stipulates that an application for admission to the profession “must be made in accordance with the Admission Rules” (s2.3.4). The Act further permits the Legal Services Board to establish procedural requirements for applying for issue or renewal of practising certificates (s2.4.9).

When it came to the various procedures adopted, each body required full disclosure of suitability matters by applicants for admission and for practising certificates. Different forms were prepared which tell applicants what they must address.

In advocating for a therapeutic approach in the assessment of mental illness in relation to a person’s suitability, the LIV submitted that it should be made clear that there was no presumption of incapacity by reason of disclosure of mental illness. Further, it suggested that regulators should publish guidelines or policies that explain to applicants how they will assess evidence about

\textsuperscript{52} See LIV submission to the National Legal Profession Reform Taskforce, \textit{Mental Capacity: A New Approach} (18 August 2010, p9.

\textsuperscript{53} LIV Discussion Paper, \textit{Therapeutic Model for Disclosure} (22 February 2011), [33].
capacity and how they determine whether cognitive impairment has a direct bearing on the applicant’s capacity to practise.

Legal capacity is an abstract concept, based on cognition, which is applied uniquely to different situations under statute and common law. Under the common law, all persons are presumed to have capacity unless it is proven that they lack capacity. This position is reinforced by Article 12 of the Convention which states that states that “persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life”. As identified above, Article 27 of the Convention deals specifically with “work and employment” and recognises the right of persons with disabilities to work, on an equal basis with others”.

In the guardianship context in Victoria, the Supreme Court has held that evidence of a disability is insufficient evidence to show that a person lacks legal capacity to make a specific decision, or specific types of decisions. While presence of a disability, such as a diagnosis of dementia or a mental illness, is a precondition to a finding that a person lacks legal capacity, this is not determinative. In addition, there must be evidence suggesting, for example, that the person does not understand the issues before them, the possible approaches to these issues or appreciate the reasonably foreseeable consequences of these approaches.

The LIV submitted that a similar approach should be taken both in the context of admission to practice and for issuing of practising certificates and that published guidelines should clarify that:

a. Applicants are not presumed to have incapacity to practise simply by reason of making a health-related disclosure. The issue of capacity is a matter which will be assessed objectively based on the circumstances of the individual’s case; and

b. Medical evidence of cognitive impairment is a precondition to a finding that a person does not have the ability to meet the inherent requirements of legal practice. However, medical evidence is not determinative and there must evidence that the cognitive impairment has a direct bearing on his or her capacity to practise (ie his or her cognitive ability to make judgments to meet appropriate professional standards in legal practice).

2.2.7 Non-discrimination

In addressing the question of mental illness in the legal profession, one of the challenging issues is that there is no entitlement to be a lawyer. Similar to requirements for other regulated professions (such as doctors, accountants and other service providers who are entrusted with professional responsibility), all are required to meet professional standards for the safety and wellbeing their patients and clients.

The LIV argued in its submissions that while no person has a right to be admitted to practise, equally, 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:

a. Under the Equal Opportunity Act 2010 (Vic), discrimination on the basis of impairment is permissible only where the impairment has a direct bearing on an applicant’s capacity to practise. Section 37 of the Equal Opportunity Act provides that a qualifying body “may set reasonable terms in relation to an occupational qualification, or make reasonable variations to those terms, to enable a person with a disability to practise the profession, carry on the trade or business or engage in the occupation or employment to which the qualification relates”. The provision appears to allow qualifying bodies, such as the Board, to establish policies and procedures that have the effect of restricting entry to the profession or the right to practise, so long as they are “reasonable” and establish a causal connection between a person’s impairment and his or her capacity to practise.

54 XYZ v State Trustees Ltd & Anor [2006] VSC 444 at [55].
55 Id.
56 See LIV Discussion Paper: Therapeutic Model for Disclosure (22 February 2011), [38].
58 See further LIV submission to the National Legal Profession Reform Taskforce, Mental Capacity: A New Approach, pp.12-14.
b. Qualifying bodies in Victoria also have a duty to take reasonable and proportionate measures to eliminate discrimination as far as possible (s15(2)).

c. Obligations arising under s 38 of the Charter require the regulators to act compatibly with human rights and to give proper consideration to relevant human rights in decision-making.

### 2.2.8 Current assessment of fitness

The final submission of the LIV was in the area of “materiality” and, specifically, that materiality must focus on a current assessment of fitness.\(^{59}\)

In considering this issue a further aspect of mental illness required particular attention. As with any illness that people can suffer during their lifetime, it is unpredictable when we will get sick and how long we will be sick for. We cannot know for sure whether we will be able to work, or when we will be able to get back to work or whether we will need to make any particular arrangements to enable us to work. It is also well understood that getting back to work can be a very important step in recovery. As a society we are also increasingly adopting more flexible work practices both in terms of working from office or home, part time or job-share, but not all types of legal practice entail the same work practices that can facilitate a return to work.

Practitioners work in a vast variety of areas and types of firm from sole practices in the country or suburbs to small, medium and large city firms. Litigation has different job requirements than transactional work; research and advice work has different job requirements than conveyancing work. In some work environments, people work in teams and in others, practitioners work on their own files, sometimes delegating or being delegated particular tasks. These features of legal work greatly affect when and whether a person may be able to work if they are suffering from illness.

Against this reality of the unpredictability of illness and its effect on our ability to work, is the fixed timeframes during which regulatory consideration is given to an individual’s “fitness to practise”.

Practising certificates are issued annually, usually in the months leading up to the start of the new financial year. Admission to the profession is an assessment made once, at the beginning of a lawyer’s professional life when they have completed their educational qualifications. What this should tell us is that the regulatory system needs to be flexible enough to anticipate that at given time when a person is required to make a disclosure for either admission to the profession or for their annual practising certificate, the person might be well or unwell at that time. They may have been previously unwell but have now recovered and in remission. They may be currently experiencing an episode of illness but in the future will be in a position to work.

We cannot, of course, predict the future but ultimately that is what the assessment of “fitness to practise” can involve when it comes to assessment of peoples capacity to fulfill the requirements of legal practice.

The submission therefore advanced by the LIV, in terms of the criteria prescribed by the legislation,\(^ {60}\) was that regulators must focus on the question of whether a person currently has a material mental impairment. The materiality of information to be disclosed was to be considered by whether it bore upon the question of whether a person has the capacity to satisfactorily carry out the inherent requirements of practice.

The LIV submissions acknowledged that some “historical” medical evidence may be relevant to the question of current capacity. However, the LIV suggested that “historical” medical evidence will be relevant only where it pertains to the current prognosis of a person.

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\(^{60}\) The Legal Profession Act requires the regulators to consider the suitability matter of whether an applicant “currently has a material mental impairment” (s1.2.6 (1)(m)). Subsection 1.2.6(2) of the Legal Profession Act clarifies that a matter is a suitability matter even if it happened before the commencement of the section, except if the provision in subsection (1) about the matter refers to the current situation in relation to the person.
The LIV submission argued that any assessment of a person’s capacity to practise is necessarily one that has a temporal dimension to it and that any procedure attempting to make that assessment must necessarily be tailored to take that into account. It acknowledged that there is necessarily a predictive element involving a degree of uncertainty and also 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.

Where a person is currently managing their health condition, then it follows that they have demonstrated a capacity to manage it. Where a person is currently not managing their health condition then the question arises whether they do have the capacity to manage it. Both matters require medical expertise depending on the nature of the medical condition. Mental illness, however, like physical illness, is not something you can plan and you cannot possibly know when you will fall sick. At best it is possible to know what may trigger an episode of illness or when one is entering or at risk of entering a period of unwellness and take steps.

3. How the LIV went about guiding a systemic industry response

The regulation of the legal profession in Victoria, is of course only part of the jigsaw of regulation of lawyers nationally. For decades there have been moves to nationalise the legal profession so that there is truly a one legal market and one legal profession in Australia. However, this has not yet occurred and under the current federal system there are in fact separate legal professions in each State and Territory of Australia. Nevertheless, arrangements between each jurisdiction have, for many years, enabled practitioners admitted to practise in one State or Territory to also practise in another. A degree of reciprocity also exists for overseas lawyers to be permitted to practise law in Australia.61

Against this broader backdrop, research into other State and Territory regulatory requirements showed that different approaches to the question of disclosure of mental illness arose in different jurisdictions. Therefore if there was to be a systemic industry response that promoted the health and wellbeing of lawyers, the Victorian profession had to participate in the national debate about a national profession where requirements for admission and practising certificate were squarely on the agenda.

In sequence of events, the LIV’s advocacy progressed in the manner set out below.

3.1 Correspondence with the Board of Examiners62

On 21 December 2009, the LIV wrote to the Board to raise issues of concern in relation to Practice Direction No.4 of 2009 (the Practice Direction). At that date, the Practice Direction provided, relevantly, the requirement that an applicant for admission “who has suffered or is suffering from a material mental impairment, including alcoholism or drug dependence, should disclose this”. The Practice Direction therefore required an applicant to disclose information about any current or past mental impairment. No guidance was provided to applicants about what might constitute a “material” mental impairment.

The LIV raised human rights issues under the Charter of Human Rights and Responsibilities Act 2006 (Vic) (the Charter), issues relating to privacy of health information and concerns that a requirement to disclose all diagnosed instances of mental impairment may deter people from seeking treatment for conditions which may give rise to mental impairment, such as mental illness, if they consider that evidence of treatment may be used against them in the admission process.

On 18 March 2010, the Board responded to LIV and made amendments to the Practice Direction to provide greater guidance to applicants for admission. While the amendments represented an

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61 See eg Legal Profession Act 2004 (Vic), Pt 2.4, Div 9.
62 See LIV submission: Practice Direction No.4 of 2009 – requirement to disclose a material mental impairment (21 December 2009).
improvement, the LIV remained concerned that current Victorian regulatory requirements, including provisions of the *Legal Profession Act 2004* (Vic) (the current Victorian Act) and the *Legal Profession (Admission) Rules 2008* (Vic) and policies and procedures of the Board of Examiners and Legal Services Board, which require disclosure of health information, did not encourage a therapeutic approach to mental illness and may in fact be a disincentive to practitioners seeking help or treatment for fear of alerting regulatory authorities to an impairment of mental capacity, which may or may not affect their ability to practise.

### 3.2 Submission to the National Legal Profession Taskforce

On 18 August 2010, the LIV made a submission to the National Legal Profession Reform Taskforce, seeking to ensure that legal practitioners suffering from mental illness are assisted and encouraged to access appropriate treatment and are not subject to unlawful discrimination in admission to the profession, practising certificate application or renewal or in seeking or maintaining employment under a National Legal Profession regulatory model. The LIV's submission argued that a new approach to mental capacity under the National Legal Profession must balance the protection of clients of legal services with the rights and welfare of legal practitioners.

The LIV's submission made a number of recommendations to the Taskforce:

**Recommendation 1:** Monitoring of health concerns, including those which might affect mental capacity, should be removed from the disciplinary/regulatory framework.

**Recommendation 2:** The Taskforce, in conjunction with the legal profession, should commission highly qualified mental health experts to assist in the design of a new independent welfare-focused body to provide a supportive external and preventative approach to mental health and well-being in the legal profession. The external body should be funded by state and territory Public Purpose Funds and should include education and awareness raising functions.

**Recommendation 3:** The LIV supports terminology in draft r 3.4.1(m) of the draft National Rules, which provides that the Board must consider “whether the person is currently unable to carry out satisfactorily the inherent requirements of practice as an Australian legal practitioner” when determining whether a person is a fit and proper person to be admitted.

The LIV prefers draft r 3.4.1(m) to s1.2.6(1)(m) of the *Legal Profession Act 2004* (Vic) (the current Victorian Act), which provides that ‘whether a person currently has a material mental impairment’ is a suitability matter relevant to fitness to practise.

**Recommendation 4:** The National Rules should be amended to define “inherent requirements”, “satisfactorily” and “unable” to provide better guidance to applicants for admission about information that is relevant to fitness to practise.

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.

**Recommendation 5:** The requirement for disclosure on affidavit (at the time of admission) or declaration (at the time of practising certificate renewal) about health conditions should be replaced with a requirement that the applicant state

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that they believe that they are currently able to carry out the inherent requirements of practice as a legal practitioner.

**Recommendation 6:** The National Legal Services Board should provide further guidance to applicants for admission and practising certificates about mental capacity requirements and assessment processes by way of publicly available guidelines.

Guidelines and procedures that have the effect of restricting entry to the profession or the right to practise should be “reasonable” and establish a causal connection between any cognitive impairment and a person’s ability to meet the inherent requirements of practice, in accordance with discrimination law and human rights principles.

**Recommendation 7:** The Taskforce should further consider how the draft National Law will interact with state and territory equal opportunity and human rights laws.

**Recommendation 8:** The Taskforce should further consider what privacy protections are required in relation to mental capacity assessments.

LIV representatives met with the Board of Examiners and Legal Services Board to discuss the recommendations and possible interim measures that could be undertaken by the Victorian regulators.

### 3.3 Discussion Paper: Therapeutic Model for Disclosure

On 22 February 2011, the LIV published a Discussion Paper: *Therapeutic Model for Disclosure*, which was discussed at a meeting of representatives of admitting authorities from the various jurisdictions on 23 February 2011. The Discussion Paper was guided by the underlying philosophy that mental illness should be dealt with as a health issue and that in all but a rare minority of cases, people can be supported to have a meaningful career in the law regardless of previous episodes of mental illness.

In the Discussion Paper, the LIV recommended:

a. the establishment of an independent and confidential advice and advocacy service to assist applicants to navigate the admissions process and provide advice about mental health-related issues and disclosure requirements

b. That the Board of Examiners:

   i. Provide applicants with a clear statement about the overarching principles adhered to by the Board in the exercise of its functions;
   
   ii. Provide detailed information to applicants about mental health and other health conditions which may be relevant to the question of whether an applicant has the capacity to carry out satisfactorily the inherent requirements of legal practice;
   
   iii. Develop a new procedure for handling health-related disclosures including:

      • **Stage One – Triage:** appoint a suitability qualified mental health professional to consider health-related disclosures and ascertain whether a Special Medical Panel should consider further the question of whether an applicant has the capacity to carry out satisfactorily the inherent requirements of legal practice.

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• **Stage two - Special Medical Panel:** a Special Medical Panel, including a suitably qualified medical practitioner and senior lawyer with mental health awareness training, should hear evidence relating to the health-related disclosure only and make a recommendation that the matter be heard by the full Board only where it cannot be satisfied that the applicant has the capacity to carry out satisfactorily the inherent requirements of legal practice.

• **Stage three - Hearing before Board of Examiners:** where the special medical panel is not satisfied that the applicant has the capacity to carry out satisfactorily the inherent requirements of practice, the Board should convene a hearing to consider the capacity issue. The capacity issue should be considered separately and prior to any issues of character; and

  c. Provide for a separate category of disclosures relating to alcoholism, drug dependence and gambling addiction, distinct to those matters relating

The LIV developed a Flowchart to illustrate our proposal, attached in Appendix 3.

### 3.4 Comments on Disclosure Guidelines and Mental Health Policy v1.0

In 2011, both the Board of Examiners and the Legal Services Board in Victoria took important steps to modify their approach to mental illness by developing new guidelines and policies. The LIV was invited to comment on both the Law Admissions Consultative Committee - Disclosure Guidelines for Applicants for Admission to the Legal Profession, which are intended to be implemented as uniform guidelines by admitting bodies in all jurisdictions, and the Legal Services Board Mental Health Policy v1.0 to operate in Victoria post admission.

The Legal Services Board published the Mental Health Policy v1.0 in December 2011. The policy sets out the Board’s approach to lawyers with mental impairments. The opening words of the policy make clear its purpose: to encourage lawyers to voluntarily seek appropriate treatment and to only require disclosure where the impairment affects the lawyer’s capacity to engage in legal practice. While not all the LIV’s suggestions were adopted, the LIV welcomed the new Legal Services Board policy, which clarified that lawyers who are effectively managing their mental illness need not disclose their condition when applying for and renewing their practising certificates. The LSB has delegated decision-making in relation to practising certificates, including management of mental health policy requirements, to the LIV where these matters are dealt with by experienced in-house practitioners.

In 2012, the Board of Examiners issued Practice Direction No. 2 of 2012 - Law Admissions Consultative Committee - Disclosure Guidelines for Applicants for Admission to the Legal Profession, which included a new section on disclosures about capacity. It asks whether the applicant has the “present capacity to carry out the tasks of a legal practitioner”. The guidelines make it clear that the requirement of capacity is separate and distinct from the requirement that an applicant be a fit and proper person or of good fame and character. The guidelines suggest that “it will often be prudent for an applicant to disclose any other matters which an Admitting Authority might think relevant” and that “matters which an applicant might be wise to disclose include any condition which might affect the applicant’s present ability to engage in legal practice - such as physical impairment, mental illness or addictions”. Following introduction of the guideline, a disclosure about capacity may be made in a separate statutory declaration lodged with an application.

Despite the issuing of new guidelines, the continuing approach of the Board of Examiners was criticised in an article by Mary-Jane Ierodiaconou and Roberta Foster in the Jan/Feb 2013 *Law*

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Institute Journal. The authors suggest that there have been a number of candidates who struggle to meet the Board of Examiners’ requirements and conclude that “the Board does not apply a therapeutic model”. They warn candidates for admission that they “should not underestimate how difficult it may be to satisfy Board requirements, and should consider obtaining legal advice if they are required to appear before the Board to discuss these issues”.

4. LIV’s Mental Health and the Legal Profession Project

Complementing its advocacy work, the LIV’s Mental Health Strategy seeks to improve mental wellbeing in the legal profession through the following six approaches:

(a) Consistency across the LIV in using the term ‘mental health and wellbeing’;
(b) Raising awareness of mental health issues in the legal profession;
(c) Providing lawyers with access to assistance from mental health professionals;
(d) Providing training on mental health issues through our Continuing Professional Development and events programs;
(e) Monitoring and contributing to the debate on the national legal profession initiative; and
(f) Scoping options for a lawyers’ health program.

The LIV’s Mental Health Strategy is underpinned by the overarching principles discussed above, to reinforce the underlying philosophy that mental health is a health issue, not a question of character.

The World Health Organisation (WHO) defines mental health to be:

A state of well-being in which an individual realizes his or her own abilities, can cope with the normal stresses of life, can work productively and is able to make a contribution to his or her community.

By approaching mental health and wellbeing as a health issue based on the WHO definition, it is, possible to take steps to prevent serious mental health issues from developing. Such a philosophy makes it possible for the LIV, through its Mental Health and the Legal Profession Project, to look at options that might assist lawyers to withstand the pressures of professional practice, while recognising that the responsibility for ensuring healthy lawyers is not one that should rest on the shoulders of individual lawyers alone. Many actors in the broader legal community have a role to play in ensuring the health and wellbeing of our colleagues.

In late 2011, the LIV obtained funding from the Legal Services Board for three activities which support implementation of its Mental Health Strategy:

a) To operate a pilot health and wellbeing service providing independent and confidential services for lawyers, now known as the Vic Lawyers’ Health Line;

b) To undertake a literature review on lawyer personality traits and the susceptibilities towards particular forms of psychological distress; and

c) To scope out options for an ongoing lawyers’ health program.

A project consultant was appointed in April 2012 and a Steering Group for the project convened in June 2012.

4.1 Vic Lawyers’ Health Line

The Vic Lawyers’ Health Line was launched in April 2012 and is operated for the LIV by PPC Worldwide. The Vic Lawyers’ Health Line provides a confidential triage and referral service for all Victorian lawyers, law students, judges and other members of the legal profession.

This is a significant trial. As a professional representative body, the LIV represents over 14,500 members. The service is however open to lawyers and other members of the profession who may not be members of the LIV including barristers, judges and tribunal members of state and federal courts and tribunals and law students at Victorian universities.

The LIV pays for up to three face-to-face counselling sessions provided by qualified psychologists from PPC Worldwide and all telephone consultations (which include initial triage, a Managers' Hotline, providing advice to legal employers about how to manage a person where they have concerns about their mental wellbeing, and a debriefing service, available to all lawyers following a particularly traumatic case). Information can also be obtained about regulation and disclosure requirements. After the funded counselling sessions, the user is referred on to an appropriate service (for example, a psychologist or a general practitioner). After this, the costs of further consultations must be paid for by the user directly.

Uptake has been moderate so far, with 31 counselling requests and 16 information requests relating to regulation and disclosure requirements received between the period 10 April 2012 – 10 December 2012. The predominant presenting issue during counselling has been psychological issues. Callers have been predominantly female, with 29 female callers and 17 male callers, which apparently is consistent with access to Employee Assistance Programs. Where disclosed, the majority of callers have been younger lawyers (less than 35 years old or less than 10 years in practice) and the highest number of calls has been from small practices and from in house lawyers.

An evaluation of the Vic Lawyers' Health Line will inform the options for an ongoing lawyers' health program.

4.2 Literature review on lawyer personality traits and the susceptibilities towards particular forms of psychological distress

The literature review is ongoing. The initial findings suggest that any response by the legal profession as a whole must work at the individual level to improve a lawyer’s awareness of his or her own personality and cognitive styles. Equally, however, any approach must address broader systemic issues and the external factors which impact on a person’s mental wellbeing. The literature review is primarily being used to inform the options for an ongoing lawyers’ health program.

4.3 Scoping options for an ongoing lawyers’ health program

4.3.1 Identifying levels of responsibility and intervention points

The LIV's consultation paper will suggest that promoting lawyer mental health must occur at a number of levels:

- at the individual lawyer level,
- at the intermediate level of the employer, and
- at the broader level of the jurisdiction conferring the license to practise as a lawyer.

The LIV consultation paper will note that what is appropriate for a new graduate will be different from a more experienced professional and it may well differ for men and for women.

At the individual level, the LIV will suggest that a degree of self-awareness coupled with self-care is necessary, based on the findings of the authors of the Courting the Blues report:

*Awareness of one’s mental style is the first step towards taking control of one’s method of thinking, and of adapting one’s mental style to different situations. What is relevant to the*
professional situation is not necessarily relevant to the personal situation. It is an important personal skill to distinguish between such different styles of thinking and behavior, and to be able to use them in different life contexts.\textsuperscript{70}

At the level of the employer – being anything from a sole practitioner up to multinational corporate law practice – the LIV consultation paper will promote strategies that ensure that the culture and practices of firms, to the best extent possible, support rather than diminish the health and wellbeing lawyers.

At the jurisdiction level, the LIV will continue to consider our profession’s practices in relation to disclosure and medical assessments for the purposes of admission, for disciplinary processes and for practising certificate renewals.

The LIV’s consultation paper will emphasise the idea of the lawyer being a member of various communities that might provide potential pathways for solutions. The Brain and Mind study noted that “the diversity of educational and practice settings will generate a wide variety of strategies for dealing with psychological distress and mental illness in different local situations”.\textsuperscript{71} Put simply, there is not one solution but the need for a series of strategies with the aim of building awareness and resilience in the profession. It entails teaching people healthier behaviours and ultimately, a change in professional culture.

The LIV consultation paper will suggest four different levels of responsibility for ensuring that lawyers practise with the required level of professionalism, which includes considering relevant health issues. An overview of this four-layer approach is set out below.\textsuperscript{72}

At the personal level
- integrity
- contributes to workplace culture
- responsibility for legal advice and ethical practices
- recognise limits of competence

At the level of the team
- many lawyers work in teams
- each lawyer contributes to the workplace culture
- each lawyer has a responsibility to ensure others in team act appropriately
- each lawyer has further responsibility to ensure any risk to clients posed by any team member is identified early and addressed

At the level of the firm
- employers have systems in place to ensure lawyers comply with required standards
- each firm has its own distinctive workplace culture
- legal practice governance arrangements to assure lawyers are competent and fit to practice
- legal practice governance arrangements enable concerns to be identified and addressed as quickly as possible

At the state level
- Board of Examiners in its assessment of applicants for admission to the profession
- Legal Services Board in its assessment of applications for practising certificates (including renewals)
- Legal Services Commissioner (and its delegates) in hearing complaints from clients and examining any evidence from practitioners

The LIV’s Mental Health and the Legal Profession Project is developing the concept of an intervention continuum, which seeks over time to implement a range of strategies and programs and which will address problems affecting mental wellbeing in the legal profession at these different levels, or intervention points.

\textsuperscript{70} Brain and Mind Study, pp 46-47.

\textsuperscript{71} Brain and Mind Study, p. 49.

\textsuperscript{72} This model has been adapted and modified from that used by the General Medical Council in the UK: General Medical Council 2011, p. 8. See also Department of Health (UK), Invisible Patients: Report of the Working Group on the Health of Health Professionals, (Department of Health 2010), pp. 21-29.
4.3.2 Further consultation

The LIV has researched programs in other jurisdictions, including the United States and the United Kingdom, in legal and other professions, to develop a range of options for a lawyers’ health program in Victoria. A consultation paper, providing an overview of these options, will be released for comment in 2013.

The consultation paper will seek feedback on the appropriate role of professional bodies and responsibilities of other actors within the legal professional community and one of the main questions it will ask is whether an independent body should be established to best meet the needs of the Victorian legal profession, based on the model of the Victorian Doctors Health Program.\(^\text{73}\)

An independent lawyers’ health program could undertake a range of activities, such as:

- Training
- Policy development and advocacy
- Best practice principles development
- Information on health and wellbeing
- Information and advice on regulatory requirements for admission and practising certificates
- Peer support for lawyers facing disciplinary proceedings
- Peer support/ mentoring model
- Triage and referral service
- Treatment services (psychological)
- Treatment services (allied health)
- Treatment services (medical – GP)
- Treatment services (medical – specialist)
- Treatment services (inpatient treatment)
- Treatment services (ongoing support groups)
- Treatment services (rehabilitation)
- Treatment services (return to work)
- Research

Importantly for the LIV, based on its work so far on the role of regulation in mental wellbeing of the profession, the consultation paper will consider how a lawyers’ health program could interface with regulation, (if at all).

One way in which a lawyers’ health program might work with regulators is to be used as the ‘expert’ that reviews disclosures made for the purpose of admission to practice (Board of Examiners) or for applying for/renewing a practising certificate (Legal Services Board through its delegates).\(^\text{74}\) This would require the lawyers’ health program to have the necessary expertise and resources to perform this function.

Another way a health program could interface with the regulators is for it to offer, subject to legislative amendment, a diversionary program,\(^\text{75}\) whereby a lawyer facing disciplinary charges (subject to certain limits so as to satisfy the consumer protection objectives of the Legal Profession Act) is diverted from disciplinary proceedings into a program to treat a mental impairment. The consultation paper will outline that under such a program, the regulator would make the decision on participation, which the lawyer must volunteer for; the lawyers’ health program could manage the treatment, which could include monitoring compliance with any conditions imposed (such as testing for alcohol and/or drugs where alcoholism and/or drug dependence is relevant). This option would require legislative amendment to empower the Legal Services Board (or the tribunal) to make orders diverting a practitioner from disciplinary sanctions to a therapeutic program.

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\(^{74}\) See New York City Bar Association Lawyers Assistance Program, 2010 Annual Report, p. 3 for information on how the LAP undertakes character and fitness assessments on referral.

\(^{75}\) An example of such a program can be found in Alternative Discipline Program run by the State Bar Court of California, with treatment provided through the Monitored Assistance Program run by the State Bar of California.
The consultation paper will consider potential issues of conflict of interest and confidentiality that could arise if the health program were to have any role in regulation.

The consultation paper will also look at funding options, ranging from a user pays system or annual member contribution to a regulator funded service, and will address ownership and governance issues.

5. Next steps...

It is in the profession’s interest for there to be wide participation in consultations and continued sharing of knowledge, expertise and learning from jurisdictions about mental health and wellbeing. The LIV’s consultation on options for an ongoing lawyers’ health program will be an important opportunity to continue discussions about implementing strategies to address the mental health problems faced by the profession. Many people and organisations are working to promote wellness in law and collaboration will be the key to effective interventions.
Appendix 1 – Overview of depression and anxiety disorders

Depression

Beyond Blue, the national depression initiative, provides the following overview of the five major types of depression:

- **Major depression** - a depressed mood that lasts for at least two weeks. This may also be referred to as clinical depression or unipolar depression.
- **Psychotic depression** - a depressed mood which includes symptoms of psychosis. Psychosis involves seeing or hearing things that are not there (hallucinations), feeling everyone is against you (paranoia) and having delusions.
- **Dysthymia** - a less severe depressed mood that lasts for years.
- **Mixed depression and anxiety** - a combination of symptoms of depression and anxiety.
- **Bipolar disorder** - (formerly known as manic depressive illness) - involves periods of feeling low (depressed) and high (manic).

The World Health Organisation estimates that at least 350 million people live with depression, making depression the leading cause of disability worldwide. Beyond Blue suggests that around one million Australian adults and 100,000 young people live with depression each year. On average, one in six people will experience depression in their lifetime - one in five females and one in eight males.

Anxiety disorders

According to Beyond Blue, anxiety disorders are the most common mental disorders in Australia. Nearly one in 7 people will experience some type of anxiety disorder in any one year - around one in 6 women and one in 10 men. One in four people will experience an anxiety disorder at some stage of their lives.

There are many different types of anxiety disorders. Beyond Blue lists the most common disorders as:

- **Generalised Anxiety Disorder (GAD)** - People feel anxious on most days for at least six months. Symptoms include feeling edgy/restless, tired, having difficulty concentrating, muscle tension (sore back, neck or jaw, headache) and finding it hard to fall/stay asleep.
- **Phobia** - People feel very fearful about particular objects or situations. People often have more than one phobia. Approximately 9 per cent of people in Australia experience a phobia at some time in their lives.
- **Obsessive Compulsive Disorder (OCD)** - People who experience it have ongoing unwanted/intrusive thoughts and fears that cause anxiety - often called obsessions. These obsessions make people feel they need to carry out certain rituals in order to feel less anxious and these are known as compulsions.
- **Post-Traumatic Stress Disorder (PTSD)** - involves bursts of anxiety that happen after a person experiences a major emotional shock following a stressful event i.e. a trauma.
- **Panic Disorder** - A panic attack is an intense feeling of anxiety that seems like it cannot be bought under control. If a person has a panic attack at least four times a month, they may be diagnosed as having a panic disorder.

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78 Beyond Blue, above n74.
80 Id.
Appendix 2 - The Victorian regulatory approach to mental illness

Common law and fitness to practise

The story of mental health in the legal profession must be understood against the backdrop that not everyone is entitled to practice law. Solicitors and barristers must be “fit and proper persons” to practise law to be admitted and to remain on the roll of legal practitioners. The requirement that a person be a “fit and proper person” to practise law means that an individual must have personal qualities of both character and faculty (including education, training and competence) that are required to discharge the important responsibilities of being a barrister and solicitor. The concept of fitness to practise is “perfectly general” and can encompass “any reason”. If fitness to practise is not therefore limited to good fame and character (upon which most case law is focused) and a lack of mental capacity can render a person unfit to practise.

Assessment of mental capacity and whether this renders a person unfit to practise is not punitive and forms part of the protective jurisdiction of the court. Exercise of this aspect of the protective jurisdiction is, however, extremely rare and is subject to evolving understanding about mental illness and mental capacity.

Assessment of fitness to practise, including mental capacity, is now largely a function performed under the current Victorian Act by bodies charged with regulatory responsibility, including the Board of Examiners (the Board) and the Legal Services Board (the LSB), to be performed in the interests of protecting both the administration of justice and individual clients in our community.

Requirements under the Legal Profession Act 2004 (Vic)

Under the Legal Profession Act 2004 (Vic), (the current Victorian Act), whether a person currently has a material mental impairment is a suitability matter (s1.2.6(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) and may be considered by Legal Services Board (LSB) (or its delegate) in relation to grant and renewal of practising certificates (s2.4.4). The LSB must, however, be satisfied that the applicant is a fit and proper person to hold the certificate (s2.4.7).

The current procedures in Victoria for application for admission and for practising certificates are based on a process of full and frank disclosure of relevant personal circumstances made on affidavit (in the case of applications for admission) and until 2012, a statutory declaration (in the case of practising certificate grant and renewal applications).

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81 See eg Re B (a solicitor) [1986] VR 695 at 699 where Brooking J cites re Weare [1893] 2 QB 439 at 448; Southern Law Society v Westbrook (1910) 10 CLR 609 at 612 and 627; Re Davis (1947) 75 CLR 409 at 416, 427 and 429; Ziem s v Prothonotary of the Supreme Court of New South Wales (1957) 97 CLR 279 at 288 and 297-8.
84 Brooking J observed in Re B (a solicitor) [1986] VR 695 at 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”.

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THERAPEUTIC MODEL FOR DISCLOSURE

Application for admission to practice

Independent advice and advocacy service
- Entirely confidential
- Endeavor to work with treating doctor
- Assists applicant to navigate disclosure process, prepare materials and support at hearing

Stage One: “Triage” – Dual function
- Optional pathway for applicants
- Mental health practitioner exercising delegated power from the Board of Examiners
- Entirely confidential process
- Provides procedural advice and considers if a question arises whether the applicant has capacity to carry out satisfactorily the inherent requirements of practice
- Meets with applicant, can obtain authority to speak to treating doctor and request a medical report
- Advise if “a medical issue arises for consideration by the Special Medical Panel”

A question arises whether the applicant has capacity to carry out satisfactorily the inherent requirements of practice

Medical evidence has no direct bearing on applicant’s ability to meet inherent requirements of practice

Applicant withdraws application until mental health/condition has improved

Stage Two: Special Medical Panel
- Three person panel including at least one suitably qualified medical practitioner and senior lawyer with mental health awareness training
- Inquire into and hear evidence to consider whether it is satisfied that the applicant has the capacity to carry out satisfactorily the inherent requirements of legal practice
- Confidential hearing held in a neutral, non-legal space
- Convened as needed
- Non-binding decision conveyed to the Board

Not satisfied that applicant has capacity to carry out satisfactorily the inherent requirements of practice

Conditional recommendation eg undertaking to disclose the medical condition to the Legal Services Board

Satisfied that applicant has capacity to carry out satisfactorily the inherent requirements of practice

NO DISCLOSURE – follow usual admission process

DISCLOSURE

Applicant withdraws application until mental health/condition has improved

Stage Three: Hearing before full Board of Examiners
- Membership of hearing panel should include senior qualified medical practitioner (Not practitioner who sat on Special Medical Panel to ensure independence)
- Consider issue of capacity separately and distinctly from any other character issues

NO DISCLOSURE – follow usual admission process