

Victorian Legal Services BOARD

Policy

Mental Health

Introduction

- 1.1 This policy sets out the Victorian Legal Services Board's (the Board's) approach to lawyers with mental health conditions. The purpose of this policy is to encourage such lawyers to voluntarily seek appropriate treatment and to only require disclosure where the mental health condition affects the lawyer's ability to carry out satisfactorily the inherent requirements of legal practice.
- 1.2 The Board will treat lawyers with mental health conditions fairly and sensitively. The Board is not concerned with those who are effectively managing mental health conditions and there is no requirement to disclose in this instance. Nor does the Board require disclosure where lawyers have mental health conditions that have no impact on their capacity to engage in legal practice. The Board is only concerned with mental health (or, indeed, other) conditions that affect a lawyer's ability to carry out satisfactorily the inherent requirements of legal practice.
- 1.3 The Board appreciates that legal practice can place significant stresses and pressures on lawyers. There are a number of dedicated organisations and services that provide care and assistance for lawyers who have a mental health condition. Along with family and close friends, the following are examples of the people and organisations that can play an important role in ensuring these stresses and pressures do not affect a lawyer's capacity to engage in legal practice:
 - Health practitioners;
 - Vic Lawyers' Health – a 24 hour confidential, independent wellbeing service for LIV members (telephone 1300 664 744);
 - Victorian Bar Health Crisis Counselling Service: a 24 hour confidential, counselling service for barristers (telephone 1300 307 912);
 - beyondblue – the national depression initiative, providing comprehensive online information on the signs and symptoms of depression and anxiety and how to help someone;
 - The Black Dog Institute – a not-for-profit, educational, research, clinical and community-oriented facility offering specialist expertise in depression and bipolar disorder;
 - The Tristan Jepson Memorial Foundation – the Foundation's objective is to decrease distress, disability and the causes of depression and anxiety in the legal profession.
- 1.4 Where disclosure to the Board is required, this policy reflects the Board's obligations to treat disclosed information confidentially and to perform its functions without discrimination. Disclosure will not necessarily result in a finding that a lawyer is not fit to practise. The privacy of lawyers with mental health conditions and the confidentiality of information disclosed will be protected in accordance with relevant laws.
- 1.5 As guidance material, this policy does not impose binding obligations or rights. This policy clarifies what it means to be able to carry out satisfactorily the inherent requirements of legal practice under existing legislation and case law. Any obligations noted in this policy are drawn from the Legal Profession Uniform Law (Vic) (the Uniform Law).

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	1.6 This policy complements the Board's Fit and Proper Person Policy to the extent that it deals with the impact of mental health conditions on the question of 'fit and proper person'.
Background	2.1 There are a number of dedicated organisations and services that provide care and assistance for lawyers who have a mental health condition. This Mental Health Policy provides guidance on the particular role of the Board in relation to the ability of lawyers to carry out satisfactorily the inherent requirements of legal practice under the Uniform Law and the Legal Profession Uniform General Rules 2015 (the Uniform Rules). 2.2 Under the Uniform Rules, the question of whether a person is currently unable to carry out satisfactorily the inherent requirements of practice as an Australian legal practitioner may be considered by the Board when granting, renewing, amending, suspending or cancelling a practising certificate. This is a clear reflection of the Board's objective to provide for the protection of consumers of legal services. 2.3 Equally important, however, is the regulator's educative role in ensuring the legal profession is aware of, and appropriately addresses, issues of concern to the profession and to consumers of legal services. 2.4 This policy notes these objectives, outlining responses to mental health issues that are appropriately graduated to ensure that the ability of lawyers, who may have (or have had) a mental health condition, to practise is not unnecessarily restricted.
Legislative Framework	3.1 A mental health condition that affects a lawyer's ability to carry out satisfactorily the inherent requirements of legal practice are relevant to Board functions in a number of areas. Grant or renew a practising certificate 3.2 Under section 44(1) of the Uniform Law, the Board may grant or renew a practising certificate. Section 45(2) provides that the Board must not grant or renew a practising certificate if it considers that the applicant is not a fit and proper person to hold the certificate. 3.3 Section 45(3) provides that the Board, in considering whether a person is or is not a fit and proper person to hold a practising certificate, may have regard to the matters specified in the Uniform Rules. 3.4 Rule 13(m) of the Uniform Rules provides that in considering whether an applicant is or is not a fit and proper person to hold an Australian practising certificate, the Board may have regard to whether the applicant is currently unable to carry out satisfactorily the inherent requirements of practice as an Australian legal practitioner. Vary, suspend or cancel a practising certificate 3.5 Under section 82(1)(d), the Board may vary, suspend or cancel a practising certificate where it reasonably believes that the holder is unable to fulfil the inherent requirements of an Australian legal practitioner.

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	Matters other than the ability to carry out satisfactorily the inherent requirements of legal practice 3.6 More information on 'fit and proper' as it relates to matters other than the ability to carry out satisfactorily the inherent requirements of legal practice is provided in the Board's Fit and Proper Person Policy. Confidentiality and Privacy 3.7 Information provided to the Board is handled under the Board's Privacy Policy and in accordance with the <i>Privacy and Data Protection Act 2014</i> and the <i>Health Records Act 2001</i> as well as the Uniform Law. The Board and Commissioner may delegate certain functions or activities to authorised bodies and, as a result, will share information with those bodies in relation to those delegated functions or activities. Non-discrimination 3.8 The Board complies with all non-discrimination requirements including, but not limited to, those contained in the <i>Equal Opportunity Act 2010</i>.
Policy & Guidelines	4.1 There are three common ways in which a mental health condition that affects a lawyer's ability to carry out satisfactorily the inherent requirements of legal practice come to the attention of the Board: • Lawyers raise mental health issues in direct approaches to the Board; • Applicants disclose mental health conditions when applying for the grant/renewal of practising certificates; or • Mental health issues arise in relation to complaint handling and other regulatory activities performed under the Uniform Law. 4.2 Direct approaches to the Board 4.2.1 There is no requirement for lawyers to disclose where a condition is managed and has no impact on the lawyer's capacity to carry out satisfactorily the inherent requirements of legal practice. However, direct approaches to the Board provide a good opportunity for lawyers to raise possible mental health issues before they start to negatively affect the lawyer's capacity to engage in legal practice and/or lead to complaints against the lawyer. 4.2.2 The Board may suggest the lawyer seek advice from an external agency, such as those mentioned in clause 1.3. 4.2.3 Such a suggestion is not binding on either the Board or the lawyer. 4.3 Grant/renewal applications 4.3.1 Lawyers may raise mental health issues with the Board when they apply for the grant and/or renewal of practising certificates.

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- 4.3.2 This application process provides another opportunity for the Board (and/or its delegates) to liaise with applicants on the professional management of any mental health condition that the applicant may have, or may have had, that affects his or her ability to carry out satisfactorily the inherent requirements of legal practice.
- 4.3.3 Whether an applicant is a fit and proper person to engage in legal practice is one of a number of questions that are relevant to the Board's consideration of an application. More detail on 'fit and proper' as it relates to matters other than mental health issues is provided in the Fit and Proper Person Policy.
- 4.3.4 The possible inability of an applicant to carry out satisfactorily the inherent requirements of legal practice is explicitly relevant to the Board's consideration of whether an applicant is a fit and proper person to hold a practising certificate. The Board is entitled to consider the causes of that inability, including any mental health condition that the applicant might have.
- 4.3.5 The particular circumstances of each application will be relevant to the Board's decision to exercise its legislative power to consider whether the applicant is a fit and proper person.
- 4.3.6 Unlike most other matters relevant to whether the applicant is a fit and proper person to hold a practising certificate, the question of whether the lawyer currently has a mental health condition may be professionally relevant to the lawyer's capacity to engage in legal practice rather than their conduct or character.
- When will a lawyer be considered to be unable to carry out satisfactorily the inherent requirements of legal practice by reason of his or her mental health condition?**
- 4.3.7 The Board will generally consider a lawyer to be unable to carry out satisfactorily the inherent requirements of legal practice by reason of his or her mental health condition if he or she has a medical condition that:
- is characterised by significant disturbance of thought, mood, perception or memory (including alcoholism and drug dependence); and
 - without management, has and continues to, or is likely to continue to, adversely affect the lawyer's capacity to engage in legal practice.
- 4.3.8 Disclosures made by the lawyer could provide the Board with reasonable grounds to believe that the lawyer may be unable to carry out satisfactorily the inherent requirements of legal practice such that it may result in them not being a fit and proper person to engage in legal practice or hold a practising certificate.

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Board responses following consideration of possible mental health condition

- 4.3.9 After considering all relevant information, the Board may:
- take no further action;
 - either formally or informally, seek an undertaking or impose/amend a condition on the lawyer's practising certificate; or
 - refuse to grant/renew, or vary, suspend or cancel the lawyer's practising certificate.
- 4.3.10 Unless deciding to take no further action, the Board will generally discuss possible responses with the lawyer (in the presence of the lawyer's support person or legal representative if the lawyer wishes) in an attempt to negotiate agreed future action that will adequately protect consumers.

No further action

- 4.3.11 The Board will generally take no further action if satisfied the lawyer:
- does not have a mental health condition, or
 - has a mental health condition which does not affect their ability to carry out satisfactorily the inherent requirements of legal practice, or
 - has a mental health condition that only affects their ability to carry out satisfactorily the inherent requirements of legal practice in a minimal or negligible way, because:
 - the condition presents a low risk to consumers or others; and
 - the condition is adequately controlled; and
 - the lawyer has a good record of compliance with treatment.

Seeking undertakings or imposing conditions

- 4.3.12 The Board will generally seek undertakings or impose conditions if satisfied that:
- the undertaking or condition would likely result in the lawyer being fit and proper to engage in legal practice; and
 - the lawyer is likely to comply with the undertaking or condition.
- 4.3.13 The Board will generally seek undertakings rather than impose conditions as undertakings are not recorded on the face of the practising certificate or in the register of legal practitioners.

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Imposing conditions

- 4.3.14 The Board may impose a condition where:
- the restriction is ordinarily imposed by way of a condition (not authorised to receive trust money, practice other than as principal, engage in supervised legal practice, etc); and/or
 - the lawyer refuses to provide an undertaking; and/or
 - the Board considers it necessary for the protection of consumers.

Undertakings on conditions

- 4.3.15 Reasonable or relevant undertakings/conditions may include (but are not limited to) the lawyer:
- attending an appropriate health practitioner or other support service (that may be specified) for treatment;
 - authorising the Board to communicate with the treating health practitioner or support service;
 - using their best endeavours to provide reports from the treating health practitioner or support service at specified intervals;
 - complying with a treatment plan recommended by the treating health practitioner;
 - abstaining from alcohol, drugs and/or gambling;
 - undergoing specified screening tests;
 - limiting the nature/extent of their legal practice as specified (work part-time, engage in supervised legal practice or practice as an employee, etc);
 - authorising the Board to communicate with a specified person about the lawyer's legal practice (employer, supervisor, mentor, etc);
 - undergoing a medical examination at a specified interval, or intervals.

Time periods for restrictions

- 4.3.16 Restrictions and compliance monitoring will generally be applied for three years unless the Board considers a different period appropriate.
- 4.3.17 The Board may reduce the nature/extent of restrictions and/or monitoring (at the lawyer's request) if the lawyer:
- demonstrates compliance with restrictions; and
 - provides a supporting report from a health practitioner.

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Non-compliance with restrictions

- 4.3.18 When a lawyer does not comply with restrictions, the Board may consider increasing the nature/extent of the restrictions or monitoring or prohibiting the lawyer from practice.
- 4.3.19 The Board will generally discuss potential non-compliance action with the lawyer before taking that action.

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

- 4.3.20 The Board will generally refuse to grant/renew or will suspend/cancel a practising certificate if:
- an undertaking/condition would be unlikely to result in the lawyer being fit and proper to engage in legal practice; or
 - the lawyer is unlikely to comply with the undertaking/condition.
- 4.3.21 Circumstances in which practising certificate decisions may be appropriate include (but are not limited to) where:
- the mental health condition is severe;
 - the lawyer denies their mental health condition despite clear medical advice to the contrary;
 - there has been material and/or repeated non-compliance with treatment plans, undertakings and/or conditions;
 - the Board considers it necessary to protect consumers or others.

4.4 Complaints-handling and other regulatory activities

- 4.4.1 The Board may become aware that a lawyer may have a mental health condition either in performing its regulatory functions or from performance of regulatory functions by the Legal Services Commissioner, its delegates or other regulators.

Suspension or deferral of compliance or enforcement activity

- 4.4.2 When the Board becomes aware of such a condition, it may (where practicable) suspend or defer any compliance or enforcement action relating to the lawyer until it has determined whether the lawyer is unable to carry out satisfactorily the inherent requirements of legal practice.
- 4.4.3 Regardless of the Board's determination, the existence of a mental health condition will not necessarily preclude the Board from taking appropriate compliance or enforcement action.

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- 4.4.4 If the Board determines the lawyer is able to carry out satisfactorily the inherent requirements of legal practice, the Board may commence or resume any suspended or deferred compliance or enforcement action.

If the lawyer is unable to carry out satisfactorily the inherent requirements of legal practice by reason of a mental health condition

- 4.4.5 If the Board determines the lawyer is unable to carry out satisfactorily the inherent requirements of legal practice by reason of a mental health condition, the Board may:
- take the mental health condition into account; and
 - discuss any cancelled or deferred compliance or enforcement action with the lawyer;
 - before commencing or resuming such action.

Interaction with disciplinary activities

- 4.4.6 As soon as the Board becomes aware that a lawyer may have a mental health condition that affects the lawyer's ability to carry out satisfactorily the inherent requirements of legal practice, the Board will generally:
- notify the Commissioner that the lawyer may have a material health condition;
 - request any relevant information held by the Commissioner;
 - provide relevant information to the Commissioner if there is a disciplinary investigation or proceeding on foot.

Medical Examination of Lawyer

- 5.1 In considering whether or not to grant, renew, vary, suspend or cancel a certificate, under section 95(1)(b) the Board may, by notice to the holder, require the holder to be medically examined by a medical practitioner nominated by the Board. The Board may wish to require such an examination where it has a reasonable basis for believing that the lawyer may have a mental health condition that affects the lawyer's ability to carry out satisfactorily the inherent requirements of legal practice.

General principles

- 5.2 In considering requiring a medical examination, the Board will have regard to the need to:
- properly protect consumers while supporting lawyers with mental health conditions to practise, or to continue to practise, where possible;
 - treat mental health conditions as a health issue rather than a professional standards issue;
 - encourage lawyers to voluntarily seek appropriate health care;
 - treat lawyers with mental health conditions fairly and sensitively;
 - protect the privacy of lawyers with mental health conditions as far as possible while properly protecting consumers.

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When will a medical examination be required?

- 5.3 The Board will generally require a lawyer to undergo a medical examination when:
- It believes on reasonable grounds that the lawyer may have a mental health condition that affects the lawyer's ability to carry out satisfactorily the inherent requirements of legal practice; and
 - There is insufficient probative information available to enable the Board to determine what (if any) restrictions on engaging in legal practice would be likely to result in the lawyer being a fit and proper person to engage in legal practice, despite the mental health condition.

What are reasonable grounds?

- 5.4 The Board will generally consider:
- information provided to the Board by or on behalf of the lawyer;
 - information obtained by the Board in the course of performing functions under the Act;
 - information provided to the Board by a local, interstate or overseas regulatory authority;
 - information provided to the Board by the courts;
 - information provided to the Board by the Police, Director of Public Prosecutions or any other relevant public agency;
 - publicly available information obtained by the Board.

What is a mental health condition that may result in a lawyer not being a fit and proper person to engage in legal practice?

- 5.5 See clause 4.3.7 above.

Reports requested before medical examination

- 5.6 To help determine whether a medical examination is required, the Board may request a lawyer provide a report (at the lawyer's expense) from a treating health practitioner.
- 5.7 The Board will generally require the report to include:
- the health practitioner's qualifications;
 - the nature and extent of the mental health condition;
 - the extent (if any) to which that condition may result in the lawyer not being a fit and proper person to engage in legal practice;
 - the treatment the lawyer is receiving to manage that condition;
 - the lawyer's compliance with that treatment;
 - recommendations (if any) of practising certificate conditions the Board could impose, or undertakings the Board could seek, that should enable the lawyer to be

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	fit and proper to engage in legal practice, including duration and means of monitoring compliance; and whether the health practitioner considers disclosure of the report may be prejudicial to the lawyer's mental health or well-being.
5.8	The Board will generally not pursue such a report if the treating health practitioner considers providing the report would materially damage their therapeutic relationship with the lawyer. Requiring a medical examination would be appropriate in those circumstances. Selection of specialist
5.9	The Board may seek advice from the Medical Board of Australia on an appropriate specialist to conduct a medical examination. Disclosure to the specialist
5.10	The Board will usually disclose to the specialist: - a copy of any available reports by health practitioners; and - a summary of any other relevant information available. Informing the lawyer
5.11	Having decided to require a medical examination, the Board will provide the lawyer with an information notice outlining: - the name and qualifications of the specialist; - the date, time and place for the examination; and - the applicable confidentiality obligations. Board responses following receipt of report
5.12	See clauses 4.3.9 to 4.3.21 above.
Policy Management & Implementation	6.1 This policy is complemented by the following policies, procedures and forms of the Board: - application for / variation of practising certificate form - renewal of practising certificate form - privacy policy - foreign lawyer registration policy - fit and proper person policy. The policy will be communicated to relevant employees of the Victorian Legal Services Commissioner, Law Institute of Victoria and Victorian Bar and further training will be available if required.

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	The Board and its delegates will ensure that their relevant employees have access to current legislation, case law and relevant Board policies and guidelines.