

# Disclosure of mental illness and implications for your practising certificate

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A question often asked of the Legal Practice Board (Board) is whether the disclosure of a mental illness will result in the loss of the person's practising certificate.

It is clear that all practitioners have an obligation to disclose the existence of a mental illness that may be affecting their ability to carry out the inherent requirements of legal practice. However, the reluctance to disclose the existence of a mental illness seems to arise from the perceived stigma attached to the disclosure, and the potential consequences of that disclosure. This results in a practitioner being dishonest about capacity to practise, in the belief that it is not an option to do otherwise, and deters the practitioner from accessing treatment.

Further, even if the existence of a mental health condition is disclosed, there is a perception that the enquiry into the history, treatment and extent of that illness will evoke, in the practitioner, attitudes of discrimination and overwhelming pressure. That is, it is difficult enough managing the illness, without the added impost of answering enquiries by the Board.

The simple truth is that it is not enough to say that practitioners suffering from a mental illness should be absolved from scrutiny as to their fitness to practise, for fear of exacerbating the illness.

Determining fitness to practise is not a question of assessing a person's morals. Equally, it is not sufficient to categorise fitness to practise based simply on a diagnosis.

The complexity surrounding the assessment of capacity in the face of an existing mental illness is not a matter taken lightly by the Board. However, the Board has the role of assessing that capacity in determining if the person is a fit and proper person to hold a local practising certificate.

## ROLE OF THE BOARD

One of the Board's overarching statutory responsibilities is to protect the public by ensuring legal services are provided by practitioners who are fit and proper to do so.

The Court of Appeal in *Skerritt v Legal Practice Board of Western Australia* noted that depression that causes neglect of clients, or causes a person to act in an inappropriate way, could be an issue relevant to fitness.<sup>1</sup> Matters pertaining to a person's fitness warrant further enquiry as to the extent that enquiry relates to the person's fitness to practise.<sup>2</sup>

## DISCLOSURE REQUIREMENTS<sup>3</sup>

The *Legal Profession Act 2008* (LPA) requires that an application for the grant or renewal of a local practising certificate must be made in the approved form.<sup>4</sup> The approved form may require the applicant to disclose matters that may affect the applicant's eligibility for the grant or renewal of a local practising certificate or the question whether the applicant is a fit and proper person to hold a local practising certificate.<sup>5</sup> In addition, rule 3 of the *Legal Profession Rules 2009* requires an applicant to provide documents and other information required by the approved form.

Those matters include suitability matters (see section 8(1) of the LPA), other matters relevant to whether the person is a fit and proper person (see section 38(2) of the LPA), and show cause events (see section 61 of the LPA).

A person is required to disclose any matter which might be relevant to the Board in considering whether the person is currently of good fame and character and is a fit and proper person to hold a local practising certificate. This will include any of the suitability matters set out in sections 8(1) and 38(2) of the LPA that apply to the person.



Further, any *other* matter that might be relevant to a decision by the Board or the Court about whether the person is a fit and proper person must also be disclosed.

The Board will also consider whether a person has the present capacity to carry out the tasks of a legal practitioner. At common law, the principle is as follows:

To be a fit and proper person for admission to the legal profession an applicant must possess the capacity to make the judgments necessary to meet appropriate professional standards in legal practice or otherwise "discharge the important and grave responsibilities of being a barrister and solicitor".<sup>6</sup>

A person's capacity to engage in legal practice is specifically identified as a "suitability matter" in section 8(1)(m) of the LPA in the following terms: "whether the person is currently unable to carry out the inherent requirements of practice as an Australian legal practitioner".<sup>7</sup>

Furthermore, in deciding whether a person is a fit and proper person, in addition to each of the suitability matters prescribed by statute, the Board may also take into account any other matters relating to the person it considers are appropriate.<sup>8</sup>

At common law, a person who is otherwise qualified to practise is presumed to have capacity to practise unless the contrary is established. The Board may be satisfied that the contrary is established if there is evidence that the person does not currently have the ability, whether physically or mentally, to carry out the responsibilities of an Australian legal practitioner in accordance with appropriate professional standards. This underlines the importance of disclosure of any matters that may be relevant to that assessment.

Matters which a person should disclose include any condition which might affect the person's present ability to engage in legal practice - such as physical impairment, mental illness or addictions.

The Board assesses each person's capacity individually, in the light of the person's particular disclosures and any other supporting information. Such information will include any historical or current medical evidence submitted by the person. For this reason, if a person discloses a condition which the Board may consider relevant to the person's present capacity to practise law, it will be prudent also to provide a report from an appropriately-qualified medical practitioner relevant to the condition disclosed.

The confidentiality of any personal or medical evidence disclosed to the Board by or on behalf of a person will be maintained.

## THE CASE OF THE THREE SEBASTIANS

The following three scenarios elaborate on the relationship between the Board's obligations to assess the fitness of a practitioner with a mental illness and to ensure the practitioner's entitlement to engage in legal practice is not impeded in an irrelevant or unreasonable manner.

### MR SEBASTIAN

Mr Sebastian had been running his own practice for a number of years. He had been suffering from some physical health issues and a recent marital breakdown.

After failing to make some court appearances, and the court itself reporting that conduct to the Board, the practitioner advised the Board that he was suffering from a physical illness that caused periodic hospitalisation.

However, Mr Sebastian did not disclose to the Board that he was also suffering from major depression and was not open to obtaining treatment for that depression.

After further enquiries were made, Mr Sebastian finally revealed the existence of the major depression. The insight demonstrated by Mr Sebastian, that his illness was directly attributable to his failure to meet client and court expectations, meant that the Board appointed a mentor (a senior practitioner peer) at what was still an early stage.

It is likely that if the depression continued undisclosed and untreated, matters would have escalated to the point that the law practice could not be saved. As Mr Sebastian was a sole practitioner, the Board would have to intervene to wind up the law practice, at a cost to the practitioner. There was also the increased risk of a complaint being made by a client. Once there is a complaint, matters can spiral rapidly. First, complaints are stressful to deal with; secondly, they largely arise due to issues of delay, or lack of communication.

### MS SEBASTIAN

Ms Sebastian led an alcohol fuelled lifestyle, along with a back injury, family and tenancy disputes. Complaints are made to the Legal Profession Complaints Committee, and by the time the matter is brought to the attention of the Board Ms Sebastian is in complete denial that there are any physical or mental health issues.

As Ms Sebastian refused to provide the Board with medical reports, the Board required her to undergo an independent medical examination, with which she refused to comply.

Eventually, to ensure the safety of the client's interests, and following Ms Sebastian's eviction from her law practice premises, the Board intervened into the law practice.

Ms Sebastian was found to not be a fit and proper person to hold a local practising certificate and her practising certificate was suspended.

### SEBASTIAN THE THIRD

Sebastian had a history of bi-polar disorder, something from which he had suffered since his early days in university. However, Sebastian managed to obtain treatment for his illness and the worst indicator was isolated to a particularly stressful period during his studies.

After a successful twenty year career, Sebastian had managed his illness and practising on his own. However, he subsequently suffered from acute stress and anxiety due to a marital breakdown and encountered a recurrence of his bi-polar disorder, requiring hospitalisation.

Sebastian self-reported his condition to the Board, providing a medical report from his treating psychiatrist and commitment to providing periodic reports to the Board setting out compliance with his treatment regime.

## SUMMING UP

Disclosure of a mental illness does not of itself determine that a practitioner is not a fit and proper person to hold a practising certificate. The illness itself is not a mark on character, or an indication of weakness.

However, non-disclosure indicates a lack of honesty and candour, and a failure to address the reasonable and relevant enquiries of the Board may lead to an adverse assessment of fitness. A complication can be where such lack of candour may be attributable to the mental illness itself.

The Board's role in protecting the public from practitioners not mentally stable to handle a client's affairs, and trust money, is not designed to be punitive, but protective. The Board's enquiry into a practitioner's diagnosis and treatment of mental illness should not be seen as a deterrent to obtaining that assistance. To that extent, in the knowledge that a practitioner is acting responsibly, and managing a medical condition, the Board is more likely to take a passive, or at least co-operative, role in that management.

## NOTES

1. *Skerritt v Legal Practice Board of Western Australia* [2004] WASCA 28 at [44] – [45].
2. *Skerritt v Legal Practice Board of Western Australia* [2004] WASCA 28 at [48].
3. See Disclosure Guidelines published on the Board's website found at [www.lpbwa.org.au](http://www.lpbwa.org.au).
4. *Legal Profession Act 2008* section 43(1)(a).
5. *Legal Profession Act 2008* section 43(3).
6. *Frugtniet v Board of Examiners* [2002] VSC 140 per Pagone J.
7. *Legal Profession Act 2008* section 8(1)(m).
8. *Legal Profession Act 2008* section 38(2)(f).