The Law Society of British Columbia

Mental Health Task Force - Mid-Year Report

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Prepared for: Benchers

Prepared by: Mental Health Task Force

Purpose: Information

Introduction

1. The 2018-2020 Strategic Plan sets the course for the Law Society's proactive approach to improving mental health within the profession, which focuses on two key goals: reducing stigma around mental health issues and developing an integrated mental health review concerning the current regulatory approach to discipline and admissions.[1] The Mental Health Task Force is responsible for coordinating and assisting the Benchers in implementing this strategic vision.

2. In addition to the Strategic Plan, the Task Force's work in 2019 has been guided by three key documents: the Task Force's Terms of Reference,[2] its First Interim Report[3] and associated recommendations, and the Task Force's 2019 work plan.

3. Pursuant to section 3(b) of its Terms of Reference, the Task Force is required to produce a mid-year report to the Benchers on its activities. This report is therefore intended to serve as an informational update on the Task Force's work since January 2019.

4. Over the past seven months, the Task Force has pursued three streams of work, described in parts one, two and three of this mid-year report, respectively:

    a. implementing the recommendations contained in the First Interim Report;
    b. engaging in informal consultations and educational outreach activities; and
    c. developing an additional set of recommendations that further advance the Law Society's strategic priorities in relation to mental health.

Part 1: Implementation of the recommendations of the First Interim Report

5. In December 2018, the Benchers approved the 13 recommendations contained in the Task Force's First Interim Report. The recommendations fall into two broad categories: educational strategies that increase awareness and understanding of

[1] Law Society of BC 2018-2020 Strategic Plan, online at: www.lawsociety.bc.ca/Website/media/Shared/docs/about/StrategicPlan_2018-2020.pdf
[2] Law Society of BC Mental Health Task Force Terms of Reference, online at: https://www.lawsociety.bc.ca/Website/media/Shared/images/initiatives/MentalHealthTaskForce_termsofreference.pdf
[3] Law Society of BC Mental Health Task Force First Interim Report (December 2018), online at: https://www.lawsociety.bc.ca/Website/media/Shared/docs/initiatives/MentalHealthTaskForceInterimReport2018.pdf

mental health and substance use within the legal profession and reduce stigma, and regulatory strategies that focus on how these issues are most appropriately addressed in the regulatory context.

6. As detailed in the following sections, the Task Force has made considerable progress in implementing both the educational and regulatory recommendations.

Providing Law Society staff, Benchers and other Tribunal members with specialized education and training related to mental health and substance use issues

7. Over the past six months, the Task Force has worked closely with both Law Society staff and the Canadian Mental Health Association ("CMHA") to implement the series of recommendations addressing the education and training of staff, as well as Bencher and other committee and hearing panel members, with the goal of enhancing their knowledge, skills and access to resources related to mental health and substance use issues.

> **Recommendation 2:** Provide Practice Advisors with specialized education and training to enhance their knowledge, skills and access to resources related to mental health and substance use issues.
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> **Recommendation 3:** Provide Practice Standards lawyers and support staff with specialized education and training to enhance their knowledge, skills and access to resources related to mental health and substance use issues.
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> **Recommendation 4**: Provide lawyers and paralegals in the Professional Regulation Department with specialized education and training to enhance their knowledge, skills and access to resources related to mental health and substance use issues.
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> **Recommendation 5:** Provide Credentials Officers, auditors in the Trust Assurance Program and staff lawyers in the Lawyers Insurance Fund with basic education and training to improve their awareness of mental health and substance use issues.
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> **Recommendation 7:** Provide members of the Credentials Committee, the Practice Standards Committee and the Discipline Committee and their associated hearing panels, as well as individuals who are responsible for practice reviews, conduct meetings and conduct reviews, with basic

education and training to improve awareness and knowledge of mental health and substance use issues.

8. Early in 2019, the Task Force finalized its consultations with the staff groups identified in the above recommendations as requiring specialized training. The CMHA was subsequently provided with detailed information about the function of these groups within the Law Society, the manner in which they typically interact with lawyers or applicants experiencing wellness issues, the number of individuals requiring training and their educational needs. This information was intended to assist the CMHA with developing a framework for the training program and to tailor content to the specific needs of the various groups.

9. In March 2019, the CMHA presented the Task Force with an initial draft proposal for a series of workshops, resulting in the Law Society committing to the following training:

    - a customized 3-hour workshop that includes information about the mental health continuum, mental illnesses, stigma, risk and protective factors, as well as a set of applicable case studies and resources;
    - compassion fatigue training for individuals that frequently interact with lawyers in distress;
    - a half-day SafeTalk suicide awareness and prevention course to help recognize those who might be at risk of suicide and connect them to supports and resources;
    - an online "Understanding Addictions" modular program to learn effective, practical skills that will assist staff working directly or indirectly with lawyers with substance use issues.

10. The Task Force has been working closely with the CMHA through this development phase and is currently overseeing the refinement of the content to ensure that the programming is appropriately tailored to the regulatory context. The goal is to finalize this content in the coming months, in anticipation of commencing training in the fall.

11. More than half a dozen training sessions have been scheduled for staff in the latter half of 2019, following which, the training program will be modified for, and made available to, Benchers and other members of the Discipline committee, Practice Standards committee and Credentials committee and their respective hearing panels.

Consultation with Lifeworks

12. The Task Force has made considerable progress in implementing its recommendation in relation to improving access to, and information about, the support services provided by LifeWorks:

> **Recommendation 9:** Seek assistance from LifeWorks to help the Law Society better explain to the profession what services are available and who may benefit from them, and to explore alternate means for lawyers to connect with LifeWorks support services that do not require access through the Law Society's member portal.

13. Earlier this year, LifeWorks representatives met with the Chair of the Task Force to outline the full scope of their services and what individuals should expect when they contact LifeWorks, including the processes associated with any referrals to a mental health professional. A modified version of this presentation was also provided to the Benchers.

14. The Task Force has explored a range of options to improve the accessibility LifeWorks' services to Law Society members and is now developing a proposal to modify the current process to ensure that members are not required to utilize the member portal to access LifeWorks' services.

15. The Task Force also continues to work with LifeWorks to develop and distribute additional materials designed to improve lawyers' understanding of the types of issues LifeWorks can assist with and the support services offered.

Communications with the profession

16. The Communications department continues to work with the Task Force to implement its communication strategy in relation to mental health within the profession:

> **Recommendation 8:** Develop a comprehensive, profession-wide communication strategy for increasing awareness about mental health and substance use issues within the legal profession.

17. In January, the Law Society participated in the Bell Let's Talk Day Twitter campaign to draw attention to the work being done by the Task Force, share facts about mental health in the legal profession and highlight available resources. Each of

the tweets included an interactive component, whether asking for a retweet to further spread the messaging about mental health or linking to a relevant article or webpage.

18. In May, the Law Society participated in the CMHA's Mental Health Week by releasing a series of tweets that provided members with information about the Task Force's work and support resources such as LifeWorks and the Lawyers Assistance Program (the "LAP"). The tweets also highlighting a number of compelling articles on mental health and substance use in the legal profession that all BC lawyers were encouraged to read. The Communications department also oversaw internal communications for staff on a range of mental health and wellness topics and initiatives.

19. The use of social media to draw attention to the Task Force's work and the issue of mental health in the legal profession more generally, is ongoing. Additionally, the summer edition of the *Benchers' Bulletin* contained an update on the Task Force's work.

20. The Communications department also continues to work with the Task Force to improve the information available to members about LifeWorks services and to expand the content of the Task Force's webpage to include more information on available resources and additional reading materials.

Establishing a roster of qualified mental health professionals to support Law Society staff

21. Work is also progressing on establishing a roster of mental health professionals to support Law Society staff, pursuant to Recommendation 6:

> **Recommendation 6:** Establish a roster of qualified mental health professionals that Practice Advisors, Practice Standards lawyers, Credentials Officers and staff in the Professional Regulation Department may consult to assist them in addressing mental health and substance use issues that arise in the course of Law Society processes involving lawyers or applicants.

22. Staff are currently exploring the extent to which the Law Society could utilize Lifeworks' clinical counsellors to provide staff with the necessary consultation and coaching services. As outlined in the First Interim Report, the role of these professional counsellors would exclusively focus on supporting Law Society staff, sourcing and disseminating information on how to recognize mental health problems

and providing guidance on communicating with an affected lawyer, and would be confidential in nature.

Consultation with the Credentials Committee on the medical fitness questions in the LSAP Application form

23. A key priority for the Task Force this year has been the development of consultation materials for the Credentials Committee, in accordance with the recommendation regarding the medical fitness questions contained in Schedule A of the Law Society's admission application form ("LSAP Application form"):

> **Recommendation 12**: Collaborate with the Credentials Committee in re-evaluating the Law Society's current approach to inquiries into mental health and substance use in the Law Society Admission Program Enrolment Application.

24. A brief summary of the Task Force's concerns with the medical fitness questions were outlined in the First Interim Report. Since the publication of that report, however, the Task Force has undertaken extensive additional research into the effectiveness of, and concerns relating to, the current medical fitness questions.

25. Following from this research and analysis, the Task Force has developed a series of detailed rationales for the elimination of the medical fitness questions in the LSAP Application form.

26. In summary, the Task Force is strongly of the view that inquiries into fitness should solely focus on applicants' conduct or behaviour, not their medical status.

27. This position, which is supported by numerous academics, law school administrators and a number of key US legal bodies, was presented to the Credentials Committee as part of a comprehensive consultation package comprised of more than 700 pages of material.

28. Part One of the consultation package includes recent reports, studies, legal opinions from the US Department of Justice, resolutions from the American Bar Association and comprehensive submissions from the University of Victoria Faculty of Law and the Allard School of Law, all of which address a variety of concerns with the use of mental health questions and advocate for their elimination. Part Two contains a body of academic literature supporting the removal of these types of questions, as well as

examples of applications and rules from jurisdictions that do not ask medical fitness questions in their admissions forms.

29. Recognizing that Part One and Part Two of the consultation package represent a large body of material, the Task Force distilled its research into a detailed memo that was provided to the Credentials Committee in advance of a joint meeting in April 2019, a copy of which is attached as **Appendix A**.

30. The memo outlined the Task Force's position that questions regarding substance use disorders and mental health conditions should be removed from the LSAP Application form for two overarching reasons. First, from an evidence-based perspective, the questions are not helpful in assessing an applicant's overall fitness to be a lawyer. Second, in addition to failing to achieve their intended purpose of protecting the public from unfit lawyers, the questions have significant adverse effects for both individual applicants and the profession more generally.

31. With respect to the effectiveness of the questions, the Task Force identified new research that refutes the assumed predictive value of the medical fitness questions in assisting the regulator in determining whether an applicant that provides a positive answer to these questions is likely to have disciplinary problems as a lawyer.[4]

32. Additionally, the Task Force has been advised that the numbers of students answering the medical fitness questions in the affirmative are very low. These low rates of disclosure are notable given that the most recent studies on mental health and substance use among law students reveal that a high percentage of students feel they need help for a mental health issue or exhibit problematic drinking behaviours.[5] This suggests that many individuals either do not consider that the medical fitness questions apply, or they choose not to reveal a medical fitness issue on their application, again raising doubts about the effectiveness and utility of the medical fitness inquiry.

33. Even if there were a connection between those individuals that identify as having a mental health or substance use issue and later misconduct — which the evidence

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[4] Leslie C. Levin, Christine Zozula and Peter Seigleman, "A Study of the Relationship between Bar Admissions Data and Subsequent Lawyer Discipline" (2013) Law School Admission Council Grants Report Series.

[5] J. M. Organ, D. Jaffe, & K. Bender, "Suffering in Silence: The Survey of Law Student Well-Being and the Reluctance of Law Students to Seek Help for Substance Use and Mental Health Concerns" (2016) 66 J. Legal Educ. 116. This study found that 43% of students felt that hiding a mental health condition would improve their chances of being admitted to the bar and that 49% of students felt that hiding a substance use issue would improve their admission chances. These percentages were even higher among students with the highest rates of binge drinking, drug use, depression or severe anxiety.

shows there is not — identifying a few individuals with these issues must be weighed against the significant costs associated with asking the questions at all.

34. In this regard, the Task Force's research reveals that the medical fitness questions are associated with a variety of harms. Most notably, both academic research[6] and the observations of administrators at BC law schools[7] suggest that the questions deter individuals from seeking counselling and treatment for mental health and substance use issues based on concerns about the consequences of disclosure.

35. This chilling effect is counterproductive to the purpose of the questions — protecting the public — as applicants that may have benefited from support or treatment prior to entering the profession often fail to seek it, resulting in the admission of individuals that may be less prepared to deal with the pressures and stresses of practice.

36. A number of other deleterious effects are also associated with the medical fitness questions. Rather than revealing actual risks, the questions rely on stereotypes about applicants with mental health issues that compound the counterproductive effect of the inquiry. In addition to reinforcing the stigma experienced by individuals at the time of their admission to the Law Society, the stereotypes and assumptions created by the medical fitness questions appear to be significant contributors to perpetuating stigma around mental health and substance use issues within the profession as a whole. As identified in the 2018-2020 Strategic Plan and the Task Force's Terms of Reference, reducing this stigma is a key priority for the Law Society.

37. Additionally, given that an affirmative answer to the questions often result in applicants being required to consent to the release of medical records or a medical examination, the questions have a significant impact on applicants' privacy interests. In particular, students that must undergo an independent medical examination frequently have their call date delayed, which must be explained to their principal. This puts students in the position of having to disclose personal health information to their employer that they would likely have otherwise keep confidential.

38. Students have also expressed concerns about the nature of the questions they are compelled to answer as part of the medical examination process, which may include questions about physical, mental or sexual abuse and their reproductive medical

[6] *Ibid.*
[7] This concern was highlighted by both the Allard School of Law and the University of Victoria Faculty of Law in their submissions to the Task Force earlier this year.

history. Some students have also raised concerns that they are unclear about who has access to their medical information and for how long.

39. Investigations that may follow from providing affirmative answers to medical fitness questions can be a source of great stress for, and prejudice to, applicants. Law school administrators have underscored that affirmative answers can diminish students' ability to participate in law school clinical programs and result in delays to the admission process.

40. Throughout its consultations with the Credentials Committee, the Task Force has been unequivocal that it is not suggesting that the Law Society abandon its consideration of fitness to practice as an element of the application process. Indeed, s. 19 of the *Legal Profession Act* (the "*LPA*") requires that such an inquiry is made. Rather, the issue is whether there are more effective, less stigmatizing ways to assess "fitness" than the current *medical* fitness questions.

41. Importantly, medical fitness is not mandated by the *LPA.* To date, however, it has been incorrectly presumed that medical fitness questions are required on the basis that they provide helpful information to the Law Society with respect to fitness to practice. Evidence shows that this is not the case. In this regard, the Task Force is strongly of the view that the existing questions in the LSAP Application form that inquire into applicants' past conduct are sufficient for the Law Society to assess each of the good character, repute and fitness requirements of all candidates.

42. The Task Force has developed additional materials and recommendations for the Credentials Committee to consider in respect of fulfilling the Law Society's statutory mandate with helpful and non-stigmatizing inquiries. The Committee has advised it intends to review the recommendations, along with the Task Force's earlier consultation materials, in the coming months.

Consultation with the Ethics Committee on *BC Code* rule 7.1-3 and Commentary

43. The Task Force has also prioritized consultations with the Ethics Committee regarding the stigmatizing language in the *Code of Professional Conduct for British Columbia* (the "*BC Code*"):

> **Recommendation 13**: To eliminate stigmatizing language and approaches to the reporting requirements in *BC Code* provision 7.1-3(d) [Duty to report] and the associated Commentary

44. As part of these consultations, the Task Force has proposed a series of amendments to the rule and associated Commentary. With respect to the rule itself, the Task Force advocates for the removal of subsection 7.1-3(d), which currently imposes a duty on lawyers to report "the mental instability of a lawyer of such a nature that the lawyer's clients are likely to be materially prejudiced," and replacing this language with a duty to report "conduct that raises a substantial question about the lawyer's capacity to provide professional services."

45. In addition to eliminating stigmatizing language that reinforces the stereotype that those living with mental health conditions are more likely than others to harm the public, these changes will also bring the *BC Code* into closer alignment with the corresponding rule in the Federation's Model Code.[8]

46. With respect to the Commentary associated with rule 7.1-3, the Task Force advocates for two significant modifications. The first is the removal of the latter half of Commentary [3], which currently reminds lawyers acting as counsellors for professional support groups that they have an ethical duty to report a lawyer they are assisting if they are aware they are "engaging in, or may in the future engage in serious misconduct or in criminal activity related to the lawyer's practice."[9]

47. The second suggested change is the creation of a specific exemption from the duty to report under rule 7.1-3 for lawyer-counsellors providing peer support through programs such as the LAP. Notably, a number of Canadian and US jurisdictions have long standing exemptions for lawyer-counsellors participating in an approved lawyer assistance program, excusing them from the mandatory reporting requirements.

48. The rationales for these changes are two-fold, namely: concern that Commentary [3], as currently worded, creates barriers to lawyers seeking support from peer assistance programs, while at the same time, failing to ensure the Law Society will obtain meaningful information that would serve to protect the public.

49. With respect to deterring support-seeking behaviour, the most current and comprehensive study on the prevalence of mental health and substance use disorders among lawyers found that the greatest barriers to lawyers seeking support for these issues are "not wanting others to find out they needed help" and related

[8] See the Federation's Model Code rule 7.1-3, online at: https://flsc.ca/wp-content/uploads/2018/03/Model-Code-as-amended-March-2017-Final.pdf, which was recently amended based on concerns about stigmatizing language.
[9] See *BC Code* rule 7.1-3, online at: https://www.lawsociety.bc.ca/support-and-resources-for-lawyers/act-rules-and-code/code-of-professional-conduct-for-british-columbia/chapter-7-%E2%80%93-relationship-to-the-society-and-other/].

apprehensions regarding privacy and confidentiality.[10] The Task Force is of the view that Commentary [3] does not sufficiently allay confidentiality concerns for lawyers that are considering seeking assistance from a professional peer support group, and has the potential to undermine the peer support relationship. Specifically, lawyers needing support may not seek it based on concerns about what information, if shared with a lawyer-counsellor, could be disclosed to the Law Society.

50. With respect to the value of the information Commentary [3] seeks to elicit, the Task Force observes that it is unrealistic, and indeed impossible, for anyone to predict whether another lawyer "may engage" in serious misconduct in the near future, all the more so as lawyer-counsellors are not trained mental health professionals. The challenge of predicting future behaviour, even by medical professionals, is well documented in the academic literature.

51. Further, the Task Force notes that it is anomalous that lawyer-counsellors are currently caught by the mandatory reporting provisions of rule 7.1-3, while a lawyer providing legal advice to another lawyer with respect to the otherwise mandatory reporting matters would not be required to provide this information to the Law Society given that the rule includes an exemption for communications covered by solicitor-client privilege. Nor would a non-lawyer counsellor providing counseling advice be required to report this information. However, Commentary [3] makes a particular point of emphasizing that a lawyer-counsellor — the primary resource the Law Society offers to lawyers seeking support — would be required to report a lawyer they were assisting under rule 7.1-3.

52. Such circumstances are particularly problematic where, as is the case in British Columbia, no reports under rule 7.1-3 have been provided to the Law Society in the last ten years, and possibly ever, from lawyer-counsellors operating under the LAP.

53. The Task Force recognizes that the removal of this language from Commentary [3] and the creation of an exemption from rule 7.1-3 for lawyer-counsellors may generate concerns that the Law Society might not receive information about a lawyer's conduct that is necessary to protect the public.

54. The Task Force is cognizant of the importance of the Law Society obtaining information that may protect the public, given its statutory mandate. However, the costs associated with creating a potential disincentive for lawyers to utilize the LAP for fear of being reported by their own lawyer-counsellors is not offset by any

[10] P. R. Krill, R. Johnson, & L. Albert, "The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys" (2016), 10 J. Addiction Med . 46.

benefits of the information lawyer-counsellors are expected to report, given that the Law Society loses nothing in terms of the quality or quantity of valuable reported information. Consequently, the public interest is better served by encouraging lawyers to seek support through the LAP and removing any barriers that may prevent them from doing so.

55. The Task Force has articulated, as part of its consultations with the Ethics Committee, that there are other provisions in the *BC Code* that address this concern by permitting or requiring all lawyers, including lawyer-counsellors, to disclose confidential information in circumstances where serious harm and public safety may be an issue.

56. Specifically, *BC Code* rules 3.3-1[Confidential information] and 3.3-3 [Future harm / public safety exception] ensure that lawyers must divulge information if required to do so by a law or a court, and are permitted to make a disclosure if a lawyer believes on reasonable grounds that there is an imminent risk of death or serious bodily harm, and that disclosure is necessary to prevent the death or harm to the lawyer, client or others.[11] From the Task Force's perspective, these rules are sufficient to address the type of conduct that truly warrants the disclosure of otherwise confidential information by lawyer-counsellors. In addition, these rules provide lawyer-counsellors with detailed guidance regarding when confidential information should be disclosed, in contrast to the stigmatization and vague guidance provided in the current Commentary [3] associated with rule 7.1-3.

57. The Task Force's views on the rule 7.1-3 and Commentary [3] have been presented to the Ethics Committee and are the subject of ongoing discussion and analysis by that Committee.

Consultation with the Lawyer Education Advisory Committee on potential mandatory mental health and substance use disorder programming

58. Earlier this year, the Task Force held consultations with the Lawyer Education Advisory Committee regarding the possibility of introducing a mental health CPD requirement, pursuant to recommendation 10 of the First Interim Report:

[11] The commentary associated with *BC Code* rule 3.3-3 notes that serious bodily harm may include psychological harm that substantially interferes with the health or well-being of an individual. See rule 3.3-3, online at: https://www.lawsociety.bc.ca/support-and-resources-for-lawyers/act-rules-and-code/code-of-professional-conduct-for-british-columbia/chapter-3-%E2%80%93-relationship-to-clients/].

Recommendation 10: Collaborate with the Lawyer Education Advisory Committee to explore the merits of the Law Society introducing a mandatory CPD requirement for mental health and substance use disorder programming

59. In its presentation to the Lawyer Education Advisory Committee, the Task Force provided background information on recent research on the prevalence of mental health and substance use issues within the legal profession and the manner in which, if left untreated, these issues can impact on lawyer competence and professionalism, both areas of focus for the CPD program.

60. The benefits of mandatory CPD include raising awareness of these issues among all lawyers and providing valuable information as to how practitioners can seek, or assist others in obtaining, support. The Task Force also discussed how a mandatory requirement could reduce stigma that might otherwise prevent some lawyers from attending this type of CPD training.

61. The Task Force has provided the Lawyer Education Advisory Committee with a consultation package containing a number of relevant materials, including the ABA Model rule that encourages regulators to ensure lawyers receive an hour of mental health or substance use disorder programming every three years[12] and a similar recommendation made by the US National Task Force on Lawyer Well-Being.[13] The rules of other jurisdictions that have adopted mandatory mental health and substance use disorder continuing legal education were also included. Materials from the consultation package provided by the Task Force to the Committee are attached at **Appendix B.**

62. The Lawyer Education Advisory Committee indicated that it will revisit these materials in more detail later this year.

Part 2: Informal consultations and outreach

Speaking engagements and informal consultations

63. As part of the Task Force's work to reduce stigma surrounding mental health and substance use issues, and in an effort to share the work of the Task Force with the

[12] For information about the amendments to the ABA Model Rule as the result of ABA Resolution 106 (February 2017), see: https://abacolap.wordpress.com/2017/02/09/aba-approves-changes-to-cle-model-rule-adding-substance-use-mental-health-requirement/

[13] See recommendation 20.3 of the National Task Force on Lawyer Well-Being, online at: https://www.americanbar.org/content/dam/aba/images/abanews/ThePathToLawyerWellBeingReportRevFINAL.pdf

broader legal community, several members of the Task Force have participated in educational outreach activities in various regions of the province. This work includes presentations to the CBA family and criminal law sections in Kamloops and the Fraser Valley bar, and participation in a LawTalk CPD event in Prince George.

64. Additionally, several Task Force members have served as guest instructors for the PLTC program and have integrated mental health and wellness content into the ethics materials.

65. As part of its outreach work, the Task Force has also undertaken informal consultations with a number of groups. This includes discussions with articled students during both PLTC classes and Bencher interviews, during which some students expressed a desire for more information about the support resources available to them earlier in the articling process. This feedback was shared with the Law Society's Manager of Member Services and Credentials.

66. Additionally, members of the Task Force have received feedback from a number of lawyers on the services provided by Lifeworks, including both positive remarks about the support resources available and some comments regarding the challenges of utilizing these services. This feedback has been shared with Lifeworks.

Federation of Law Societies conference on lawyer wellness

67. As further evidence of the growing attention on the mental health of lawyers, the Federation of Law Societies 2019 Fall Conference will focus on mental health and wellness in the legal profession.

68. Importantly, the Task Force's First Interim Report has been instrumental in framing the issues and shaping the agenda that will be explored over the two-day meeting in St. John's, Newfoundland in October. Policy and legal services lawyers supporting the Task Force have been appointed to the conference planning Committee and continue to share the work of the Task Force with the planning group.

Engaging the judiciary

69. In the wake of Supreme Court Justice Gascon's courageous step to publicly speak about his experiences with depression and anxiety, President Merrill, assisted by the Task Force, wrote to Chief Justice Hinkson and Chief Judge Gillespie to explore the judiciary's interest in participating in the work of the Task Force.

70. Recognizing that judges are well-positioned to play a leadership role in combatting stigma by signalling an awareness and understanding of these issues, the correspondence suggested a variety of ways that the judiciary could contribute to the work of the Task Force. In response, Chief Justice Hinkson suggested Madam Justice Iyer be appointed to the Task Force, and her Ladyship expressed her willingness to join.

71. The Task Force is grateful for Justice Iyer's involvement in its work, and regards judicial representation as a powerful way to convey to lawyers, law students and judges that addressing mental health and substance use issues is of critical importance for the profession.

Part 3: Developing recommendations for the Second Interim Report

72. In parallel with implementing the recommendations contained in the First Interim Report, the Task Force is developing a second set of recommendations for the Benchers that include additional regulatory and educational strategies.

73. On the regulatory front, the Task Force continues to explore the potential for a "diversion" or other alternative discipline process for lawyers affected by mental health or substance use disorders. In building its understanding of how diversionary schemes can be beneficial not only to lawyers, but to the protection of the public, the Task Force is currently conducting a literature review and identifying key issues requiring further research.

74. The Task Force has also spoken to several US regulators with a depth of knowledge of American diversionary schemes, as well as meeting with the Law Society's Chief Legal Officer and managers within the Professional Regulation department on this issue.

75. The Task Force is also considering a recommendation supporting the development of a statement of best regulatory practices that will improve the manner in which the Law Society responds to mental health and substance use issues affecting its members. The aim of a best practices framework would be to establish a series of evidence-based guidelines that ensure the Law Society is effectively addressing mental health and substance use issues across its various processes.

76. On the educational front, the Task Force has completed foundational work on a future recommendation to the Benchers regarding the advisability, viability and scope of a potential voluntary, confidential member survey addressing mental health

and wellness among BC lawyers, pursuant to item 3(c) (viii) of its Terms of Reference.

77. In the United States, several recent ground breaking studies have used survey methodology to evaluate the mental health of American lawyers.[14] In addition to highlighting the prevalence of mental health and substance use issues within the profession, these surveys have been critical in developing and prioritizing appropriate responses.

78. Very little comparable research has been undertaken Canada, resulting in a dearth of knowledge about the wellness of Canadian lawyers.[15] The Task Force is of the view that developing an anonymous survey to explore members' experiences with a range of issues along the mental health continuum is vital to understanding these issues in the BC-specific context and establishing a set of aggregate data that can be used to monitor and improve mental health outcomes for BC lawyers.

79. Having recently completed a review of more than half a dozen wellness surveys conducted by other professional bodies and legal organizations, the Task Force has identified a number of approaches and issues that require further analysis.

Conclusion

80. In the first half of 2019, the Task Force has maintained its strong forward momentum in advancing the Law Society's strategic goals in relation to improving mental health within the profession.

81. This work, which has been both comprehensive and consultative, includes the implementation of previously approved recommendations, the development of new proposals, as well as a number of outreach activities. Collectively, this work has raised the profile of the Mental Task Force's work within the profession and established the Law Society of BC as a leader in improving awareness about, and responding to, mental health and substance use issues affecting lawyers.

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[14] Krill et al. *supra* note 10, Jaffe et al. *supra* note 5.

[15] The Quebec Bar Association recently conducted a study of more than 2,500 lawyers to measure psychological health at work among its members. The 150-question survey focused on three health indicators: psychological distress, exhaustion and well-being. Psychological distress. See the summary report (French only): https://www.barreau.qc.ca/media/1887/sommaire-sante-psychologique-travail-avocats.pdf.

82. Looking forward, the Task Force will continue to focus on implementation, outreach and refining a second suite of recommendations for the Benchers, with the goal of producing a second interim report by the end of 2019 or early 2020.

Appendix A: Consultation memo from the Mental Health Task Force to the Credentials Committee, "Rationales for the elimination of the medical fitness questions in the LSAP Application form" (April 15, 2019)

Appendix B: Overview of Mental Health Task Force consultation materials for the Lawyer Education Advisory Committee (January 20, 2019)

The Law Society of British Columbia

Memo

To: Credentials Committee

From: Mental Health Task Force

Date: April 15 2019

Subject: **Rationales for the elimination of the medical fitness questions in the LSAP Application form**

Please Note: Some of this memorandum has been redacted for the purposes of maintaining privilege and confidentiality.

Purpose

1. In its First Interim Report, the Mental Health Task Force (the "Task Force") summarized a series of concerns with the medical fitness questions contained in the Law Society Admission Program Application form ("LSAP Application form"). The resulting recommendation was that the Task Force and the Credentials Committee collaborate in re-evaluating the current approach to inquiries into mental health and substance use in Schedule A. This memo, and the supporting material included in this consultation package, goes a step further and advocates for a new approach to assessing fitness.

2. In the nine years since the Law Society last reviewed the medical fitness questions in the LSAP Application form, there have been significant advances in understandings about the impact and effectiveness of these inquiries. This new body of information includes studies, reports, academic papers, resolutions and opinions from key US regulatory bodies, recommendations from the National Task Force on Lawyer-Wellbeing and submissions from BC law schools. All of this information is contained in this consultation package, and much of it is referenced in this memo.

3. **Part one** of the memo outlines the Task Force's position that questions regarding substance use disorders and mental health conditions should be *eliminated* from the LSAP Application form on the basis that, from an evidenced-based perspective, the questions are not effective in protecting the public interest. Moreover, the questions are counterproductive as they are associated with a variety of significant harms, including: deterring some individuals from seeking treatment and support, invading applicants' privacy and causing stress, inconvenience and delays to bar admission that can have profound personal and professional implications.

4. **Part two** proposes shifting the focus of the fitness inquiry to *conduct or behavior* that impairs an applicant's ability to practice law in a competent, ethical and professional manner.

Background

5. Most Canadian and US legal regulators evaluate "fitness" to practice law as part of the admission process. In many jurisdictions, the inquiry includes questions in the admission application about conditions, impairments, diagnoses and/or treatments relating to mental health and/or substance use.[1]

6. The Law Society of BC's inquiry into applicants' medical fitness is informed by s. 19 of the *Legal Profession Act* ("*LPA*"), which establishes that "no person may be enrolled as an articled student, called and admitted or reinstated as a member unless the Benchers are satisfied that they are of good character and repute and is fit to become a lawyer." This requirement flows from s. 3 of the *LPA*, which mandates the Law Society to uphold and protect the public interest by ensuring the competence of lawyers.

7. One of the mechanisms used by the Law Society to assess fitness to practice is the medical fitness questions contained in Schedule A of the LSAP Application form. These questions pursue two lines of inquiry. First, whether an applicant has a substance use disorder and whether they have received counseling or treatment, and second, whether an applicant has an existing condition that is reasonably likely to impair their ability to practice:

> 2a) Based on your personal history, your current circumstances or any professional opinion or advice you have received, do you have a substance use disorder?
>
> b) Have you been counseled or received treatment for a substance use disorder?
>
> 3. If you answered yes to questions 2 (a) or (b), please provide a general description on a separate sheet.
>
> 4. Based on your personal history, your current circumstances or any professional opinion or advice you have received, do you have any existing condition that is reasonably likely to impair your ability to function as an articled student?

[1] The nature and scope of these questions varies widely. Some regulators ask very specific questions, other inquiries are more general; some are temporally limited, others are not; some questions refer to mental and physical impairments and substance use disorders, others target only mental health conditions.

> 5. If the answer to question 4 is "yes", please provide a general description of the impairment on a separate sheet.

Purpose of the medical fitness questions

8. Proponents of medical fitness questions typically defend these inquiries on two grounds. First, the questions are necessary to identify applicants that may put clients' interests at risk, and as such, protect the public by helping to ensure that lawyers that are not fit to practice competently are screened at the admission stage.[2]

9. The secondary purpose of the medical fitness questions is to protect the profession's reputation by signaling to the public that lawyers have been adequately vetted before they are licensed and are therefore worthy of trust.[3] Both purposes are underpinned by the assumption that applicants with past or present mental health and substance use issues are more likely to engage in misconduct once admitted to the bar than currently "healthy" individuals.

10. These dual purposes - protection of the public and upholding the profession's reputation - are reflected in the preamble of Schedule A:

> In asking the questions in this Schedule, the Benchers are seeking information that will help them assess medical fitness to practice competently [...]The practice of law is often rigorous, demanding a high level of functioning. Any medical condition that would render you incapable of practicing law competently puts clients' interests at risks and harms the profession's reputation [emphasis added].

[2] See Jennifer McPherson Hughes, "Suffering in Silence: Questions Regarding an Applicant's Mental Health Bar Applications and their Effect on Students Needing Treatment" (2004) 28 J. Legal Prof. 187 ("McPherson Hughes"); Levin et al. infra note 8 at 2; Dragnich infra note 7 at 682; Josselyn infra note 3 at 90; Lusk infra note 28 at 364; Bauer infra note 3 at 144, 149; National Conference of Bar Examiners Comprehensive Guide to Bar Admissions Requirements 2015 (4-5).

[3] Sara Josselyn, "Bar Mental Fitness Questions: Perpetuating Stigma" (2007) 16 Dalhousie J. of Legal Stud. 85 at 91 ("Josselyn") (while most proponents would likely argue that inquires into medical fitness actually serve to protect the public ...the more common (unintentional) justification is that the questions *appear* to fulfill these ends); Jon Bauer, "The Character of the Questions and the Fitness of the Process: Mental Health, Bar Admissions and the American With Disabilities Act" (2001) 49 UCLA L. Rev 93 at 203 ("Bauer") (although the officially sanctioned rationale for the medical fitness screening is public protection, it is really upholding the image of the profession that seems to be the foremost concern); Deborah L. Rhode, "Moral Character as a Professional Credential" (1985) 94 Yale L. J. 491 at 511 ("Rhode") (regardless of whether admission certification procedures actually decrease future lawyer misconduct by excluding mentally unfit candidates, it is the public's perception that disreputable individuals are excluded that is essential in order to ensure a credible bar); Leslie C. Levin, "The Folly of Expecting Evil: Reconsidering the Bar's Character and Fitness Requirement" (2014) BYU L. Rev. 775 at 779 ("Levin #2) (the inquiry is also thought to serve a symbolic function: it communicates to the public that lawyers are to be trusted).

11. As described in this memo, the Task Force is of the view that the medical fitness questions fail to fulfill their primary purpose of protecting the public and instead cause harm by, amongst other things, dissuading students and lawyers from seeking appropriate support for mental health and substance use issues.

Revisions to the LSAP Application form in 2010

12. In 2010, the decision of the Human Rights Tribunal in G*ichuru v. Law Society of BC, (*No. 4) 2009 BCHRT 360 found that the question about past treatment for a list of specific mental health disorders in the LSAP Application form discriminated against applicants with mental disabilities.[4]

13. To address the problems the Tribunal identified with the question, the Law Society sought both a medical and legal opinion.[5] The medical opinion advised against eliminating the mental health question, and instead suggested replacing it with a general, inclusive question covering both physical and mental conditions that might affect a candidate's ability to practice. The medical opinion also supported maintaining a separate substance use question.

14. [redacted]

15. Based on the medical and legal opinions, the Law Society modified the mental health question in the LSAP Application form and made minor changes to the substance use question (although no analysis was done as to whether that question was discriminatory). The results of these amendments are reflected in the current medical fitness questions contained in Schedule A.

[4] The question at issue in *Gichuru* was: "Have you ever been treated for schizophrenia, paranoia, or a mood disorder described as a major affective illness, biploar mood disorder or manic depressive illness?" A separate question asking whether an applicant has ever had a drug or alcohol dependency and whether they had received treatment or counselling for this dependency was not at issue.

[redacted]

Why should the Credentials Committee re-visit the medical fitness questions?

16. The Task Force strongly urges the Credentials Committee to revisit the medical fitness questions for three interrelated reasons. First, the last review did not include a fulsome policy analysis of the effectiveness of the questions in achieving their purpose, including weighing their deleterious effects. [redacted]

17. Second, understandings of mental health and substance use have evolved considerably over the past decade, as have understandings about the consequences and effectiveness of asking medical fitness questions. New research reveals that, from an evidence-based perspective, the questions are unhelpful. What is at issue is not whether the Law Society should consider fitness to practice, but rather, whether the current questions are an effective means of doing so.

18. Third, in recent years, major bodies including the American Bar Association ("ABA") and the US Department of Justice have called for the elimination of medical fitness questions following their comprehensive review of the utility and impact of this type of inquiry. As an increasing number of US regulators respond by removing medical fitness questions from their bar applications, a review of the Law Society's use of these questions is timely.

Discussion

Part 1: Problems with the medical fitness questions

19. The medical fitness questions in the LSAP Application form should be removed for two overarching reasons.[6] First, the questions do not achieve their intended purpose of protecting the public from unfit lawyers. Second, questions about applicants' medical status have a series of adverse effects that further erode the effectiveness and, indeed, their appropriateness of, this line of inquiry. These two areas of concern are discussed in further detail below.

[6] Given that the Task Force advocates for the elimination of the medical fitness questions, the discussion does not include an analysis of how the current questions could be further modified, or whether, due to developments in the case law, they are problematic from a *Charter*, human rights or privacy perspective.

Medical fitness questions have no predictive value

20. Empirical evidence now confirms what mental health professionals and academic commentators[7] have suggested for some time: the predictive value of the medical fitness questions is so limited that regulators simply cannot determine, with any level of confidence, whether an applicant that provides a positive answer to a medical fitness question on an admissions application will go on to have disciplinary problems as a lawyer.

21. The first statistically significant study exploring the relationship between bar applicants who disclose mental health and substance use issues in the character and fitness process and the subsequent imposition of discipline was published in 2013.[8] Researchers compared rates of discipline for lawyers admitted to the Connecticut bar to determine whether the information provided in the admission application was predictive of whether individuals would subsequently be subject to disciplinary action as lawyers. Although an imperfect proxy, discipline was deemed the best available measure for lawyers who engage in misconduct.[9]

22. The study found that drug or alcohol problems reported at the time of bar admission were *not* associated with any higher discipline risk.[10]

23. With respect to mental health, the study found that there were no cases in which an applicant who reported a mental health issue on their bar application was later "severely disciplined" for the serious misconduct.[11] There was, however, a higher probability that

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[7] See Phyllis Coleman and Ronald A. Shellow, "Ask About Conduct, Not Mental Illness: A proposal for Bar Examiners and Medical Boards to Comply with the ADA and Constitution" (1994) 20 J. Legis. 147 at 148-149 ("Coleman and Shellow") (presence of, or treatment for mental illness or substance abuse are not directly related to character and fitness. Instead the test is conduct: whether the applicant's behaviour is likely to injure...clients, the profession or the public); Nancy Paine Sabol, "Stigmatized by the Bar: An Analysis of Recent Changes to the Mental Health Questions on the Character and Fitness Questionnaire" (2015) 4 Mental Health L. & Pol'y J. 1 at 3 ("Sabol") (new research reveals that the mental health questions do not adequately predict whether an individual will later have character and fitness issues); Josselyn *supra* note 3 at 99 (medical fitness inquiries are wholly incapable of eliciting meaningful information regarding applicant's' competence and fitness); Alyssa Dragnich, "Have You Ever…? How State Bar Association Inquiries into Mental Health Violate the American with Disabilities Act" (2015) 80 Brooklyn L. Rev. 677 at 742 ("Dragnich").

[8] Leslie C. Levin, Christine Zozula and Peter Seigleman, "A Study of the Relationship between Bar Admissions Data and Subsequent Lawyer Discipline" (2013) Law School Admission Council Grants Report Series ("Levin et al."). The study referenced an earlier study published in 1991 that undertook a similar analysis of the discipline records and bar admission files of lawyers in Minnesota. However, owing to the small sample size and the lack of statistical analysis, the data is unreliable, with the investigators themselves concluding that "the study was not conducted scientifically". See also, Dragnich *supra* note 7 at 721.

[9] Leslie C. Levin, "Rethinking the Character and Fitness Inquiry" (2014) 22 Prof. Law. 12 at 22 ("Levin").

[10] *Ibid*. at 22; Levin et al. *supra* note 8 at 29.

[11] Levin et al. *supra* note 8 at 24. The study broadly characterized discipline as "severe" (e.g. suspended for 2 or more years or disbarred) and "less severe", which included shorter suspensions, reprimands and conditions.

lawyers whose applications indicated the presence of a mental health issue would be subject to "less severe" discipline, raising the probability of discipline by 3.5% (from a baseline discipline rate of 2.5% up to 6%).[12]

24. Despite this slightly increased risk, an applicant who answered affirmatively to the mental health questions still had a 94% probability of *not* being disciplined over the time of the study.[13]

25. By way of comparison, the study found that being male raises the probability of discipline by 2.5%.[14] As more than one author notes, there is no suggestion that based on this "elevate risk" (which is similar to the increased risk associated with the presence of a mental health issue), all men should be subject to a more rigorous and intrusive bar application process in an effort to protect the public interest.[15]

26. The study concluded that "it remains true that someone who reports a mental health diagnosis or treatment is still overwhelmingly unlikely to be disciplined."[16] Further, the researchers observed that "even knowing that an applicant has a substantial elevated risk of future discipline is probably not sufficient to justify some kind of corrective or preventive action, given the low baseline risk"[17] and cautioned that "policy makers would almost certainly not be advised to take significant action based on a predictive probability of future discipline as low as 6%."[18]

27. This data, which did not exist at the time the Law Society's medical fitness questions were last evaluated, raises serious doubts about the effectiveness of these types of questions in identifying unfit lawyers.

28. [redacted]

[12] *Ibid*. Notably, Levin's study found that 23.68% of the disciplined lawyers may have had psychological issues which contributed directly or indirectly to their misconduct. However, she emphasizes that it is not know if those lawyers had these issues at the time of their admission or whether they developed later in their careers.
[13] Sabol *supra* note 7 at 15.
[14] Levin et al. *supra* note 8 at 25.
[15] Dragnich *supra* note 7 at 723; Sabol *supra* note 7 at 16.
[16] Levin et al. *supra* note 8 at 29. The study also emphasized that the failure of the variables to strongly predict subsequent discipline was not due to the fact that those who were likely to be problematic lawyers were denied admission to the bar as only one to two lawyers in Connecticut were denied admission each year based on concerns about medical fitness.
[17] Levin et al. *supra* note 8 at 1.
[18] Levin et al. *supra* note 8 at 38.

[redacted] Similarly, very few US regulators indicate that they can support the use of mental health inquiries with statistical data.[20]

29. The Task Force recognizes that not infrequently, disciplinary proceedings involve individuals with mental health or substance use issues, however, these conditions can (and do) develop at *any* point in a lawyer's career. Research indicates, however, that asking about these issues at the application stage is not an effective means of identifying which students will have competency issues once they become lawyers.

Jurisdictions that ask medical fitness questions do not have lower rates of lawyer discipline

30. If medical fitness questions are effective in identifying applicants that lack the requisite fitness to practice competently, one would expect to see lower levels of lawyer discipline in those jurisdictions that ask questions about mental health and substance use as compared to jurisdictions that do not ask these types questions. This, however, does not appear to be the case.[21]

31. For example, Pennsylvania and Massachusetts, neither of which ask questions about mental health in their bar applications, have lower rates of discipline as compared to several states that do ask mental health questions.[22] Aggregate data also fail to show a correlation between those states that ask medical fitness questions and lower rates of discipline.[23] This is not the result one would expect if the questions were effective in "weeding out" unfit lawyers.

32. Amongst Canada law societies, Ontario, Saskatchewan and the Northwest Territories do not ask medical fitness questions on their admissions application forms.[24] Although no analysis has been done as to whether these provinces have higher rates of lawyer discipline as compared to provinces that do ask these questions, presumably these regulators (along with the growing number of US states that do not ask medical fitness questions) are satisfied that they can achieve the goal of protecting the public without relying on questions about applicants' medical status.

[redacted]

[20] An informal study of 33 states found that while most asked about mental health on their applications, only 15% of examiners said they could support their use of mental health inquiries with statistical or anecdotal data (the acknowledge use of anecdotal data is in itself someone concerning). See Dragnich *supra* note 7 at 720.
[21] Sabol *supra* note 7 at 32.
[22] Dragnich *supra* note 7 at 725 (using discipline as a proxy for unfit lawyers).
[23] *Ibid*. at 726.
[24] These jurisdictions are statutorily mandated to consider good character but not "fitness".

Low rates of affirmative responses to medical fitness questions

33. Although the Task Force does not have statistics on the percentage of applicants that answer the Law Society's medical fitness questions affirmatively, anecdotally the Task Force has been advised that the numbers are very low. This corresponds with observations in other jurisdictions where the number of affirmative responses are also minimal, often in the range of one to two percent of applicants.[25] The number of denied or conditional admissions resulting from responses to medical fitness questions are, of course, much lower.

34. These low rates of disclosure are notable given that the most comprehensive study to date on mental health and substance use affecting US law students (the "Student Well-Being study") found that 42% of respondents felt they needed help for a mental health issue and 25% of respondents exhibited drinking behaviours for which further screening for alcoholism was suggested.[26]

35. There are several possible explanations for the gap between the number of applicants self-reporting and the number of students likely experiencing these issues. Some applicants may feel their condition does not cause an impairment, and therefore, does not need to be reported. In other cases, an applicant may be unaware that they have a mental health or substance use disorder (demonstrating that the questions are ineffective in eliciting information about undiagnosed and untreated conditions).[27]

36. Another likely explanation is that those with mental health or substance use issues, particularly those without a history of treatment, keep their condition hidden based on concerns about the consequences of disclosure. Data from the Student Well-Being study supports this explanation. Researchers found that 43% of students felt that hiding a mental health condition would improve their chances of being admitted to the bar and 49% of students felt hiding a substance use issue would improve their admission chances. Notably, these rates were considerably greater, in the range of 72% (substance use) and 62% (mental health) amongst students with the highest rates of binge drinking, drug use, depression or severe anxiety.

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[25] Dragnich *supra* note 7 at 728. For example, the rate of affirmative answers regarding mental health on the Virginia bar application were less than 1% (*Ibid*. at 685). Approximately 2% of the lawyers in the Connecticut study answered the mental health questions positively.

[26] J.M. Organ, D.B. Jaffe and K.M. Bender, "Suffering in Silence: the Survey of Law Student Well-Being and Reluctance of Law Students to Seek Help for Substance Use and Mental Health Concerns" (2016) 66 J. Legal Educ. 116 ("Student Well-Being study").

[27] As at least one commentator observers, the problem with diagnosis or treatment based questions about substance use (the approach currently employed by the Law Society) is that "they are practically useless in identifying applicants with active, untreated substance use problems. Ask such a person whether they have a disorder, or are being treated, and their denial virtually guarantees a no answer." (Bauer *supra* note 3 at 178).

37. These statistics suggests that many individuals, and *particularly* those with the most serious issues (arguably the group regulators are attempting to identify) will choose not to reveal a medical fitness issue on their admissions application. Conversely, the questions are more likely to capture those individuals that have sought treatment or support and are therefore less likely to deny or hide their condition. Again, this raises questions as to the effectiveness and utility of these inquiries.

38. Proponents of medical fitness questions assert that identifying even a few applicants with mental health or substance use conditions that may lead to competency issues is better than not "capturing" any of these individuals at all. This line of argument is problematic for at least two reasons. First, as previously discussed, the data suggest a very weak connection, if any, between those individuals that identify as having a mental health or substance use issue on their admission application and later lawyer misconduct. Second, the medical fitness questions only make sense if they produce a net gain in public protection. That is, even if the questions identify *some* problematic individuals, these "gains" must be weighed against the significant costs associated with asking questions, as described below.

Medial fitness questions deter students from seeking treatment

39. There is an abundance of academic literature[28] and empirical research [29] demonstrating that asking medical fitness questions in a bar application deters some applicants from seeking necessary counselling and treatment for mental health and substance use issues. Although it is not possible to measure the full impact of the questions on help-seeking behaviour, two studies suggest the deterrent effect is likely significant.

40. In 1994, a nation-wide study of US law students explored whether individuals would seek assistance if they believed they had a substance use issue. The results showed that the prospect of disclosure in the bar application significantly reduced students' willingness to seek counselling for substance use issues or to refer friends for help. Specifically, when students were asked whether they would seek assistance for a substance use problem, only 10% said yes. However, 41% indicated they would seek assistance if they were

[28] See for example, Josselyn *supra* note 3 at 97; Lindsay Lusk,"The Poison of Propensity: How Character and Fitness Sacrifices "Others" in the Name of Protection" (2018) 1 University of Illinois L. Rev 345 at 365, 372; Dragnich *supra* note 7 at 683; Bauer *supra* note 3 at 150; Rhode *supra* note 3 at 581; Jennifer Jolly-Ryan, "The Last Taboo: Breaking Law Students with Mental Illness and Disabilities out of the Stigma Straightjacket" (2010) 79 UMKC L. Rev. 124, 131; Sabol *supra* note 7 at 3,17.

[29] Report of the Association of American Law Schools (AALS) Special Committee on Problems of Substance Abuse in Law Schools, (1994) 44 J. Legal. Educ. 35 ("AALS Study") which involved over 3,300 students from 19 law schools; Student Well-Being study *supra* note 26, which involved 3,300 students from 15 law schools.

assured that *bar officials would not have access to the information.* A similar effect of confidentiality assurances was seen in relation to student's willingness to report an impaired colleague.[30]

41. This deterrent effect was also observed in the 2013 Student Well-Being study. Researchers found that although 42% of respondents thought they needed help for mental health issues, only half of these students had actually sought help. Only 4% of respondents reported they had used a health professional for drug or alcohol issues, a very low percentage relative to the 25% of respondents that exhibited drinking behaviours that met the threshold for further screening for alcoholism.[31]

42. In exploring barriers to help-seeking behaviours, researchers found that 63% of respondents identified the potential threat to bar admissions as discouraging them from seeking assistance for substance use issues. Additionally, 45% of respondents identified potential threat to bar admissions as discouraging them from seeking assistance for a mental health issue.[32] The researchers confirmed that "one of the most significant obstacles to seeing a health professional for alcohol, drug or mental health issues is fear of not being admitted to the bar, owing the character and fitness component of bar applications."[33]

43. Administrators at BC law schools also observe that the medical fitness questions contained in the LSAP Application form have a negative impact on law students' desire to seek treatment.[34] Although Schedule A contains a preamble stating that disclosing treatment is not a bar to admission, the message from the law schools and reflected in the low rates of self-reporting is that many students simply do not trust that this is the case.[35]

44. Additionally, medical fitness questions may also prevent applicants who are actively seeking help for these issues from being forthcoming with their healthcare providers due to fear that this information will find its way back to the regulator. This lack of candour may result in misdiagnosis or a less effective course of treatment.[36]

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[30] *Ibid.*
[31] Student Well-Being study *supra* note 26 at 140.
[32] *Ibid*. at 141.
[33] *Ibid*. at 154.
[34] See the submissions of the Allard School of Law and the UVic Faculty of Law contained in the supporting materials included in this consultation package.
[35] For a critique of the preambles to medical fitness questions, see Hilary Duke, "The Narrowing of State Bar Examiner Inquiries into the Mental Health of Bar Applicants: Bar Examiner Objectives are Met Better Through Attorney Education, Rehabilitation and Discipline" (1997) 11 Geo. J. Legal Ethics 101 at 122-123; Dragnich *supra* note 7 at 711.
[36] American Bar Association, "Resolution 102 and supporting report" (August 2015) at 7; Josselyn *supra* note 3 at 98; Dragnich *supra* note 7 at 686.

45. This chilling effect is counterproductive to the purpose of the questions - protecting the public - as applicants that may have benefited from counselling or treatment prior to beginning their legal career fail to seek it. As a result, these individuals may be less prepared to deal with the pressures and stresses of legal practice. As one author notes, "medical fitness inquiries serve to deter treatment that would otherwise enable applicants to be stronger, healthier, more successful and generally "fit" lawyers."[37]

46. Even if there were some discernable benefit to retaining the medical fitness questions — which the evidence suggests there is not — their counterproductive effect still justifies their removal.

Medical fitness questions reinforce stigma

47. The inclusion medical fitness questions in the LSAP Application form sends the message that those experiencing mental health and substance use issues pose an elevated risk to the public and must therefore be considered for more intensive screening. As discussed previously, current research suggests this is not the case.

48. Rather than revealing actual risks, the questions rely on speculation, stereotypes and generalizations about applicants with mental health or substance use issues.[38] Consequently, one of the most significant impacts of asking the questions is reinforcing the stigma surrounding mental health and substance use, extending the counterproductive effect of the inquiry further still.

49. Similarly, justifying these questions on the basis that they achieve their secondary objective of protecting the reputation of the profession by assuring the public that a rigorous vetting process is in place to prevent unfit individuals from being admitted to the bar is not acceptable as this "reassurance" reinforces the notion that there is a correlation between applicants' medical status and competence.

50. Given that addressing stigma is a strategic priority for the Law Society,[39] it is imperative to find ways to elicit information about applicants' fitness to practice in a non-stigmatizing manner and for the Law Society to undertake a leadership and educating role in challenging these stereotypes and actively seeking ways to reduce stigma.

[37] Josselyn *supra* note 3 at 98.
[38] Josselyn *supra* note 3 at 104; Rhode *supra* note 3; Bauer *supra* note 3at 193; Sabol *supra* note 7 at 17.
[39]Law Society of BC Strategic Plan 2018-2020, online at: www.lawsociety.bc.ca/Website/media/Shared/docs/about/StrategicPlan_2018-2020.pdf

Medical fitness questions impact on privacy interests

51. The impact of medical fitness questions on privacy interests are well documented.[40] Within BC, in addition to being required to disclose the existence of, and details about certain medical conditions, an affirmative answer to the medical fitness questions can result in an applicant being asked to consent to the release of their medical records and/or an independent medical examination.[41]

52. Medical records can include information about life circumstances, past traumas, personal relationships, past struggles with mental health or addiction and associated treatment histories, much of which will have nothing to do with the applicant's current ability to practice law.

53. Generally, students are also obliged disclose their health status to their employer to explain the Law Society's involvement in their application process, particularly when the process surrounding the release of medical records and independent medical examinations result in delays in the commencement of articles.

54. In balancing applicants' rights to privacy with the public interest in having relevant information disclosed at the time of admission, the efficacy of the medical fitness questions must be considered. Given the body of evidence that demonstrates that self-identifying as having a mental health or substance use issue in a bar admission application has little, if any, bearing on future professional competence, the questions and related follow-up inquiries are an unreasonable invasion of privacy.

Medical fitness questions cause stress, inconvenience and delay

55. In addition to potentially generating feelings of shame and embarrassment, being required to answer medical fitness questions, and the investigations that flow from providing affirmative answers to these questions, can be a great source of stress and inconvenience for many applicants.[42]

56. As noted above, consenting to the release of highly confidential medical information to individuals that have enormous control over applicants' future can be an extremely

[40]Shellow and Coleman *supra* note 7 at 159; Dragnich *supra* note 7 at 68.
[41] See the Law Society of BC's Procedure regarding affirmative answer to the medical fitness questions, contained in this consultation package.
[42] Lusk *supra* note 3 at 372; Dragnich *supra* note 7 at 684; Bauer *supra* note 3 at 193, 210; Levin, #2 *supra* note 2 at 779.

difficult experience for many individuals. Similarly, independent medical examinations, can be inconvenient, onerous and stressful.

57. Academics and law school administrators have also observed that affirmative answers to the medial fitness questions can lead to delays in the admission process that can affect students' ability to participate in law school clinical programs, as well as impacting professional opportunities.[43] Delays that limit a student's employability can be tremendously inconvenient and stressful for applicants. The submissions from the Allard School of Law and the University of Victoria Faculty of Law, included in this consultation package, provide a more detailed account of these challenges.

Part 2: What is the scope of the appropriate fitness inquiry?

58. Given the significant costs associated with medical fitness inquiries and the body of evidence indicating that the questions are not an effective means of protecting the public from unfit lawyers and further, are not an appropriate means of safeguarding the reputation of the profession, are there alternate means to achieving these goals?

59. In posing this question, it is important to underscore that the issue is not whether the Law Society should consider fitness to practice as an element of the application process. Indeed, under section 19 of the *LPA*, it is required to. Rather, the issue is whether there are more effective means of doing so than the medical fitness questions.

60. Numerous academics,[44] the American Bar Association[45] and the US Department of Justice[46] are all of the view that the answer is yes, there are better ways to undertake a fitness inquiry that protects the public from unfit lawyers and safeguards the reputation of

[43] Dragnich *supra* note 7 at 684; Levin #2 *supra* note 3 at 779; Allard Law and UVic Faculty of Law submission.
[44] Coleman and Shellow *supra* note 7 at 149,173 (the most accurate way to predict whether a person's conduct is likely to cause injury is to determine if he has a history of harmful behaviour. Consequently, professional licensing boards should inquire about conduct, not treatment for or history of mental illness or substance abuse)(as with mental illness, when evaluating an applicant for a professional license, the important question is conduct, not substance abuse); Josselyn *supra* note 3 at 112 (instead of continuing the debate regarding how to appropriately narrow and improve upon current medical fitness questions, a more suitable examination might be to consider whether Bar Societies' screening processes can be effective without any mental health questions at all); Dragnich *supra* note 7 at 737 (the appropriate inquiry should be the applicant's history of behaviour...the mere existence of a particular mental health diagnosis has no probative value); McPherson Hughes *supra* note 2 at 195 (because bar exam questions regarding mental health can deter students from seeking necessary help, they may be unlawful or ineffective or both. Therefore, they should be excluded from bar applications. Instead, state bars should focus on applicants' behaviour and not his mental health status); Sabol *supra* note 7 at 5 (it is now time for all of the states to focus their questions on applicant conduct, rather than mental health status or history).
[45] ABA Resolution 102 and supporting report *supra* note 36.
[46] Letter from Jocelyn Samuels, Acting Assistant Attorney General, US Department of Justice, Civil Rights Division to the Louisiana Supreme Court, the Louisiana Supreme Court Committee on Bar Admission and the Louisiana Attorney Disciplinary Board Office of Disciplinary Counsel (February 5, 2014) ("DoJ Findings Letter to Louisiana State Bar").

the public, namely: applicants' fitness to practice can, and indeed *should* be evaluated on the basis of their actions, not the presence or absence of a medical condition.

61. The Task Force strongly supports this position.

62. Recognizing the limitations and drawbacks of mental health inquiries, in 2015 the American Bar Association replaced its resolution urging regulators to *narrowly tailor* questions concerning mental health and treatment to elicit information about fitness to practice with a new resolution calling on licensing entities to no longer ask *any* questions concerning mental health history, diagnosis or treatment and instead focus on conduct or behaviour that impairs an applicant's ability to practice in a competent, ethical and professional manner.[47]

63. Again, the Task Force supports this view. Illness does not affect a professional's fitness to practice unless it results in *conduct* that is harmful to clients. Because the issue is behaviour, fitness inquiries should focus on conduct that demonstrates (or fails to demonstrate) that an applicant can competently fulfill the professional and ethical duties required of a lawyer.[48]

64. As such, questions about mental health or substance use should not be included on admissions applications, and should *only* occur in the context of follow-up inquiries if the applicant has demonstrated problematic conduct and mental health or substance use is shown to be an explanation for the conduct.

65. This approach is perhaps best articulated by the ABA in its letter of support for the recent elimination of the medical fitness questions in Washington state:

> Requiring bar applicants to provide their mental health histories, diagnoses, or past treatment details unfairly discriminates against individuals with disabilities and is likely to deter individuals from seeking mental health counseling and treatment. Additionally, these questions have proven to be ineffective for the presumed purpose of identifying unfit applicants. The ABA does, however, make clear that:
>
> > licensing entities are not precluded from making reasonable and narrowly tailored follow-up inquiries concerning an applicant's mental health history if the applicant has engaged in conduct or behavior that may otherwise warrant a denial of admission, and a mental health condition either has been raised by the applicant as, or is shown by other information

[47] *Ibid*.
[48] Coleman and Shellow *supra* note 7 at 154,155.

> to be, an explanation for such conduct or behavior. We believe this approach strikes the right balance and allows licensing entities to carry on in their vital role of protecting the profession and the public.[49]

66. The US Department of Justice similarly advocates for an approach in which applicants are not asked to disclose diagnosis of, or treatment for a disability *unless that information is being used to explain the applicant's conduct.*[50]

67. More than half a dozen states have adopted the approach advocated by the ABA and the US Department of Justice. Samples of some of these application forms are included in the consultation package for reference, as are the admissions application forms in Ontario, Saskatchewan and the Northwest Territories, which do not ask questions specific questions about applicants' mental health or substance use.

68. These jurisdictions are clearly confident that they can protect the public without inquiring into an applicant's medical status. A focus on behavioural inquiries will result in fitness concerns being revealed through other information gathered in the application process (e.g. leaves of absence from school or work, credit problems, employment history revealing multiple terminations)[51] in a manner that does not of deter treatment, perpetuate stigma, or subject applicants to unnecessary invasions of privacy, stress, inconvenience and delay.

69. Under this behavioural approach, denial of admission may be justified if the applicant's fitness to practice competently is in doubt based on a pattern of problematic conduct, including that which can be explained by a mental health issue or substance use disorder.

70. Given the ineffectiveness of the medical fitness questions in achieving their stated purpose and the significant costs associated with these inquiries, the Task Force supports the approach proposed by the ABA and the US Department of Justice and adopted by many states, and advocates for the removal of the questions found in Schedule A of the LSAP Application form.

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[49] American Bar Association, "Letter to Washington State Supreme Court Re: Revisions to Admissions Practice Rules 20-25 and the Bar Application" (April 21, 2016) ("ABA Letter to Washington State Court")

[50] DoJ Findings Letter to Louisiana State Bar *supra* note 46 at 31 ("To remedy the deficiencies discussed above and protect the civil rights of individuals with mental health diagnoses or treatment who seek to practice law in the State of Louisiana, the Court should promptly implement the minimum remedial measures set forth below. a) Refrain from utilizing […] any other question that requires applicants to disclose diagnosis of, or treatment for, a disability when that information is not being disclosed to explain the applicant's conduct").

[51] By way of example, behavioural inquiries have proved effective in California, where without asking a status based substance use question, the regulator has found indications of problematic substance use in hundreds of applications a year (Bauer *supra* note 3 at 178).

71. The Law Society's fitness inquiry should instead focus on eliciting information about *conduct or behavior* that impairs an applicant's ability to practice law in a competent, ethical and professional manner.[52] Reasonable and narrowly tailored follow-up inquiries concerning an applicant's mental health or substance use are only permissible if the applicant has engaged in conduct or behavior that may otherwise warrant a denial of admission and these conditions have either has been raised by the applicant as, or shown by other information to be, an explanation for such conduct.

Conclusion

72. The Law Society has a duty to protect the public from incompetent lawyers and in doing so, ensuring that applicants are effectively screened for fitness to practice law. However, from an evidence-based perspective, asking medical fitness questions in the LSAP Application form is not an effective or appropriate means to achieve this goal. Rather, these questions are counterproductive and reinforce stigma.

73. In the time since the Law Society last reviewed the medical fitness questions in the LSAP Application form, there have been important advances in understandings about the impact and effectiveness of these inquiries. A consideration of this new body of information, which includes studies, reports, academic papers, policy positions and opinions from the American Bar Association, the US Department of Justice and the National Task Force on Lawyer-Wellbeing, submissions from BC law schools and examples of admission applications from other legal regulators that have eliminated medical fitness questions, is necessary.

74. All of this material is contained in this consultation package, and much of it has been referenced throughout this memo.

75. New research shows the predictive value of the medical fitness questions is so limited that regulators simply cannot determine, with any level of confidence, whether an applicant that provides a positive answer to a medical fitness question on an admissions application will go on to have disciplinary problems as a lawyer.

76. There is also no evidence that jurisdictions that ask medical fitness questions have lower rates of lawyer misconduct that those that do not. Further, data suggests that many individuals, and *particularly* those with the most serious conditions, will choose not to reveal a medical fitness issue on their admissions application. Collectively, these issues raise serious questions as to the effectiveness and utility of the medical fitness inquiry.

[52] ABA Letter to Washington State Court *supra* note 49.

77. There are significant costs associated with asking medical fitness questions. There is an abundance of research that medical fitness questions deter some individuals from seeking necessary counselling and treatment for mental health and substance use issues. Medical fitness questions also invade applicants' privacy, cause stress and inconvenience and result in delays bar admission that can have both personal and professional ramifications.

78. Based on the evidence and arguments discussed in this memo and the supporting materials included in this consultation package, the Task Force strongly advocates for the removal of the all medial fitness questions from Schedule A of the LSAP Application form.

79. The fitness inquiry should, instead, focus on *conduct or behavior* that impairs an applicant's ability to practice law in a competent, ethical and professional manner. Follow-up inquiries concerning an applicant's medical condition may, however, be appropriate, if the applicant has engaged in concerning conduct or behavior and a mental health or substance use issue has either has been raised by the applicant as, or is shown by other information to be, an explanation for such conduct or behavior.

The Law Society of British Columbia

Memo

To: Lawyer Education Advisory Committee

From: Mental Health Task Force

Date: January 20, 2019

Subject: Overview of Mental Health Task Force consultation materials for the Lawyer Education Advisory Committee

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1. In December 2018, the Benchers approved all 13 of the Recommendations contained in the Mental Health Task Force's First Interim Report.

2. Recommendation 10 proposed that the Mental Health Task Force work together with the Lawyer Education Advisory Committee to explore the merits of the Law Society introducing a mandatory continuing professional development requirement for mental health and substance use disorder programming.

3. As the Mental Health Task Force shifts its focus to implementing its Recommendations, it seeks to collaborate with the Lawyer Education Advisory Committee in undertaking a policy analysis of this issue.

4. The following materials are included in this consultation package to assist the Mental Health Task Force and the Lawyer Education Advisory Committee in their consideration of this issue:

    - **CPD purpose statement and Professional Wellness excerpt from the LEAC 2017 Final CPD Report (December 2017)**
        - This excerpt from the 2017 Final CPD Report outlines the recent changes to the CPD program that resulted in "professional wellness" becoming a newly accredited subject matter, and the rationales for those changes.
        - This material includes guidance for the profession on what topics qualify for "professional wellness" credit in BC.

- **Part 1 and Recommendation 10 of the Mental Health Task Force's First Interim Report (December 2018)**

    - Part 1 of the First Interim Report outlines the prevalence of mental health and substance use issues in the legal profession, the role of stigma, and the rationales for the Law Society to work proactively to address these issues across its various functions and processes.
    - Recommendation 10 highlights the recent changes to the American Bar Associations Model Rule, which now includes a stand-alone CLE requirement for mental health and substance use disorder programming. This rule has been adopted by a number of US states.

- **National Task Force on Lawyer Well-Being, "The Path to Lawyer Well-Being: Practical Recommendations for Positive Change" (2017) – highlighted sections pertaining to CPD/CLE**

    - The National Task Force's *Path to Lawyer Well-Being* is widely regarded as the most authoritative report on lawyer well-being to date. The report strongly advocates for action to address mental health and substance use in the legal profession, and encourages specific actions for improving the well-being of lawyers, as outlined in more than three dozen recommendations for various stakeholders.
    - In addition to drawing a link between lawyer well-being and professionalism and competence (both objectives of the Law Society of BC's CPD program), the report contains a specific recommendation to regulators to adopt the ABA's Model Rule in relation to mandatory mental health programming.
    - Specifically, Recommendation 20.3 proposes that all states adopt the Model Rule provision requiring lawyers to earn one credit hour every three years of CLE programming that addresses the prevention, detection, and/or treatment of "mental health and substance use disorders."
    - The report also highlights a broader set of well-being topics that the National Task Force recommends regulators accredit for the purposes of CLE/CPD.

- **American Bar Association Resolution 106 and Report (February 2017)**
    - Resolution 106 amending the ABA Model Rule for Minimum Continuing Legal Education includes a requirement for lawyers to receive at least one hour of mental health or substance use disorder programming every three years.

- The comments detail that while these types of programs generally count toward general CLE or ethics requirements, the amended Model Rule recommends a stand-alone requirement.
- The Resolution's accompanying Report explains the rationales for this approach, including reducing the concern of lawyers who would otherwise be reluctant to attend due to stigma.

- **Rules of other jurisdictions that have adopted stand-alone *mandatory* mental health and substance use disorder CLE requirements**
  - The CPD rules on stand-alone mandatory mental health and substance use disorder programming from the following states are enclosed: California, Illinois, Nevada, South Carolina and North Carolina. Indiana is also poised to implement mandatory mental health CLE.

5. The Mental Health Task Force encourages collaboration and dialogue with the Lawyer Education Advisory Committee in exploring the merits of instituting a mandatory mental health and substance use disorder CPD requirement in BC. This could include a series of meetings and/or an exchange of memos on the issue, with the ultimate goal of working toward a recommendation for the Benchers.

6. The Task Force's view is that the mandatory approach has the potential to address the very real concern – as highlighted in the Report accompanying ABA Resolution 106 - that stigma will prevent many lawyers from attending voluntary CPD programming on mental health and substance use disorders, and that these topics are of critical importance to lawyer learning given the prevalence of these issues among the profession.