Grey Areas
A COMMENTARY ON LEGAL ISSUES AFFECTING PROFESSIONAL REGULATION
SML Steinecke Maciura LeBlanc Barristers & Solicitors

Fixing Good Character Registration Requirements

by Erica Richler
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As a general rule, regulators cannot discipline practitioners for conduct that occurred before they became registered: *Association of Professional Engineers of Ontario v. Leung*, 2018 ONSC 4527 (CanLII), https://canlii.ca/t/htl3k. One exception is where the applicant provided false information on their application for registration about their pre-registration conduct. However, the questions posed on the application form must then be clear and unambiguous before the regulator can act on a failure to disclose past examples of bad conduct: *Payne v. Law Society of Upper Canada*, 2014 ONSC 1083 (CanLII), https://canlii.ca/t/g6982.

Therefore it is important for regulators to screen for applicants whose past conduct suggests that they will act unprofessionally in the future. Regulators who fail to do so face considerable criticism. Even someone with good technical skills can cause significant damage through inappropriate, dishonest or abusive conduct: https://www.theglobeandmail.com/opinion/article-the-good-doctor-its-time-to-stop-treating-character-like-an/.

In the case of police officers, the evidence shows that officers who have had conduct issues in the past are much more likely to have additional complaints in the future when they move to a different jurisdiction: https://www.newyorker.com/news/us-journal/how-violent-cops-stay-in-law-enforcement.

However, in recent years, regulators have been criticized for imposing good character requirements that are misguided, ineffective, intrusive, unnecessarily traumatic and discriminatory.

Misguided and Ineffective

Many criticisms of good character registration requirements go back to the seminal article by Alice Woolley's on *Tending the Bar: The "Good Character" Requirement for Law Society Admission*: https://digitalcommons.schulichlaw.dal.ca/cgi/viewcontent.cgi?article=1911&context=dlj (now Justice Woolley).

Alice Woolley argues that the conceptual foundation of the good character approach is flawed:

> Good character is thus defined not simply as a matter of moral behaviour, but also as a matter of having the virtues which will result in moral behaviour…
>
> It is impossible to prove that conduct flows from character, and some have argued that the assertion that it does is largely indefensible… *[footnote omitted]*
>
> To the social psychologist the overwhelming empirical evidence is that it is the circumstances of the lawyer's life—the pressures, culture and temptations of legal practice—which will dictate the ethics of his practice.

[1] This is a reprinted version of a paper published by the Canadian Network of Agencies of Regulation (CNAR).

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Alice Woolley also expressed significant concerns about how the good character process is administered:

> First, there is little consistency with respect to how past misconduct will be treated. Second, there is little consistency with respect to the significance which will be accorded to positive third party references about the applicant. Third, there is significant variation in how psychological evidence is used. Fourth, decisions often turn less on the evidence received about the applicant than on the panel's impression of the applicant as a witness during the proceeding. Finally, and perhaps most significantly, even when two cases present similarly on several evidentiary levels, inconsistent outcomes may be reached…
>
> Further, and more significantly, because law societies do not undertake independent investigation of applicants, there is no assurance that all applicants with issues arising from prior misconduct have been identified. Even a basic requirement that applicants provide a criminal record check, or a social services check, would significantly widen the scope of the law societies' inquiries. … [The] investigation of potential applicants should reach beyond the simple self-reporting system currently used.

Alice Woolley concludes:

> [T]he focus needs to be less on an applicant's "character" writ large than on her "fitness" for the ethical rigours of legal practice.

Research in the United States suggests that past criminal findings are poor predictors of future professional misconduct: Levin, Leslie, "Rethinking the Character and Fitness Inquiry" (2014). Faculty Articles and Papers. 125, cited at: https://opencommons.uconn.edu/law_papers/125.

Intrusive, Unnecessarily Traumatic and Discriminatory

The May 2021 article in Canadian Lawyer entitled *Good character, bad predictor, for law societies* cites Alice Woolley: https://www.canadianlawyermag.com/resources/professional-regulation/good-character-bad-predictor-for-law-societies/356482.

The article goes further, suggesting that the good character questions asked of applicants are too broad.

> Amy Salyzyn, an associate professor at the University of Ottawa's faculty of law, says there is a lack of evidence that the "good character" process is even effective in protecting the public. "If you look at the number of questions on the good character requirement form . . . it would be interesting to know what empirical evidence is behind [each] question," says Salyzyn. "Because the connection between those questions and future concerns aren't always evident. I think it's a part of a broader need for law societies to engage in evidence-based regulation."

Samantha Peters from the University of Ottawa law school raised the issue of the discriminatory impact of the good character requirements:

> "I understand that the good character requirement is intended to protect the public and maintain high ethical standards in the profession," says Peters. "But I think that the

> current process, as it stands, does not fully take into account the over-policing, wrongful convictions and criminalization of everyday movements of Black, Indigenous and criminalized folks."

An earlier article in Canadian Lawyer by Naomi Sayers, an Indigenous lawyer, described the trauma of going through the good character screening process: https://www.canadianlawyermag.com/news/opinion/the-trauma-of-proving-my-good-character/275404.

In an article published earlier this year, Andrew Flavelle Martin reviewed the case law and literature on regulators asking questions about applicants' mental health: Mental Illness and Professional Regulation: The Duty to Report a Fellow Lawyer to the Law Society | Alberta Law Review. Such questions may be presumptively discriminatory and need to be worded in such a way as to not to be overly inclusive, capturing medical histories that are unlikely to be relevant to the suitability to practise the profession.

The CBC recently reported on a request for a regulator to reduce the kinds of good character information that applicants for regulation need to disclose because the questions are "an intrusion of privacy …. [and] also deter members of marginalized groups from joining the legal profession …." https://www.cbc.ca/news/canada/manitoba/manitoba-lawyers-good-character-screening-1.5954198

In the United States there has been a concern that criminal records have unduly excluded people from occupations and professions, particularly racialized and marginalized individuals. Reforms are ongoing to reduce this barrier: https://ij.org/report/barred-from-working/; https://www.clearhq.org/page-1860709.

So What is a Regulator to do?

These critiques are not entirely consistent. Some call for broader scrutiny of past conduct to identify possible concerns. Others call for more limited questions focused on the most relevant of conduct and which do not have discriminatory effect.

However, even the strongest critics seem to see some sort of ongoing role for regulators to screen the past conduct of applicants for registration. As Alice Woolley states:

> Moreover, it is possible to imagine plausible but hypothetical cases … in which maintenance of the character requirement seems essential. If, for example, a lawyer were to be disbarred by the Law Society of Alberta for misappropriation of client funds and then apply for admission to the Nova Scotia Barristers' Society, it is obvious that his admission should be denied on the basis of his character as evidenced by his disbarment. *[footnote omitted]*

A good starting point for regulators is the leading case of *Ontario (Alcohol and Gaming Commission of Ontario) v. 751809 Ontario Inc. (Famous Flesh Gordon's),* 2013 ONCA 157 (CanLII), https://canlii.ca/t/fwk8l. That case dealt with whether a member of the Hells Angels met the "good character" requirements to obtain a liquor licence. The learning points from that case include the following:

- The test in that legislation did not even refer to "good character". Rather it took the more modern and relevant approach of asking whether the past conduct of the applicant afforded reasonable grounds for belief that the

applicant will not carry on business in accordance with the law and with integrity and honesty.
- The regulator could look at any past conduct of the applicant, not just past conduct in the practice of the business or profession.
- The past conduct did not need to result in criminal findings.
- The analysis of the past conduct was for the sole purpose of assessing whether it was likely to affect the future conduct of the practitioner.

Also, the standard of suitability based on anticipated future conduct is less generous to the applicant than the standard for removing someone from the profession who is already a member. That a practitioner has not been removed by their current regulatory body does not mean that another regulator has to register someone with a troubled practice history: *Lum v Alberta Dental Association and College (Review Panel)*, 2016 ABCA 154 (CanLII), https://canlii.ca/t/grmxn; *Nowoselsky v Saskatchewan Association of Social Workers*, 2015 SKQB 390 (CanLII), https://canlii.ca/t/gmn1w.

See also the discussion by Rebecca Durcan about how Canadian regulators, generally, are analyzing the relevance of past conduct concerns, from whatever source, to the future professional behaviour of the applicant: https://www.clearhq.org/page-1860709.

Going beyond the guidance of the case law, regulators might consider the following:

1. The legislative test should be amended if necessary so that it is based on whether the past conduct of the applicant provides a reasonable basis to believe that their future behaviour is likely to cause harm.
2. Even though the questions posed should not be limited to criminal conduct,[2] they should be as objective as possible. For example, conduct that resulted in complaints, investigations, formal allegations, charges, tribunal findings or court findings might all be reportable.
3. The questions should capture concerns where consequences were avoided, for example, by resigning from a position or similar avoidance strategies.
4. Regulators should consider whether it is appropriate to obtain additional information beyond the applicant's self-declaration. For example, contacting prior regulators of applicants should probably be routine. Even better would be a searchable database shared with other regulators. Are internet searches appropriate? Should CanLII or other court and tribunal case databases be searched? Should criminal record checks be required?
5. The regulator should have a comprehensive published policy explaining in plain language the purpose of the registration conduct requirements, the process followed, and the considerations taken into account by the regulator. The policy should expressly address concerns about how disabilities will be accommodated and how the experience of individuals from marginalized groups will be taken into account.
6. Communications strategies should be developed to ensure that potential applicants learn of the expectations and processes early on in their education and training for entry into the

[2] In some jurisdictions, human rights provisions limit scrutiny of offence records. Those restrictions need to be honoured.

profession. Posting a policy on the regulator's website may not be sufficient.

7. Special care must be taken in formulating the questions that will be asked about mental illness, addictions and historical conduct so as to comply with human rights obligations.
8. Regulators should carefully review their processes and language used in communicating with applicants where there are concerns, particularly where those concerns might be related to disabilities and past trauma. For example, inviting the applicant to have a preliminary telephone call before receiving a formal letter requesting additional information may be appropriate in some cases. Perhaps the regulator can offer a resource person, who is not involved in the decision making, to communicate with the applicant, if desired.
9. Investigations into concerns should be planned and focused. Requiring an applicant to report on their entire life experiences may not be necessary or appropriate.
10. Both staff conducting investigations of prior conduct concerns and decision makers on whether the applicant's past conduct creates a risk of future harm should receive training. The training should not only cover the published criteria, but should also include awareness of the impact of disabilities, race and social disadvantages on creating reportable past conduct concerns.

Regulators will continue to face competing demands in the assessment of prior conduct of applicants for registration. However, awareness of the issues should enable regulators to balance protection of the public with humane, legally defensible processes and relevant criteria.