



Leah Kosokowsky, Chief Executive Officer
The Law Society of Manitoba
200 – 260 St. Mary Ave
Winnipeg, Manitoba
R3C 0M6

Lynda Troup, President of the Law Society
The Law Society of Manitoba
200 – 260 St. Mary Ave
Winnipeg, Manitoba
R3C 0M6

Via Email: lkosokowsky@lawsociety.mb.ca

Via Email: kt@tdslaw.com

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Dear Ms. Kosokowsky and Ms. Troup,

RE: Reconciliation, Diversity and the "Good Character" Process

We are writing with respect to the "good character" process of the Law Society of Manitoba (LSM) for licensing applicants. The process currently in place creates unnecessary barriers to the legal profession that disproportionately harm individuals from Indigenous, Black and other marginalized groups due to over-policing, profiling, systemic discrimination, and colonialism. The process violates individual privacy rights, and deters members of these communities from joining or even trying to join the legal profession. Lawyers hold a position of trust and authority in society, and the LSM should be representative. The excessive requirements of the current process are unnecessary for the LSM to fulfil its purpose: "to uphold and protect the public interest in the delivery of legal services with competence, integrity and independence".¹

Concerns about "good character" processes have been under discussion nationally and in individual law societies for several years. We call now on the LSM and all its members who have made it their profession to pursue and maintain justice: (1) to conduct a rigorous review of the licensing and "good character" process, (2) to make immediate changes to the most obvious discrepancies, consistent with the recommendations in this brief; and (3) to do so in consultation with Indigenous lawyers and communities, as well as lawyers and communities from other racialized and marginalized groups in Manitoba. These would be important steps towards Truth and Reconciliation, and to enhance diversity and representation within the legal profession.

¹ *The Legal Profession Act*, CCSM c L107, s 3(1) [Legal Profession Act].

The Canadian Civil Liberties Association is a national human rights and civil liberties organization with supporters in Manitoba and across the country, including Indigenous students who have brought this matter to our attention, one of whom expressed the concern that this could affect their own admission to the bar. While the students who spoke with us did not feel comfortable coming forward directly, they approached CCLA with their concerns about the negative impacts this process has on Indigenous law students and on other Indigenous individuals who avoid the practice of law altogether.

CCLA is committed to defending the rights, dignity, and freedoms of all people in Canada. Founded in 1964, CCLA is an independent, national, non-governmental organization that works in the courts, before legislative committees, in classrooms and in the streets.

The “Good Character” Requirements in Manitoba

In order to enter the legal profession in Manitoba, applicants are compelled to disclose details and documentation about a wide array of personal and private information, including unsubstantiated allegations, complaints, charges, discipline and convictions, regardless of the relevance, the process, or the outcome.

The LSM’s Application for Admission as an Articling Student 2021-2022² requires applicants to disclose a plethora of irrelevant and remote inquiries such as whether an administrative tribunal or court ever determined that evidence presented by the applicant was not credible (possibly including, for example, a family law matter); whether the applicant was suspended for misconduct by a post-secondary institution (which could include, for example, a breach of student residence rules); and whether the applicant was permitted to resign from their position due to allegations in an employment context (for example, allegations against a whistleblower). An applicant is also required to disclose allegations and complaints as well as disciplinary action, convictions and charges, in a wide variety of contexts regardless of the relevance, the fairness of the process, or any outcome including a wholly exculpatory result.

Question 17³ requires an applicant to disclose all charges, possibly including those that were withdrawn, stayed, or that resulted in acquittal, as well as most minor, and all old convictions, and even a conviction for a historic offense like cannabis possession that is no longer unlawful. In the result, for example, an applicant who was charged or convicted with shoplifting years before may have to disclose that information as a pre-condition to their entry to the legal profession.

² The Law Society of Manitoba, “Application for Admission as an Articling Student 2021 – 2022”, online: <https://lawsociety.mb.ca/wp-content/uploads/2020/01/Application-for-Admission-as-an-Articling-Student.pdf>.

³ “Have you ever been charged in any jurisdiction with a crime, offence or delinquency under any statute, regulation or law, with the exception of three or less convictions under *The Highway Traffic Act*, *The Liquor Control Act*, or any municipal by-law? (Offences for which a conditional or absolute discharge has been granted, or for which a pardon has been obtained must be disclosed)”.

In addition, the question appears to require applicants to disclose an absolute or conditional discharge, or a conviction for which a pardon or record suspension has been granted, contrary to the strong legal protections that exist in federal legislation against disclosure. Absolute and conditional discharges are not convictions. Judges grant a discharge, for example in relation to non-serious or first-time offenses, for the very purpose of *avoiding* a conviction and criminal record.⁴ Pursuant to section 6.1 of the federal *Criminal Records Act*, records of absolute discharges are removed after one year and records of conditional discharges are removed after three years. Despite this, the LSM appears to require applicants to disclose all discharges, no matter how old they are. Both discharges, and record suspensions and pardons are granted to aid in rehabilitating a person's reputation, and in removing barriers to employment. The LSM's requirements on the other hand, retain both the stigma and the barriers.

And despite detailed protections against disclosure under the *Youth Criminal Justice Act*, the LSM Application form fails to inform candidates that they do not need to disclose information pertaining to engagement with the youth criminal justice system. This failure creates a significant dilemma for applicants who may be unsure how to interpret the form's requirements, and who may fear the consequences (and exposure) that could befall them if they do not disclose such information.

On top of this exceptionally broad list of disclosure requirements comes question 26:

Is there to your knowledge or belief any event, circumstance, condition or matter not disclosed in your replies to the preceding questions that touches on or may concern your conduct, character and reputation, and that you know or believe might be thought to be an impediment to your admission, or any matter that could warrant further inquiry by the Society?

This question could include a great deal of highly personal and irrelevant information. And applicants who wish to become licensed may feel unsure as to whether they must disclose medical or mental health issues out of a concern that failure to disclose could lead to denial of admission to the Law Society, or later disciplinary action.

Some individuals may choose a different career path entirely to avoid the intrusion and uncertain results of the LSM's "good character" process (results that would only be known after a costly and time-consuming legal education). The contributions such individuals could have made to the legal profession are a loss both for the Law Society and for the general public in Manitoba.

The "Good Character" Process is Ineffective and Unnecessary

The Law Society's statutory purpose is 'to uphold and protect the public interest in the delivery of legal services with competency, integrity and independence.'⁵ However the excessive and

⁴ *R v Young*, 2008 MBPC 50, citing *R v Fallofield*, [1973] BCJ No 559.

⁵ *Legal Profession Act*, *supra* note 1.

discriminatory nature of the “good character” process requirements are not only highly intrusive and discriminatory, they are also unnecessary to achieving this purpose.

Alice Woolley, prior to her appointment to the Court of Queen’s Bench in Alberta, conducted a review of published decisions in relation to the “good character” process in Canada. She found that the key factor in determining whether an applicant will be admitted to the law society is whether the applicant admits the misconduct that gave rise to the hearings. Applicants who acknowledged and repented their misconduct were admitted despite committing *serious misconduct* including bribing a public official, having 38 convictions for fraud-related offences, drug smuggling and committing sexual assault. By contrast, applicants who did not fully acknowledge their misconduct were denied admission even when the misconduct was found to be relatively minor such as impaired driving. Based on her research, then-Professor Woolley proposed abandoning the good character process entirely.⁶

She explains that moral and behavioural psychology have raised doubts about the use of “character” as a measure of suitability to practice law. The evidence suggests that the existence of “character” is not something that reliably delineates individuals from each other. Character can be considered as a philosophical construct, but it is not psychologically demonstrable. Significantly, it cannot be used to predict future behaviour.⁷

Professor Woolley found that the “good character” process is not effective as a protective measure for the legal profession or for the public, and it certainly does not define someone’s character or fitness to practice law. Indeed, there is little evidence that past misconduct is a meaningful predictor of future behaviour.

The Good Character Process Discriminates and Impedes Reconciliation and Diversity

The Law Society of Manitoba’s “good character” process creates unnecessary and invasive barriers that undermine Truth, Reconciliation, and diversity in law. This contravenes the LSM’s own declarations, including the following:

Commitment to Truth and Reconciliation

The Law Society of Manitoba recognizes the significance of the work of the Truth and Reconciliation Commission and the 94 Calls to Action directed at all segments of Canadian society. In particular, the Law Society endorses Call to Action #27 that calls upon law societies to ensure that lawyers receive appropriate cultural competency training, which includes the history and legacy of residential schools, the United Nations Declaration on the Rights of Indigenous Peoples, Treaties and Aboriginal rights,

⁶ Alice Woolley, “Can Good Character Be Made Better? Assessing the Federation of Law Societies’ Proposed Reform of the Good Character Requirement for Law Society Admission (2013) Canadian Journal of Administrative Law and Practice at 4-5, available online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2262863.

⁷ *Ibid.*

Indigenous law and Aboriginal-Crown relations. This will require skills-based training in intercultural competency, conflict resolution, human rights and anti-racism.

We are committed to responding to the Calls to Action and embrace the opportunity to work toward reconciliation between Indigenous people, the legal profession and within the justice system.⁸

And:

Equity & Diversity

The Law Society of Manitoba believes that the public is best served by a legal profession that reflects our diverse community. We are committed to all individuals participating in the legal profession regardless of their age, disability, race, religion, sexual orientation, gender identity, marital or family status.⁹

The LSM's "good character" process, on the other hand, has a detrimental and discriminatory impact on people who are Indigenous, Black, who have experienced mental health issues, homelessness, or other forms of racialization or marginalization. It is well-established that these groups are over-policed, experience profiling and discrimination within the criminal justice and other systems, and are disproportionately represented within them as a result of colonialism and systemic discrimination. The practical result is that a disproportionate number of Black, Indigenous and other marginalized individuals may have experienced profiling, complaints and allegations, or interactions with police that led to a charge, a discharge or conviction, which an applicant would be required to disclose under the current "good character" process in Manitoba. Indeed, an Ontario Bar Association report found that an open-ended inquiry into discharge dispositions would have a disproportionate impact on Indigenous and racialized communities, concluding that "[I]t is important to give serious consideration to these perspectives in the current era of increased recognition of inherent barriers and subjective biases."¹⁰

And while it is true that most individuals who disclose these allegations, charges and convictions may be ultimately accepted into practice by the Law Society, the violation of individual privacy, the risk of exposure, and most of all the threat that a person may not become licensed as a lawyer after years of study and considerable financial investment, unfairly impact those who go through it, and serve to deter others from even taking up legal studies and embarking on a career in law.

⁸ The Law Society of Manitoba, "TRC Calls to Action", online: <https://lawsociety.mb.ca/about/lsm-initiatives/trc-calls-to-action/>.

⁹ The Law Society of Manitoba, "Equity Officer", online: <https://lawsociety.mb.ca/for-lawyers/supports-for-lawyers/equity-officer/>.

¹⁰ Ontario Bar Association, "Good Character Inquiry and Dispositions of Discharge", submission to the Law Society of Ontario (16 April 2018), online: <https://www.oba.org/CMSPages/GetFile.aspx?guid=6cb2855f-d4a6-4c29-9a9d-7f575a219a95> at 5.

This affects not only diversity among lawyers in private practice, but also among prosecutors, legal academics and judges. And it impacts the broader society. A person from a racialized or marginalized group who needs legal assistance in housing or employment, who has the chance to serve on a jury, or who faces charges in a criminal trial, will be dealing with legal professionals who, for the most part, come from a different background and do not represent the diversity of Manitoba society. For example, even amongst those entering law, only 13% of articling students and new lawyers in Manitoba are visible minorities and only 6% are Indigenous,¹¹ while 17.5% of Manitoba's population comes from visible minority communities, and 18.2% are Indigenous.¹²

Conclusion, Violations and Recommendations

Lawyers occupy a position of trust and authority in society, and for this reason alone, the LSM should strive for greater inclusivity and representation. The LSM's maintenance and application of its "good character" process, and in particular its broad disclosure requirements, are an unnecessary, disproportionate, and harmful fishing expedition that replicates and perpetuates discrimination, biases and the systemic estrangement of Indigenous, Black and other racialized and marginalized peoples. As such, this process contravenes the Law Society's own purpose and its commitment to Truth and Reconciliation, equity and diversity; it constitutes unlawful discrimination under Manitoba's *Human Rights Code*; and it violates fundamental rights, including the right to privacy and equality, under the *Canadian Charter of Rights and Freedoms*.

CCLA calls on the Law Society as follows:

1. To engage in a serious and expeditious review of its "good character" process. Such a review should consider the scholarly writings questioning the utility of this process at all, and should aim to align the licensing process with fundamental rights, and with the Law Society's declared commitments to Truth and Reconciliation, equity and diversity.
2. To eliminate and rectify the most obvious deficiencies and violations forthwith, including by:
 - a. Expressly eliminating the most egregious disclosure requirements including, but not limited to, the requirement to disclose:
 - i. Charges, complaints, or allegations;
 - ii. Convictions for which a pardon or record suspension has been granted;
 - iii. Offences for which an absolute discharge was granted over one year ago or a conditional discharge was granted over three years ago;

¹¹ The Law Society of Manitoba, "Articling Program Assessment", Research Report (31 July 2019), online: <https://lawsociety.mb.ca/wp-content/uploads/2020/01/2019-LSM-Articling-Research-Report.pdf> at 54.

¹² Statistics Canada, "Census Profile" (2016), online: <https://www12.statcan.gc.ca/census-recensement/2016/dp-pd/prof/details/page.cfm?Lang=E&Geo1=PR&Code1=46&Geo2=PR&Code2=01&SearchText=46&SearchType=Begins&SearchPR=01&B1=All&TABID=3&type=1>.

- iv. Convictions for minor offences;
 - v. Convictions for anything that is no longer an offense, in particular cannabis possession;
 - vi. Any activity or allegation that is not serious, proportionate or relevant to the practice of law or the public's interest in the delivery of legal services;
 - b. Eliminating Question 26 on the Application for Admission as an Articling Student form and other similar questions on admissions forms;
 - c. Ensuring that any assessment of candidates utilizes the principles identified in the *Gladue* and *Ipeelee* decisions;
 - d. Ensuring that any assessment of candidates recognizes the impacts of systemic discrimination on over-policed communities including Black candidates and candidates who have experienced mental health issues and homelessness.
3. Central to any proposed changes to the LSM's rules and process and in developing your path forward: to consult with Indigenous lawyers and communities, as well as lawyers and communities from other racialized and marginalized groups in Manitoba.

We look forward to your response.

Sincerely,



Noa Mendelsohn Aviv
Equality Director



Verna George
Special Advisor on Indigenous Issues

Cc:

Alissa Schacter, Equity Officer and Policy Counsel
Richard Porcher, Director of Admissions and Membership
Sacha Paul, Chairperson of the Admissions and Education Committee
Jessica Saunders, Chairperson of the Equity Committee
Geraldine Wiebe, Co-Chair of the Access to Justice Steering Committee
Brian McLeod, Co-Chair of the Access to Justice Steering Committee
Paul Grower, Winnipeg Electoral District Bencher
Anthony Kavanagh, Winnipeg Electoral District Bencher
Kenneth Mandzuik, Winnipeg Electoral District Bencher
Christian Monnin, Winnipeg Electoral District Bencher
Wayne Onchulenko, Winnipeg Electoral District Bencher

Mason Broadfoot, Dauphin-Central Electoral District Bencher
Grant Driedger, Eastern Electoral District Bencher
Vincent Sinclair, Northern Electoral District Bencher
Ashley Joyce, Western Electoral District Bencher
Anu Osborne, Appointed Bencher
Joelle Pastora Sala, Appointed Bencher
Kelli Potter, Appointed Bencher
Susan Boulter, Lay Bencher
Miriam Browne, Lay Bencher
Tehani Jainarine, Lay Bencher
Patricia Kloepfer, Lay Bencher
Anna Maria Magnifico, Lay Bencher
David Asper, Q.C. (Acting Dean), Faculty Bencher
Christine Williams, Bar Admission Student Bencher