

Policy

Fit & Proper Person

Introduction	1.1	This policy is intended to provide guidance on the matters that should be disclosed to the Victorian Legal Services Board (Board) as well as the issues that decision-makers may consider in deciding whether a person is a fit and proper person to hold a practising certificate.
	1.2	This policy includes guidance on matters relating to a person’s suitability to practise. Rule 13(1) of the Legal Profession Uniform General Rules 2015 (Uniform Rules) sets out matters that the Board may take into account in considering whether a person is a fit and proper person to hold a practising certificate.
	1.3	The relevant case law affirms that honesty, open candour and frankness are particularly relevant to legal practice. Accordingly, in considering a person’s fitness to hold a practising certificate where a suitability matter is disclosed, the Board may give consideration to the honesty, open candour and frankness demonstrated by that person. Open and frank disclosure is likely to be viewed favourably, while a failure to disclose may adversely reflect on a person’s fitness to practise.
	1.4	Where disclosures are made to the Board, this policy reflects the Board’s obligations to treat disclosed information confidentially and to perform its functions without discrimination. Disclosure will not necessarily result in a finding that a person is not fit and proper to practise.
	1.5	As guidance material, this policy does not impose binding obligations or rights. This policy clarifies the position of ‘fit and proper’ person requirements under existing legislation and case law. Any obligations noted in this policy are drawn from the relevant primary and secondary legislation.
	1.6	This policy complements the Board’s Mental Health Policy to the extent that it deals with the question of “fit and proper person” matters other than whether the person is unable to carry out satisfactorily the inherent requirements of legal practice due to a mental health condition.
Legislative Framework	2.1	The following Board functions involve considerations of whether a person holding a practising certificate or applying for the grant or renewal of a practising certificate is a ‘fit and proper person’. References to sections in this policy are to the Uniform Law. Grant or renew a practising certificate
	2.2	Under s.44(1), the Board may grant or renew a practising certificate. Section 45(2) provides that the Board must not grant a practising certificate if it considers that the applicant is not a fit and proper person to hold the certificate.
	2.3	Subsection 45(3) provides that the Board, in considering whether a person is or is not a fit and proper person to hold a practising certificate, may have regard to the matters specified in the Uniform Rules.

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2.4 Rule 13(1) lists matters which the Board may have regard to for the purposes of s.45 in considering whether an applicant is a fit and proper person to hold an Australian practising certificate. This policy relates to all matters listed in Rule 13(1), other than whether the person is unable to carry out satisfactorily the inherent requirements of legal practice due to a mental health condition, which is considered under the Board's Mental Health Policy.

Vary, suspend or cancel a practising or registration certificate

2.5 Section 76 provides that the Board may vary, suspend or cancel a practising or registration certificate on grounds referred to in s.82 of the Uniform Law (including where the holder has been charged with a serious offence or a tax offence)

2.6 Section 76 also provides that the Board may vary, suspend or cancel a certificate in relation to an automatic show cause event, including a bankruptcy-related event or a conviction for a serious offence or a tax offence, as set out in s.86, or a designated show cause event (as set out in s.90: where the holder has engaged in legal practice outside the terms of a condition restricting his or her practising entitlements, or does not hold the requisite professional indemnity insurance, or where a foreign lawyer has provided services not permitted under the Uniform Law).

2.7 Show cause events must be disclosed to the Board, by notice within 7 days after the event has occurred and by giving a written statement of explanation within 28 days after the event.

2.8 The Board may require the applicant or holder to provide any further information or documents, including a report from a Commissioner of Police as to whether the applicant or holder has been convicted or found guilty of an offence in Australia, and to verify the information or documents by statutory declaration or another manner, specified by the Board.

Statutory condition to notify certain events

2.9 Section 51 and rule 15 of the Uniform Rules provide that it is a statutory condition of an Australian practising certificate that the holder must notify the Board within 7 days in writing in specified circumstances, including where:

- the holder has been charged with or convicted of a serious (i.e. an indictable) offence or a tax offence
- a bankruptcy event has occurred in relation to the holder
- the holder has become the subject of disciplinary proceedings as a lawyer in a foreign country
- the holder has been convicted of a notifiable summary offence under rule 15, which relates to specified offences under transport or traffic legislation.

Section 66 of the Uniform Law provides that it is a statutory condition of an Australian registration certificate that the holder must notify the Board in writing within 7 days in the event of the first three dot points above.

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Refuse to grant or renew registration as a foreign lawyer

- 2.10 Rule 21 of the Uniform Rules sets out the grounds on which the Board may refuse to grant or renew an Australian registration certificate, including contraventions of laws relating to the legal profession and contravention of requirements of and orders made under the Uniform Law.

The Board may also refuse to grant or renew the certificate if satisfied that the applicant is not a fit and proper person after considering the nature of any offence of which the applicant has been found guilty, how long ago the offence was committed and the person's age when the offence was committed.

Professional misconduct

- 2.11 Under s.297(1)(b) conduct of a lawyer constitutes professional misconduct, whether occurring in connection with the practice of law or otherwise, if it would, if established, justify a finding that the practitioner is not a fit and proper person to engage in legal practice.

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- 3.1 When considering whether a person is a fit and proper person to hold a practising certificate and/or engage in legal practice, the Board will have regard to all relevant matters, including but not limited to the matters listed below.

Legislative considerations

- 3.2 Any relevant provisions of the Uniform Law and Uniform Rules, including:
- the matters raised in clauses 2.1 to 2.11 above
 - the objectives of the Board relating to the effective regulation of the legal profession, the maintenance of professional standards and consumer protection (see s.30 of the Legal Profession Uniform Law Application Act 2014 (Vic.)).

Case law considerations

- 3.3 Any relevant cases from Victorian, interstate or related common law jurisdictions considering 'fit and proper person', 'suitability' or similar terms, including:
- cases about practising certificates, disciplinary issues and admission to or removal from the roll of practitioners
 - cases arising under the Uniform Law, its predecessor legislation or corresponding interstate laws
 - cases arising under previous legal profession regulation legislation
 - cases about other relevant professions.

Board policies and guidelines

- 3.4 Any relevant Board policies and guidelines, including the guidelines set out in this document.

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Application for grant of a practising certificate

- 3.5 When applying for the granting of a practising certificate, the applicant should disclose to the Board everything that will allow the Board to satisfy itself as to whether the applicant is a fit and proper person to hold a practising certificate.
- 3.6 Relevant matters include those that have previously been disclosed to an admission body in this or another jurisdiction and to a regulatory authority in another jurisdiction.

Application for renewal of a practising certificate

- 3.7 When applying for the renewal or variation of a practising certificate, the applicant should disclose to the Board any matters that have not previously been disclosed to the Board, Law Institute of Victoria or Victorian Bar.

Confidentiality and Privacy

- 3.8 Information provided to the Board is handled under the Board's Privacy Policy and in accordance with the *Privacy and Data Protection Act 2014* and the *Health Records Act 2001* as well as the Uniform Law. The Board and Commissioner may delegate certain functions or activities to authorised bodies and, as a result, will share information with those bodies in relation to those delegated functions or activities.

Non-discrimination

- 3.9 The Board complies with all relevant human rights and non-discrimination requirements including, but not limited to, those contained in the *Equal Opportunity Act 2010*.

Guidelines

- 4.1 Each decision will depend on the individual facts and circumstances of each case. In applying this policy, the Board or delegate may consider the guidelines set out below. Drawn from case law, these guidelines reflect existing judicial consideration of 'fit and proper' matters. They are not intended to be applied inflexibly.

General principles

- 4.2 Any matter that may adversely reflect on a person's fame or character or might bring into question a person's fitness to practise should be disclosed to the Board. Where there is uncertainty disclosure is recommended, since a person's failure to disclose a matter that may be relevant to fitness could adversely reflect on that person's fitness to hold a practising certificate.
- 4.3 Where a disclosed suitability matter is determined by the Board or delegate not to adversely reflect on a person's fitness to practise, no further action will be taken in relation to their application for renewal of a practising certificate.
- 4.4 Disclosures remain confidential and private (see clause 3.8).
- 4.5 In considering any disclosed matter that is determined by the Board to adversely reflect on a person's fitness to engage in legal practice and/or hold a practising certificate, the Board will consider a range of options including placing conditions or restrictions on, refusing, varying, cancelling or suspending a practising certificate.

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- 4.6 The Board will generally consider that a person is not a fit and proper person to engage in legal practice and/or hold a practising certificate in circumstances:
- involving dishonesty
 - involving prior history of similar offences or other relevant conduct indicating a disregard for the law
 - indicating a material risk of harm to consumers of legal services
- unless** there are mitigating circumstances.
- 4.7 Past actions may be considered indicative of future behaviour, unless that inference is rebutted by other relevant circumstances.
- Convictions, charges and pending criminal proceedings**
- 4.8 Criminal convictions, charges and pending criminal proceedings should be disclosed. The matters listed in ss.51 and 66 and automatic and designated show cause events (see above) must be notified to the Board, as must any relevant matters under rules 13,15 and 21 of the Uniform Rules.
- 4.9 The Board will generally disregard conduct related to convictions and charges where:
- the charges were subsequently withdrawn
 - the person was acquitted of the charges
 - the conviction was subsequently quashed
 - the conviction is now a spent conviction
- unless** conduct related to the convictions or charges might reasonably be taken to indicate dishonesty, disregard for the law or a risk to consumers or the community more broadly.
- Driving offences**
- 4.10 Specified notifiable summary offences under transport or traffic legislation are required to be disclosed to the Board within 7 days (refer clause 2.9 above). Otherwise, traffic offences need only be disclosed where the circumstances or frequency of the offence(s) indicates a disregard for the law and/or are part of a course of conduct that might reasonably be taken to indicate dishonesty, disregard for the law or a risk to consumers or the community more broadly.
- Infringement offences**
- 4.11 Infringement offences that may be expiated by payment of an administrative penalty, such as parking offences or public transport offences, do not need to be disclosed **unless** the frequency or number of offences or failure to pay penalties indicates a disregard for the law and/or are part of a course of conduct that might reasonably be taken to indicate dishonesty, disregard for the law or a risk to consumers or the community more broadly.

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Social security and tax penalty of payment issues

- 4.12 The Board will usually disregard tax penalties and social security overpayments unless they occurred in circumstances that might reasonably be taken to indicate dishonesty, disregard for the law or a risk to consumers or the community more broadly.

Misconduct

- 4.13 Academic misconduct, including plagiarism, collusion and cheating, should be disclosed.
- 4.14 General misconduct, which may reflect on a person's fitness to hold a practising certificate, should be disclosed.

Administration of justice offences

- 4.15 Administration of justice offences should be disclosed. The Board will generally consider that a person is not a fit and proper person to engage in legal practice and/or hold a practising certificate if the person has been found guilty of:
- contempt of court (whether civil or criminal).
 - an offence or series of offences that indicate serious disregard for the law or the administration of justice.
 - an offence or series of offences that harms the integrity of the legal profession.
- unless** there are mitigating circumstances.

- 4.16 **Insolvency**

As set out in clauses 2.6 and 2.9 above, bankruptcy-related events must be disclosed under ss.51 and 66 of the Uniform Law, and are automatic show cause events under s.86 of the Uniform Law. The Board will generally not refuse to grant or renew, or cancel or suspend a practising certificate because a person is 'insolvent under administration' (s.6 of the Uniform Law) unless:

- the circumstances indicate a lack of honesty or integrity
 - the circumstances involve tax evasion
 - the insolvency relates to the practitioner's legal practice or a related incorporated legal practice.
- 4.17 However, the Board may refuse to grant or renew a practising certificate with trust authorisation during the relevant period.

Contravention of a disciplinary order

- 4.18 Contraventions of disciplinary orders should be disclosed. The Board or delegate will generally send a notice to a person who has not complied with a disciplinary order of the tribunal or a court, requiring compliance within a reasonable period.

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- 4.19 If the person has not complied at the expiration of that period, the Board will not generally be satisfied that a person is fit and proper to hold a practising certificate, unless:
- the disciplinary order involves payment of money and the person enters into, and continues to comply with, a payment scheme of payments acceptable to the Board; or
 - there are other relevant circumstances.

Policy management & implementation

- 5.1 This policy is complemented by the following policies, procedures and forms of the Board:
- application for/variation of practising certificate form
 - renewal of practising certificate form
 - notice of show cause event form
 - privacy policy
 - mental health policy
 - recovery of fines policy
 - foreign lawyer registration policy
- 5.2 The policy will be communicated to relevant employees of the Victorian Legal Services Commissioner, Law Institute of Victoria and Victorian Bar and further training will be available if required.
- 5.3 The Board and its delegates will ensure that their relevant employees have access to current legislation, case law and relevant Board policies and guidelines.