
017 **Fit and proper person policy statement – v1.0**

Purpose

1. The purpose of this policy statement is to provide the Board’s interpretation of the term ‘fit and proper person’ in Part 2.4 of the *Legal Profession Act 2004 (Vic)* (‘the Act’).
2. The policy statement has no formal legal status or effect, but is intended to guide decision makers in considering whether an applicant for or holder of a local practising certificate is a fit and proper person to hold a practising certificate.

Background

3. When making a decision to grant, renew, amend, suspend or cancel a local practising certificate under Part 2.4 of the Act, the Board must consider whether a person is a fit and proper person to hold a practising certificate.
4. The term ‘fit and proper person’ is not defined in the Act. However, Part 2.4 of the Act specifies various matters that the Board may take into account when considering whether a person is fit and proper to hold a practising certificate. To date, there have been few cases that consider the meaning of the term ‘fit and proper’ in the context of Part 2.4 of the Act.
5. The concept of ‘fitness to practice’ has also been judicially considered in the context of disciplinary proceedings and the admission and removal of lawyers from the Roll of practitioners. By analogy, this jurisprudence provides some guidance to the meaning of the term ‘fit and proper person’ in the context of Part 2.4 of the Act.

Functions

6. The Board has the following functions that involve consideration of the term ‘fit and proper person’:
 - **Grant or renew a local practising certificate**
Under section 2.4.3 of the Act, the Board **may** grant a local practising certificate. Section 2.4.7(1) of the Act provides that the Board **must not** grant a local practising certificate unless it is satisfied that the applicant is a fit and proper person to hold the certificate. Section 2.4.7(2) of the Act provides that the Board **must not** renew a local practising certificate unless it is satisfied that the applicant is a fit and proper person to continue to hold the certificate.
 - **Amend, cancel or suspend a local practising certificate**
Under sections 2.4.21 and 2.4.22 of the Act, the Board **may** amend, cancel or suspend a local practising certificate where it believes a ground exists to do so. Section 2.4.20(a) of the Act provides that it is a ground to amend, cancel or suspend a local

practising certificate that the holder is no longer a fit and proper person to hold the certificate.

- ***Refuse to grant or renew or amend, cancel or suspend a local practising certificate where a show cause event has happened***

Under section 2.4.28(1)(b) of the Act, the Board **may** refuse to grant or renew or may amend, cancel or suspend a local practising certificate where a show cause event has happened and the certificate holder has failed to show cause why they are fit and proper to hold a certificate. Section 1.2.1 of the Act defines the term 'show cause event'.

- ***Impose conditions on a local practising certificate***

Under section 2.4.14, the Board **may** impose conditions on a local practising certificate when it is granted or renewed.

Pursuant to section 2.4.13, a condition imposed by the Board must be reasonable or relevant.

- ***Apply to the Tribunal for an order varying or imposing conditions on a local practising certificate pending criminal proceedings***

Under section 2.4.16, the Board **may** apply to the Tribunal for an order varying or imposing conditions on a local practising certificate if the holder has been charged with a relevant offence but the charge has not yet been determined. Section 2.4.16(6) of the Act defines the term 'relevant offence'.

- ***Ask for a criminal record check***

Under section 2.5.3, the Board **may** ask for a criminal record check if it believes on reasonable grounds that a person has been found guilty of an offence that may result in them not being fit and proper person.

- ***Require a person to undergo a health assessment***

Under section 2.5.4, the Board **may** require a person to undergo a health assessment if it believes on reasonable grounds that the person has a mental impairment that may result in them not being fit and proper person.

- ***Prohibit multi-disciplinary partnership with certain persons***

Under section 2.7.50(2)(a), the Board **may** apply to the Court for an order prohibiting a multi-disciplinary partnership from having a partner who is not a fit and proper person to be a partner.

- ***Refuse to grant or renew registration as a foreign lawyer***

Under sections 2.8.23(4) and (5), the Board **may** refuse to grant or renew registration as a foreign lawyer if the applicant is not a fit and proper person, after considering prior offences.

- ***Disclose information or make a complaint to the Legal Services Commissioner***

Section 4.4.3(1)(b) of the Act provides that conduct by an Australian legal practitioner that would justify a finding that the practitioner is not a fit and proper person to engage in legal practice constitutes professional misconduct. Under section 7.2.14 of the Act, the Board **may** disclose information to the Legal Services Commissioner or another local or interstate regulatory authority about any matter relating to the Act (including alleged professional misconduct). Under section 4.2.4

of the Act, any person (including the Board or its delegates) **may** make a disciplinary complaint to the Legal Services Commissioner about alleged professional misconduct.

Application

7. Pursuant to section 6.2.19 and clause 8.14 of Schedule 2 of the Act, the Board has delegated the functions set out in paragraph 6 to:

- the CEO of the Board
- the Law Institute of Victoria to exercise in relation to local legal practitioners other than barristers, except:
 - disclosure of information under section 7.2.14
 - foreign lawyer registration under s.2.8.23.
- the Victorian Bar to exercise in relation to local legal practitioners who practice solely as barristers, except:
 - disclosure of information under section 7.2.14
 - multi-disciplinary partnership prohibition applications under s.2.7.50
 - foreign lawyer registration under s.2.8.23.

The delegations do not prevent the exercise of these functions by the Board.

8. The Board, the CEO, Legal Services Commissioner employees working on Board functions, the Law Institute of Victoria and the Victorian Bar must be guided by this policy statement and any other applicable Board policies when performing the functions set out in paragraph 6.

Legal Profession Act

9. The Act contains provisions about matters that may be taken into account when considering whether a person is a fit and proper person to hold a practising certificate, including:

9.1 Suitability matters

The suitability matters referred to in section 2.4.4.(1) of the Act (and defined in section 1.2.6 of the Act), which include whether the person:

- (a) is of good fame and character
 - (b) is or has been insolvent under administration (as defined in section 1.2.1)
 - (c) has been guilty of an offence in Australia or a foreign country
 - (d) has engaged in unauthorised legal practice in Australia
 - (e) has engaged in unauthorised legal practice in a foreign country
 - (f) is subject to an unresolved action under the Act or a corresponding Australian or foreign law
 - (g) is or has been the subject of disciplinary action in another profession in Australia or a foreign country
 - (h) has been removed from a Roll of practitioners in Australia or a foreign country
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- (i) has had their right to engage in legal practice suspended or cancelled in Australia or a foreign country
 - (j) has contravened a law about trust money or accounts in Australia or a foreign country
 - (k) has had a supervisor, manager or receiver appointed in relation to their legal practice under legal profession regulation laws in Australia
 - (l) is or has been disqualified from being involved in a legal practice under the Act or a corresponding Australian law
 - (m) currently has a mental impairment (as defined in section 1.2.1), including alcoholism or drug dependence.

9.2 Other matters

The other matters set out in sections 2.4.4(1)(a) to (f) of the Act, which include whether the person:

- (a) obtained an Australian practising certificate because of incorrect or misleading information
- (b) has contravened a condition of an Australian practising certificate
- (c) has contravened the Act, Regulations, Rules or a corresponding Australian law
- (d) has contravened an order of the tribunal (as defined in section 1.2.1) or a corresponding Australian disciplinary body
- (e) failed to comply with requirements imposed under the Act relating to the Fidelity Fund, professional indemnity insurance or other costs or expenses
- (f) any other matter the Board thinks appropriate.

9.3 Show cause events

The show cause events (as defined in section 1.2.1 of the Act) referred to in sections 2.4.26 and 2.4.27 of the Act, which include:

- (a) becoming bankrupt or being served with notice of a creditor's petition
- (b) presentation of a declaration of intention to present a debtor's petition or presentation of such a petition
- (c) applying to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounding with creditors or making an assignment of remuneration for the benefit of creditors
- (d) being found guilty of a tax offence (as defined in section 1.2.1) or a serious offence (as defined in section 1.2.1) in Australia), including:
 - an indictable offence against any Australian law
 - an offence against an Australian law that would be an indictable offence against a Victorian law
 - an offence against a foreign law that would be an indictable offence against a Commonwealth or Victorian law.

Note: the Victorian definition of an indictable offence is set out in section 112(1) *Sentencing Act* 1991 and the Commonwealth definition is set out in section 4G *Crimes Act* 1914.

9.4 Pending criminal proceedings considerations

The pending criminal proceedings considerations set out in section 2.4.16 of the Act, which include whether:

- (a) a local legal practitioner has been charged with a relevant offence (as defined in section 2.4.16(6)), including:
 - an offence against Division 2 of Part 1 of the *Crimes Act* 1958 (ie. theft and similar or associated offences)
 - an equivalent offence against another Australian or foreign lawbut the charge has not been determined.
- (b) it is appropriate to impose a condition on the local practising certificate having regard to:
 - the seriousness of the relevant offence and
 - the public interest.

9.5 Professional misconduct matters

The professional misconduct matters set out in sections 4.4.3, 4.4.4 and 4.4.6 of the Act (and not otherwise covered in Part 2.4), including:

- suitability matters that would be considered if the person was an applicant for admission to the legal profession under the Act
- contravening the Act, regulations or rules
- charging excessive legal costs
- a finding of guilt for an offence involving dishonesty
- failure to pay a fine imposed under the Act or a corresponding law
- becoming disqualified from being involved in the management of a corporation
- failure to comply with a compensation order made under the Act or a corresponding law
- wilful or reckless failure to comply with a condition on the local practising certificate
- wilful or reckless failure to comply with an undertaking given to a court, tribunal, the Legal Services Commissioner or the Board.

9.6 Foreign lawyer prior offence considerations

The prior offence considerations relating to foreign lawyers set out in

sections 2.8.23(4) and 2.8.23(5), including:

- the nature of any offence the person has been found guilty of in Australia or a foreign country
- how long ago the offence was committed
- the person's age when the offence was committed.

Policy

10. In considering whether a person is a fit and proper person to hold a local practising certificate the Board will have regard to all relevant matters, including but not limited to the following matters (if applicable):

10.1 Legal Profession Act considerations

Any relevant provisions of the Act, including:

- the matters set out in paragraph 9
- the objectives of the Board set out in section 6.2.3 of the Act, including:
 - effective regulation of the profession
 - maintaining professional standards
 - protection of consumers.

10.2 Case law considerations

Any relevant case law about the term 'fit and proper person' or an equivalent concept, including:

- cases about practising certificates, disciplinary issues and admission to or removal from the Roll of practitioners.
- cases arising under the Act or corresponding interstate laws
- cases arising under previous legal profession regulation legislation
- cases about other relevant professions.

10.3 Board policies or guidelines

Any relevant Board policies or guidelines, including the guidelines set out in paragraph 14.

11. In considering whether a person is a fit and proper person to hold a practising certificate the Board will disregard all irrelevant matters, including but not limited to the following matters (if applicable):

- any matter that has previously been disclosed in an application for admission in Australia and determined by the relevant authority not to be sufficient to warrant refusal of admission, unless later disclosures demonstrate that the matter is part of a course of conduct that may warrant refusal or cancellation of a local practising certificate.
- discriminatory consideration of any attributes of the person that

are protected under the Equal Opportunity Act 1995, except mental impairment (which may be considered in accordance with the Act).

12. The question of whether a person is fit and proper to hold a local practising certificate will be determined as at the time of the Board's deliberation. In making that determination, past actions may be considered indicative of future behaviour, unless that inference is rebutted by other relevant circumstances.
13. A person may be considered a fit and proper person to hold a practising certificate even though they fall within a relevant category in paragraphs 9 or 14, if the Board considers that the circumstances warrant it.

Guidelines

14. The Board recognises that each decision must be based on the individual facts and circumstances of each case. However, in applying the policy, the Board may consider the guidelines set out below. These guidelines are intended to facilitate consistent decision-making but are not to be applied inflexibly.

14.1 General principles

The Board will not usually consider that a person is a fit and proper to hold a practising certificate if the circumstances

- involve dishonesty
- involve prior history of similar offences or other relevant conduct
- indicate a material risk of harm to consumers of legal services

unless there are mitigating circumstances.

14.2 Infringement offences

The Board will usually disregard any offence that has been expiated by payment of an administrative penalty under the *Infringements Act 2006* (eg. minor traffic, parking and public transport offences), unless it forms part of a pattern of conduct.

14.3 Traffic offences

The Board will usually disregard a finding of guilt for the following traffic offences:

- speeding or careless driving
- driving in an unregistered or uninsured vehicle
- drink-driving or drug-driving

unless:

- it is a second or subsequent offence
 - the circumstances of the offence indicate the possibility of mental impairment (including alcoholism or drug dependence).
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14.4 Tax offences

The Board will usually disregard a finding of guilt for a summary 'tax offence' (as defined in section 1.2.1 of the Act), unless there are aggravating circumstances, including:

- dishonesty or deception
- repeated conduct.

Note: the definition of a summary offence is set out in section 8ZA *Taxation Administration Act* 1953.

14.5 Administration of justice offences

The Board will not usually consider that a person is fit and proper to hold a practising certificate if the person is found guilty of:

- contempt of court (whether civil or criminal)
- an offence or series of offences that indicates 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.

14.6 Serious offences

The Board will not usually consider that a person is fit and proper to hold a practising certificate if the person is found guilty of a 'serious offence' (as defined in section 1.2.1 of the Act) in any of the following categories:

- a serious offence involving dishonesty
- a serious offence involving violence
- a serious drug offence
- a serious sex offence

unless there are mitigating circumstances.

Note: the Victorian definition of an indictable offence is set out in section 112(1) *Sentencing Act* 1991 and the Commonwealth definition is set out in section 4G *Crimes Act* 1914.

14.7 Insolvency

The Board will not usually refuse to grant or renew, cancel or suspend a practising certificate because a practitioner is 'insolvent under administration' (as defined in section 1.2.1 of the Act) 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
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related incorporated legal practice.

However, the Board may impose a condition on the insolvent practitioner's practising certificate providing that the practitioner cannot practise as a principal authorised to receive trust money during the relevant period.

14.8 Contravention of a disciplinary order

- The Board will usually send a warning notice to a person who has not complied with a disciplinary order of the tribunal or a court, requiring compliance within a reasonable period.
- If the person has not complied at the expiration of the period, the Board will not usually 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 scheme of payments that is acceptable to the Board
 - there are other relevant circumstances.

Policy management / implementation

15. This policy statement 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
 - suitability information procedure
 - privacy policy
 - recovery of fines policy.
16. The policy will be communicated to relevant employees of the Legal Services Commissioner, Law Institute of Victoria and Victorian Bar and further training will be available if required.
17. The Board and its delegates will ensure that relevant employees have access to current legislation, case law and relevant Board policies and guidelines.