

## Disclosure Guidelines

### Disclosure Guidelines

(for applications for grant or renewal of a local practising certificate and for suitability matters, show cause events and other matters affecting fitness to practise to be brought to, or that come to, the attention of the Board)

#### 1. Purpose of the Guidelines

The purpose of these Guidelines is to:

- Inform applicants and practitioners that the Legal Practice Board (**Board**) places a duty and onus on each applicant and practitioner to disclose any matter that could influence the Board’s decision whether the person is “currently of good fame and character” and a “fit and proper person”; and
- Inform applicants and practitioners that failure to do so, if subsequently discovered, can have serious consequences for an applicant or practitioner as they might be suspended or struck off the roll of practitioners, or have an application for the grant or renewal of a local practising certificate refused, if they have not made full disclosure; and
- Provide guidance to the Board’s Professional Affairs Committee (**PAC**) in its consideration of whether a person is “currently of good fame and character” and a “fit and proper person”, and its management of process in that regard.

#### 2. Context

The *Legal Profession Act 2008 (LPA)* requires that an application for the grant or renewal of a local practising certificate must be made in the approved form.<sup>1</sup> The approved form may require the applicant to disclose matters that may affect the applicant’s eligibility for the grant or renewal of a local practising certificate or the question whether the applicant is a fit and proper person to hold a local practising certificate.<sup>2</sup> In addition, r.3 of the *Legal Profession Rules 2009* requires an applicant to provide documents and other information required by the approved form.

LPB Form 1 *Application for a local practising certificate (LPB Form 1)* is the form approved by the Board for the grant or renewal of a local practising certificate. LPB Form

<sup>1</sup> *Legal Profession Act 2008* s.43(1)(a)

<sup>2</sup> *Legal Profession Act 2008* s.43(3)

Version Number: 2	Object id: A429896
Pagination: Page 1 of 12	Author: Libby Fulham
<b>UNCONTROLLED DOCUMENT IF PRINTED – REFER TO ELECTRONIC MASTER</b>	

1 sets out the matters that should be disclosed to the Board to enable it to give consideration to and investigate the applicant’s suitability to hold a local practising certificate.

Those matters include suitability matters (see s.8(1) of the LPA), other matters relevant to whether the person is a fit and proper person (see s.38(2) of the LPA), and show cause events (see s.61 of the LPA). In addition, the holder of a local practising certificate is obligated to give notice to the Board if the holder is convicted of an offence or charged with a serious offence (see s.51(1) of the LPA), or is the subject of a “show cause event”<sup>3</sup> (see s.62 of the LPA). The obligation of disclosure under each of these provisions of the LPA is set out below.

## 2.1 Suitability matters

The Board must not grant or renew a local practising certificate unless it is satisfied that an applicant is a fit and proper person to hold a certificate.<sup>4</sup> In considering whether or not a person is a fit and proper person to hold a local practising certificate the Board may take into account any suitability matter relating to the applicant<sup>5</sup> and in that regard may consider any matters relating to the applicant the Board considers appropriate.<sup>6</sup> A significant suitability matter that the Board may consider is whether a person is “currently of good fame and character”.<sup>7</sup>

The Board’s Admissions & Registration Committee has the delegated authority to consider fitness to practise and suitability matters for the purpose of the grant of a local practising certificate if the applicant has never held an Australian practising certificate or the applicant has not held an Australian practising certificate within the preceding five years. The PAC has the delegated authority to consider fitness to practise and suitability matters for the purposes of the grant of a local practising certificate if the applicant has held an Australian practising certificate within the preceding five years. The PAC has the delegated authority to consider fitness to practise and suitability matters for the purpose of renewal of a local practising certificate or when a holder of a local practising certificate discloses matters to the Board, or matters come to the attention of the Board through other sources, that may relate to a practitioner’s suitability to practise.

The LPA does not provide a definition of a “fit and proper person” but does specify a number of matters each of which is a “suitability matter” in relation to an individual.<sup>8</sup>

Section 8(1) of the LPA provides that each of the following is a “suitability matter” in relation to an individual:

- (a) whether the person is currently of good fame and character;

<sup>3</sup> *Legal Profession Act 2008* s.3

<sup>4</sup> *Legal Profession Act 2008* s.45(4)(b) and s.45(5)(b)

<sup>5</sup> *Legal Profession Act 2008* s.38(2)

<sup>6</sup> *Legal Profession Act 2008* s.38(2)(f)

<sup>7</sup> *Legal Profession Act 2008* s.8 and s.22

<sup>8</sup> *Legal Profession Act 2008* s.8

Version Number: 2	Object id: A429896
Pagination: Page 2 of 12	Author: Libby Fulham
<b>UNCONTROLLED DOCUMENT IF PRINTED – REFER TO ELECTRONIC MASTER</b>	

- (b) whether the person is or has been an insolvent under administration;
- (c) whether the person has been convicted of an offence in Australia or a foreign country, and if so —
  - (i) the nature of the offence; and
  - (ii) how long ago the offence was committed; and
  - (iii) the person's age when the offence was committed;
- (d) whether the person has engaged in legal practice in Australia —
  - (i) unlawfully; or
  - (ii) when not admitted, or not holding a practising certificate, as required under this Act or a previous law of this jurisdiction that corresponds to this Act or under a corresponding law; or
  - (iii) if holding an Australian practising certificate, in contravention of a condition of the certificate or while the certificate was suspended;
- (e) whether the person has practised law in a foreign country —
  - (i) when not permitted under a law of that country to do so; or
  - (ii) if permitted to do so, in contravention of a condition applicable to the permission;
- (f) whether the person is currently subject to an unresolved complaint, investigation, charge or order under any of the following —
  - (i) this Act or a previous Act;
  - (ii) a corresponding law or corresponding foreign law;
- (g) whether the person —
  - (i) is the subject of current disciplinary action, however expressed, in another profession or occupation in Australia or a foreign country; or
  - (ii) has been the subject of disciplinary action, however expressed, relating to another profession or occupation that involved a finding of guilt;

- (h) whether the person's name has been removed from —
  - (i) the local roll, and has not since been restored to or entered on a local roll; or
  - (ii) an interstate roll, and has not since been restored to or entered on an interstate roll; or
  - (iii) a foreign roll;
- (i) whether the person's right to engage in legal practice has been suspended or cancelled in Australia or a foreign country;
- (j) whether the person has contravened, in Australia or a foreign country, a law about trust money or trust accounts;
- (k) whether, under this Act, a previous Act, a law of the Commonwealth or a corresponding law, a supervisor, manager or receiver, however described, is or has been appointed in relation to any legal practice engaged in by the person;
- (l) whether the person is or has been subject to an order under this Act, a previous Act, a law of the Commonwealth or a corresponding law, disqualifying the applicant from being employed by, or a partner of, an Australian legal practitioner or from managing a corporation that is an incorporated legal practice;
- (m) whether the person is currently unable to carry out the inherent requirements of practice as an Australian legal practitioner.

Section 8(2) of the LPA provides that a matter mentioned in subsection (1) is a suitability matter even if it happened before the commencement of the section.

In addition, the Board may have regard to any matter set out in s.38(2) of the LPA, which provides:

The Board may, in considering whether or not the person is a fit and proper person to hold a local practising certificate, take into account any suitability matter relating to the person, and any of the following, whether happening before or after the commencement of this section —

- (a) whether the person obtained an Australian practising certificate because of incorrect or misleading information;
- (b) whether the person has contravened a condition of an Australian practising certificate held by the person;

---

Version Number: 2	Object id: A429896
Pagination: Page 4 of 12	Author: Libby Fulham
<b>UNCONTROLLED DOCUMENT IF PRINTED – REFER TO ELECTRONIC MASTER</b>	

- (c) whether the person has contravened this Act, a previous Act or a corresponding law or the regulations or legal profession rules under this Act or a corresponding law;
- (d) whether the person has contravened —
  - (i) an order of the Complaints Committee or the State Administrative Tribunal or Supreme Court (full bench) exercising jurisdiction under this Act or a previous Act; or
  - (ii) an order of a corresponding disciplinary body or of another court or tribunal of another jurisdiction exercising jurisdiction or powers by way of appeal or review of an order of a corresponding disciplinary body;
- (e) without limiting any other paragraph —
  - (i) whether the person has failed to pay a required contribution or levy to the Guarantee Fund; or
  - (ii) whether the person has contravened a requirement imposed under this Act about professional indemnity insurance; or
  - (iii) whether the person has failed to pay other costs, expenses or fines for which the person is liable under this Act or a previous Act;
- (f) any other matters relating to the person the Board considers are appropriate.

A person may be considered a fit and proper person to hold a local practising certificate even though the person is within any of the categories of the matters referred to in s.38(2) of the LPA if the Board considers that the circumstances warrant the determination.<sup>9</sup>

However, if a matter was —

- (a) disclosed in an application for admission to the legal profession in this or another jurisdiction; and
- (b) determined by the Supreme Court or by the Board or a corresponding authority not to be sufficient for refusing admission,

the matter cannot be taken into account as a ground for refusing to grant or renew or for cancelling a local practising certificate, but the matter may be taken into account when considering other matters in relation to the person concerned.<sup>10</sup>

The Board may impose conditions when granting or renewing a local practising certificate<sup>11</sup> or during its currency,<sup>12</sup> but any such condition must be reasonable and relevant.<sup>13</sup>

<sup>9</sup> *Legal Profession Act 2008* s.38(3)

<sup>10</sup> *Legal Profession Act 2008* s.38(4)

<sup>11</sup> *Legal Profession Act 2008* s.45(2)

<sup>12</sup> *Legal Profession Act 2008* s.47(1)(b)

Version Number: 2	Object id: A429896
Pagination: Page 5 of 12	Author: Libby Fulham
<b>UNCONTROLLED DOCUMENT IF PRINTED – REFER TO ELECTRONIC MASTER</b>	

If the Board —

- (a) refuses to grant or renew a local practising certificate; or
- (b) imposes a condition on the certificate and the applicant does not agree to the condition,

the Board must, as soon as practicable, give the applicant an information notice.<sup>14</sup>

## 2.2 Show Cause Events

Pursuant to s.3 of the LPA, a “show cause event” in relation to a person, means:

- (a) the person becoming bankrupt or being served with notice of a creditor’s petition presented to the Court under the *Bankruptcy Act 1966* of the Commonwealth section 43; or
- (b) the presentation by the person (as a debtor) of a declaration to the Official Receiver under the *Bankruptcy Act 1966* of the Commonwealth section 54A of his or her intention to present a debtor’s petition or his or her presentation (as a debtor) of such a petition under section 55 of that Act; or
- (c) the application by the person to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounding with his or her creditors or making an assignment of his or her remuneration for their benefit; or
- (d) the conviction of the person for a serious offence or a tax offence, whether or not —
  - (i) the offence was committed in or outside this jurisdiction; or
  - (ii) the offence was committed while the person was engaging in legal practice as an Australian legal practitioner or was practising foreign law as an Australian-registered foreign lawyer, as the case requires; or
  - (iii) other persons are prohibited from disclosing the identity of the offender.

Also pursuant to s.3 of the LPA, a “serious offence” includes an indictable offence in Australia or a foreign country; and a “tax offence” is an offence committed in or outside Australia under the *Taxation Administration Act 1953* (Cth).

Sections 61 and 62 of the LPA<sup>15</sup> (ss.179 and 180 of the LPA for foreign lawyers) require practitioners to give the Board notice that a show cause event has happened. Section 61 applies to any application for the grant of a local practising certificate, the notice being in LPB Form 1, and s.62 applies to the holder of a local practising certificate, who may also be applying for the renewal of that certificate.

<sup>13</sup> *Legal Profession Act 2008* s.47(2)

<sup>14</sup> *Legal Profession Act 2008* s.45(8) and s.9

<sup>15</sup> *Legal Profession Act 2008* ss.61(2) and 62(2)(a)

Version Number: 2	Object id: A429896
Pagination: Page 6 of 12	Author: Libby Fulham
<b>UNCONTROLLED DOCUMENT IF PRINTED – REFER TO ELECTRONIC MASTER</b>	

An applicant applying for the grant of a local practising certificate must provide the Board with a written statement in regard to any show cause event explaining why, despite the show cause event the applicant considers themselves to be a fit and proper person to hold a local practising certificate.<sup>16</sup>

Practitioners must notify the Board, in the approved form, of a show cause event within 7 days of the event happening.<sup>17</sup> The approved form is LPB Form 4 *Notice by Practitioner of 'Show Cause' Event* (or LPB Form 12 *Notice by Locally Registered Foreign Lawyer of a Show Cause Event* in the case of a foreign lawyer). Additionally, within 28 days of the event happening a practitioner must provide to the Board a written statement explaining why, despite the show cause event, they remain a fit and proper person to hold a local practising certificate (in the case of a locally registered foreign lawyer, why they remain a fit and proper person to be a locally registered foreign lawyer).<sup>18</sup>

### 2.3 Notification of offence

Section 51 of the LPA makes it a condition of a local practising certificate<sup>19</sup> that its holder must, within 7 days, provide the Board with notice, in the approved form, if convicted of an offence, or charged with a serious offence<sup>20</sup> (see also **Section 5** below). The approved form is LPB Form 2 *Notice of Offence*.

Being charged with a serious offence or being convicted of an offence is not a show cause event.

“An offence” is not defined in the LPA, however a conviction is defined as a finding of guilt, or a plea of guilty, whether or not a conviction is recorded.<sup>21</sup>

There is no requirement for the practitioner to explain to the Board why the practitioner remains a fit and proper person to hold a local practising certificate. However, a conviction does become a suitability matter which the Board should take into account when considering whether or not a person is a fit and proper person to hold a local practising certificate, and in that regard it may be relevant for the practitioner to provide the Board with such a statement and an explanation of the events from which the conviction arose.

All such matters set out above go to an applicant’s “fitness to practise”.

<sup>16</sup> *Legal Profession Act 2008* s.61(2)

<sup>17</sup> *Legal Profession Act 2008* s.62(2)(a) and s.180(2)(a) for foreign lawyers

<sup>18</sup> *Legal Profession Act 2008* s.62(2)(b) and s.180(2)(b) for foreign lawyers

<sup>19</sup> *Legal Profession Act 2008* s.51(4)

<sup>20</sup> *Legal Profession Act 2008* s.51(1) and (2)

<sup>21</sup> *Legal Profession Act 2008* s.10

Version Number: 2	Object id: A429896
Pagination: Page 7 of 12	Author: Libby Fulham
<b>UNCONTROLLED DOCUMENT IF PRINTED – REFER TO ELECTRONIC MASTER</b>	

### 3. Status of the Guidelines

These Guidelines do not, and cannot, diminish or supplant a person's duty to disclose any matter which may bear on their fitness to practise. They only provide information about how the Courts and the Board have previously approached the requirement for disclosure. They also give examples of matters that a person might otherwise overlook when deciding what to disclose.

It is important to note that any matter bearing on a person's fitness should be disclosed, whether or not that matter is mentioned in these Guidelines. It is thus prudent for a local legal practitioner to err on the side of disclosing information which may turn out to be relevant in the eyes of the Board or the Court.

### 4. Relevant Principles

The Board applies the following principles when determining a person's fitness to hold a local practising certificate:

- (a) The onus is on a person to establish fitness.
- (b) The statutory test is cast in the present tense – whether a person "*is currently* of good fame and character" and, "*is a fit and proper person*". Past conduct, though relevant, is not decisive.
- (c) The candour demonstrated in any disclosure by a person is highly relevant when determining present fitness.
- (d) A person's present understanding and estimation of the person's past conduct is relevant.
- (e) If a person makes a full disclosure of a condition relevant to the person's capacity (see **Section 8** below) and demonstrates that the condition is appropriately managed, it is highly unlikely that the disclosure will lead to an adverse assessment of the person's suitability to be issued with a practising certificate.

### 5. The Duty of Disclosure

A person is required to disclose any matter which might be relevant to the Board in considering whether the person is currently of good fame and character and is a fit and proper person to hold a local practising certificate. This will include any of the suitability matters set out in ss.8(1) and 38(2) of the LPA that apply to the person and any matters that arise from the occurrence of events described at ss.51(1) and 62((1) of the LPA.

Further, any *other* matter that might be relevant to a decision by the Board or the Court about whether the person is a fit and proper person must also be disclosed. Recent cases demonstrate that the Courts believe there is an increasing expectation that any matter relevant to the assessment of a person's honesty will be disclosed.

Version Number: 2	Object id: A429896
Pagination: Page 8 of 12	Author: Libby Fulham
<b>UNCONTROLLED DOCUMENT IF PRINTED – REFER TO ELECTRONIC MASTER</b>	



Unfortunately it is not possible to provide an exhaustive list of all matters which can turn out to be relevant to assessing whether a person is currently of good fame and character, or a fit and proper person to hold a practising certificate, and which therefore need to be disclosed.

Stated in general terms, however, the duty of disclosure extends to *any* matter which reflects negatively on the person's honesty, candour, respect for the law or ability to meet professional standards. A person should provide a full account of any such matter in the person's disclosure, including a description of the person's conduct. The description should not be limited merely to listing criminal charges or other consequences of the conduct. As already noted, there is an increasing expectation that *any* matter relevant to assessing a person's honesty will be disclosed.

A person should also avoid editing, or selecting only those matters which *the person* believes should be relevant to the question. Rather, a person should disclose every matter that might fairly assist the Board or a Court in deciding whether the person is a fit and proper person.

Revealing more than might strictly be necessary counts in favour of an applicant - especially where the disclosure still carries embarrassment or discomfort. Revealing less than may be necessary distorts the proper assessment of the applicant and may itself show an inappropriate desire to distort by selecting and screening relevant facts.<sup>22</sup>

## 6. Matters that should be disclosed

The following are examples of matters which should be disclosed:

### (a) Criminal conduct

An obligation to disclose a criminal charge, as distinct from a criminal conviction, may arise, even if charges were subsequently withdrawn or the person was acquitted. The fact that a person's character has been brought into question may be sufficient to give rise to a need to disclose in the eyes of the Board or a Court.

It is usually inadequate for a person disclosing criminal conduct merely to list the relevant charges and convictions. A person needs to explain the circumstances giving rise to the charge or conviction.

It is prudent for a person to disclose an offence, even if spent convictions legislation applies to that offence.

### (b) Intervention orders and apprehended violence orders

<sup>22</sup> *Frugtniet v Board of Examiners* [2002] VSC 140, per Pagone J.

Version Number: 2	Object id: A429896
Pagination: Page 9 of 12	Author: Libby Fulham
<b>UNCONTROLLED DOCUMENT IF PRINTED – REFER TO ELECTRONIC MASTER</b>	

(c) Infringement Offences

Offences resulting in a court-ordered fine or other sanction or else an administrative penalty, such as traffic or public transport offences, should be disclosed in circumstances where the frequency or number of fines, or the failure to pay fines, or the particular circumstances of an offence, should give rise to concern in the eyes of the Board or a Court about the person's respect for the law.

(d) Traffic Offences

See item (c) above.

(e) Academic Misconduct

Academic misconduct may need to be disclosed. It will generally be prudent to disclose such conduct whether or not a formal finding was made or a record of the incident retained by the relevant organisation.

Academic misconduct includes, but is not limited to, plagiarism, impermissible collusion, cheating and any other inappropriate conduct, whereby the person has sought to obtain an academic advantage either for the person or for some other person.

(f) General Misconduct

A person may need to disclose misconduct which occurred in a workplace, educational institution, volunteer position, club, association or in other circumstances. Again it will generally be prudent to disclose such conduct, whether or not a formal finding was made or a record retained by any relevant organisation.

General misconduct may include, but is not limited to, offensive behaviour, workplace or online bullying, property damage, sexual harassment or racial vilification.<sup>23</sup>

(g) Making a false statutory declaration

(h) Failure to report social security overpayment or other social security offences

(i) Tax Offences

<sup>23</sup>

By way of illustration, in *XY v Board of Examiners* [2005] VSC 250, Habersberger J found that an applicant was under a duty to disclose that a volunteer position had been terminated as a result of making offensive remarks to a fellow worker and that she was also required to disclose property damage she had caused at a meditation retreat, notwithstanding that charges were not laid.

## 7. Certificates of Character

Anyone who supplies a certificate or reference of character to support a person:

- (a) must be informed of any disclosure of the type mentioned above that is made by the person; and
- (b) must attest to that knowledge in the referee's certificate of character.

Because of the privacy implications of disclosures about a person's capacity (see **Section 8** below), a referee who supplies a certificate of character need not be aware of any disclosure about the person's capacity.

## 8. Disclosures About Capacity

The Board will also consider whether a person has the present capacity to carry out the tasks of a legal practitioner. At common law, the principle is as follows:

To be a fit and proper person for admission to the legal profession an applicant must possess the capacity to make the judgments necessary to meet appropriate professional standards in legal practice or otherwise *'discharge the important and grave responsibilities of being a barrister and solicitor'*.<sup>24</sup>

A person's capacity to engage in legal practice is specifically identified as a "suitability matter" in s.8(1)(m) of the LPA in the following terms: "whether the person is currently unable to carry out the inherent requirements of practice as an Australian legal practitioner".<sup>25</sup>

Furthermore, in deciding whether a person is a fit and proper person, in addition to each of the suitability matters prescribed by statute, the Board may also take into account any other matters relating to the person it considers are appropriate.<sup>26</sup>

At common law, a person who is otherwise qualified to practise is presumed to have capacity to practise unless the contrary is established. The Board may be satisfied that the contrary is established if there is evidence that the person does not currently have the ability, whether physically or mentally, to carry out the responsibilities of an Australian legal practitioner in accordance with appropriate professional standards. This underlines the importance of disclosure by an applicant of any matters that may be relevant to that assessment.

Matters which a person should disclose include any condition which might affect the person's present ability to engage in legal practice - such as physical impairment, mental illness or addictions.

The Board assesses each person's capacity individually, in the light of the person's particular disclosures and any other supporting information. Such information will

<sup>24</sup> *Frugtniet v Board of Examiners* [2002] VSC 140 per Pagone J.

<sup>25</sup> *Legal Profession Act 2008* s.8(1)(m).

<sup>26</sup> *Legal Profession Act 2008* s.38(2)(f).

Version Number: 2	Object id: A429896
Pagination: Page 11 of 12	Author: Libby Fulham
<b>UNCONTROLLED DOCUMENT IF PRINTED – REFER TO ELECTRONIC MASTER</b>	

include any historical or current medical evidence submitted by the person. For this reason, if a person discloses a condition which the Board may consider relevant to the person's present capacity to practise law, it will be prudent also to provide a report from an appropriately-qualified medical practitioner relevant to the condition disclosed.

The confidentiality of any personal or medical evidence disclosed to the Board by or on behalf of a person will be maintained.

A disclosure about capacity may be made in a separate statutory declaration.

**9. Authorisation**

These Guidelines are authorised by the Legal Practice Board by its delegate, the Professional Affairs Committee.

Deputy Executive Director

Position



Signature

9/04/2014

Date

Date: 9 April 2015

---

Version Number: 2	Object id: A429896
Pagination: Page 12 of 12	Author: Libby Fulham
<b>UNCONTROLLED DOCUMENT IF PRINTED – REFER TO ELECTRONIC MASTER</b>	