

LAW ADMISSIONS CONSULTATIVE COMMITTEE¹

Disclosure guidelines for applicants for admission to the legal profession

1. PURPOSES OF THESE GUIDELINES

An applicant for admission is required to satisfy the Admitting Authority that the applicant is “currently of good fame and character”.² In all jurisdictions other than South Australia, the relevant Act also requires the Admitting Authority to consider whether the applicant is “a fit and proper person” for admission to the legal profession.³ Both these tests reflect the overarching requirements of the pre-existing common law.

The purposes of these Guidelines are:

- (a) to bring home to applicants that Admitting Authorities and Courts place a duty and onus squarely on each applicant to disclose to the Admitting Authority any matter that could influence the Admitting Authority’s decision about whether the applicant is “currently of good fame and character” and “a fit and proper person”; and
- (b) to remind applicants that failure to do so, if subsequently discovered, can have catastrophic consequences for an applicant. An applicant might either be refused admission, or struck off the roll, if the applicant has been admitted without making a full disclosure.

There are many judicial explanations of what the phrase “fit and proper person” means in different contexts.⁴ For example:

The requirement for admission to practice (*sic*) law that the applicant be a fit and proper person, means that the applicant must have the personal qualities of character which are necessary to discharge the important and grave responsibilities of being a barrister and solicitor. A legal practitioner, upon being admitted to practice, assumes duties to the courts, to fellow practitioners as well as to clients. At the

¹ LACC’S Charter is approved by the Council of Chief Justices which also appoints its Chairman. LACC is not, however, a committee of the Council, nor does it act on the Council’s behalf.

² *Legal Practice Act 1981* (SA) section 15(1)(a); *Legal Profession Act 2006* (ACT) section 11(1)(a); *Legal Profession Act 2004* (NSW) section 9(1)(a); *Legal Profession Act* (NT) section 11(1)(a); *Legal Profession Act 2007* (Qld) section 9(1)(a); *Legal Profession Act 2007* (Tas) section 9(1)(a); *Legal Profession Act 2004* (Vic) section 1.2.6(1)(a); *Legal Profession Act 2008* (WA) section 8(1)(a).

³ *Legal Profession Act 2006* (ACT) section 26(2)(b); *Legal Profession Act 2004* (NSW) section 31(2)(b); *Legal Profession Act* (NT) section 25(2)(b); *Legal Profession Act 2007* (Qld) section 35(2)(a); *Legal Profession Act 2007* (Tas) section 31(6)(b); *Legal Profession Act 2004* (Vic) section 2.3.6(1)(a)(ii); *Legal Profession Act 2008* (WA) section 26(1)(a)(ii).

⁴ *Frugtniet v Board of Examiners* [2002] VSC 140; *Frugtniet v Board of Examiners* [2005] VSC 332; *XY v Board of Examiners* [2005] VSC 250; *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321; *Re Legal Profession Act 2004*; *re OG, a lawyer* [2007] VSC 520; *Ziems v The Prothonotary of the Supreme Court of New South Wales* (1957) 97 CLR 279; *Incorporated Law Institute of NSW v Meagher* (1909) 9 CLR 655; *Re Lenehan* [1948] HCA 45; *Re Evatt*; *Ex Parte NSW Bar Association* (1967) 67 SR (NSW) 236; *In the matter of an application for admission as a legal practitioner* [2004] SASC 426; *In re Davis* [1947] 75 CLR 409; *New South Wales Bar v Murphy* (2002) 55 NSWLR 23; *New South Wales Bar Association v Cummins* (2001) NSWLR 279; *New South Wales Bar Association v Hamman* [1999] NSWCA 404; *Prothonotary of the Supreme Court of NSW v P* [2003] NSWCA 320; *Prothonotary of the Supreme Court v Alcorn* [2007] NSWCA 288; *New South Wales Bar Association v Einfeld* (2009) 259 ALR 278; *In the matter of the Legal Practitioners Act 1970 and in the matter of an application by Hinds* [2003] ACTSC 11; *In the matter of an application for admission as a practitioner* [1997] SASC 6487; *Jackson (previously known as Subramaniam) v Legal Practitioners Admission Board* [2006] NSWSC 1338; *Legal Services Board v McGrath* [2010] VSC 266

heart of all of those duties is a commitment to honesty and, in those circumstances when it is required, to open candour and frankness, irrespective of self interest or embarrassment. The entire administration of justice in any community which is governed by law depends upon the honest working of legal practitioners who can be relied upon to meet high standards of honesty and ethical behaviour. It is the legal practitioner who is effectively the daily minister and executor in the administration of justice when advising clients, acting for clients, certifying documents, and making presentations to courts, governments, other professionals, and so on. The level and extent of trust placed in what legal practitioners say or do is necessarily high and the need for honesty is self evident and essential.⁵

2. STATUS OF THESE GUIDELINES

These Guidelines do not, and cannot, diminish or supplant in any way an applicant's personal duty to disclose any matter which may bear on the applicant's fitness for admission. They merely provide information about how Admitting Authorities and Courts approach the requirement of disclosure. They also give examples of matters which an applicant might otherwise overlook when deciding what to disclose.

It is important to understand that any matter bearing on an applicant's fitness should be disclosed, whether or not that matter is mentioned in these Guidelines. It is thus prudent to err on the side of disclosing, rather than concealing, information which may turn out to be relevant in the eyes of an Admitting Authority or a Court.

3. RELEVANT PRINCIPLES

Admitting Authorities apply the following principles when determining an applicant's fitness for admission:

- (a) The onus is on an applicant to establish fitness.
- (b) The statutory test is cast in the present tense – whether an applicant “*is currently* of good fame and character” and, except in South Australia, “*is a fit and proper person*”. Past conduct, though relevant, is not decisive.
- (c) The candour demonstrated in any disclosure by an applicant is highly relevant when determining present fitness. High standards are applied in assessing the candour of any disclosures. Full and frank disclosure is essential, although in most circumstances disclosure of past indiscretions will not result in an applicant being denied admission.
- (d) An applicant's present understanding and estimation of the applicant's past conduct is relevant.
- (e) If an applicant makes a full disclosure of a condition relevant to the applicant's capacity and demonstrates that the condition is appropriately managed, it is highly unlikely that the disclosure will lead to an adverse assessment of the applicant's suitability for admission.

4. THE DUTY OF DISCLOSURE

An applicant for admission is required to disclose, in the application, any matter which might be relevant to the Admitting Authority considering whether the applicant is currently of good fame and character and is a fit and proper person for admission to the legal profession. The applicant *must* state whether any of the suitability matters set out in

⁵ *Frugtniet v Board of Examiners* [2002] VSC 140 per Pagone, J

Appendix 1 apply to the applicant. This requirement reflects the statutory obligation of the Admitting Authority.

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

Unfortunately it is not possible to provide applicants with an exhaustive list of all matters which can turn out to be relevant to assessing whether an applicant is currently of good fame and character, or a fit and proper person for admission, and which therefore should be disclosed.

Stated in general terms, however, the duty of disclosure extends to *any* matter which reflects negatively on the applicant's honesty, candour, respect for the law or ability to meet professional standards. An applicant should provide a full account of any such matter in the applicant's disclosure, including a description of the applicant'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* matters relevant to assessing an applicant's honesty will be disclosed.

An applicant should also avoid editing, or selecting only those matters which the *applicant* believes should be relevant to the decision to be made by the Admitting Authority. Rather, an applicant should disclose every matter that might fairly assist the Admitting Authority or a Court in deciding whether the applicant 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.⁶

5. MATTERS WHICH AN APPLICANT MAY NEED TO DISCLOSE

The following are examples of matters which an applicant may need to disclose in addition to the statutory matters set out in **Appendix 1**:

(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 applicant was acquitted. The fact that an applicant's character has been brought into question may be sufficient to give rise to a need to disclose in the eyes of an Admitting Authority or a Court.

It is usually inadequate for an applicant disclosing criminal conduct merely to list the relevant charges and convictions. An applicant needs to explain, in the applicant's own words, the circumstances giving rise to the charge or conviction.

Whether or not a criminal charge (as distinct from a conviction) should be disclosed will depend on the circumstances. If the charge did not proceed for a technical reason, such as the expiration of a time limit, disclosure *may* be required. On the other hand, if the charge was denied and the matter did not proceed because of an acknowledged lack of evidence, disclosure may not be necessary.

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Frugtniet v Board of Examiners [2002] VSC 140, per Pagone J.

An applicant should carefully consider whether the facts giving rise to a criminal charge are such that an Admitting Authority might reasonably regard them as relevant in assessing the applicant's suitability for admission.

An applicant should carefully consider whether it is prudent to disclose an offence, even if spent convictions legislation applies to that offence. Where spent convictions legislation does not apply, an applicant should declare any offence of which the applicant has been convicted.

(b) Intervention orders and apprehended violence orders

(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, may need to be disclosed in circumstances where the frequency or number of fines, or the failure to pay fines, may give rise to concern in the eyes of an Admitting Authority or a Court about the applicant'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 applicant has sought to obtain an academic advantage either for the applicant or for some other person.

(f) General Misconduct

An applicant may need to disclose misconduct which occurred in a workplace, educational institution, volunteer position, club, association or in other circumstances, if such conduct may reflect on whether the applicant is a fit and proper person to be admitted to the legal profession.

General misconduct may include, but is not limited to, offensive behaviour, workplace or online bullying, property damage, sexual harassment or racial vilification.⁷

(g) Making a false statutory declaration

(h) Social security offences

(i) Tax Offences

(j) Corporate insolvency or penalties and offences relating to a corporate entity where the applicant was a director or responsible officer

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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.

6. CERTIFICATES OF CHARACTER

Please also note that any person who supplies a certificate of character to support an application:

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

Because of the privacy implications of disclosures about an applicant's capacity, a person who supplies a certificate of character need not be aware of any disclosure about the applicant's capacity: see item 7.

7. DISCLOSURES ABOUT CAPACITY

An Admitting Authority is also required to consider whether an applicant 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*'.⁸

The requirement of capacity is separate and distinct from the requirement that an applicant be a fit and proper person or of good fame and character.

The Legal Profession Acts variously describe matters relating to an applicant's capacity as "suitability matters" about which an Admitting Authority must satisfy itself, in the following ways:

- (a) whether the person is currently unable satisfactorily to carry out the inherent requirements of practice as an Australian legal practitioner;⁹
- (b) whether the person is currently unable to carry out the inherent requirements of practice as an Australian legal practitioner;¹⁰
- (c) whether the person currently has a material inability to engage in legal practice;¹¹
- (d) whether the person currently has a material mental impairment.¹²

The precise statutory obligation thus depends on the relevant legislation in the jurisdiction in which an applicant seeks admission.

On the other hand, it is not clear that these various statutory statements displace the underlying common-law principles. Furthermore, in deciding whether an applicant is a fit and proper person, in addition to each of the suitability matters prescribed by statute, most Admitting Authorities must also consider:

⁸ *Frugniet v Board of Examiners* [2002] VSC 140 per Pagone J.

⁹ *Legal Profession Act 2006* (ACT) section 11(m); *Legal Profession Act 2004* (NSW) section 9(m); *Legal Profession Act 2007* (Qld) section 9(1)(m); *Legal Profession Act 2007* (Tas) section 9(m).

¹⁰ *Legal Profession Act 2008* (WA) section 8(m).

¹¹ *Legal Profession Act* (NT) section 11(1)(m).

¹² *Legal Profession Act 2004* (Vic) section 1.2.6 (1)(m).

any other matter it considers relevant.¹³

In New South Wales, the corresponding provision is in discretionary, rather than mandatory, terms.¹⁴ In the Australian Capital Territory, there is an unlimited discretion to consider other relevant matters.¹⁵

At common law, an applicant who is otherwise qualified to practise is presumed to have capacity to practise unless the contrary is established. Nevertheless, quite apart from making disclosures which respond to the particular statutory “suitability matter” relevant to an applicant’s capacity in each jurisdiction, it will often be prudent for an applicant to disclose any other matters which an Admitting Authority might think relevant when assessing an applicant’s present capacity to engage in legal practice.

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

An Admitting Authority assesses each applicant’s capacity individually, in the light of the applicant’s particular disclosures and any other supporting information. Such information should include any historical or current medical evidence submitted by the applicant. For this reason, if an applicant discloses a condition which an Admitting Authority may consider relevant to the applicant’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. If an applicant seeks to demonstrate that the relevant condition is appropriately managed and stable, a certificate to that effect from one or more of the applicant’s treating medical practitioners would greatly assist an Admitting Authority.

Except for the purposes of the administration of the *Legal Profession Act*, an Admitting Authority must not disclose any personal or medical evidence disclosed to it by or on behalf of an applicant.

For privacy reasons, a disclosure about capacity may be made in a separate statutory declaration lodged with an application.

8. SUITABILITY MATTERS PRESCRIBED BY THE LEGAL PROFESSION ACT

An applicant must disclose any matter relevant to a suitability matter prescribed by the *Legal Profession Act* in the jurisdiction where admission is sought. The suitability matters prescribed for Queensland are set out in **Appendix 1**.

9. FORM OF DISCLOSURE¹⁶

Any disclosure which an applicant is required to make must be included in the applicant’s Statement to Eligibility and Suitability (‘Form 7’) as well as their affidavit of compliance served when applying for admission or, in the case of a disclosure about capacity, in a supplementary Form 7 and supplementary affidavit, if the applicant prefers. Each disclosure should be supported by any available supporting documents, to corroborate the disclosure. Each such document should be made an exhibit to the Form 7 and affidavit.

¹³ *Legal Profession Act* (NT) section 30(1)(b); *Legal Profession Act 2007* (Tas) section 26(1)(b); *Legal Profession Act 2004* (Vic) section 2.3.3(1)(b); *Legal Profession Act 2008* (WA) section 22(1)(b). Section 31(2)(b) of the *Legal Profession Act 2007* (Qld) is in similar, though not identical, terms.

¹⁴ *Legal Profession Act 2004* (NSW) section 25(1)(b).

¹⁵ *Legal Profession Act 2006* (ACT) section 22(2).

¹⁶ In Queensland

APPENDIX 1

SUITABILITY MATTERS PRESCRIBED BY THE LEGAL PROFESSION ACT 2007 (Qld)

As noted in items 4 and 8 of the Guidelines, the Admitting Authority is required to satisfy itself about each of the following matters in relation to each applicant. Accordingly an applicant needs to disclose anything that the Admitting Authority might consider relevant when satisfying itself about each of these matters.

9 Suitability matters

- (1) Each of the following is a **suitability matter** in relation to a natural person -
 - (a) whether the person is currently of good fame and character;
 - (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 engaged in legal practice in Australia -
 - (i) when not admitted to the legal profession, or not holding a practising certificate, as required under a relevant law or a corresponding law; or
 - (ii) if admitted to the legal profession, in contravention of a condition on which admission was granted; or
 - (iii) if holding an Australian practising certificate, in contravention of a condition applicable to 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 of the permission;
 - (f) whether the person is currently subject to an unresolved complaint, investigation, charge or order under any of the following -
 - (i) a relevant law;
 - (ii) a corresponding law;
 - (iii) a 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) a local roll but has not since been restored to or entered on a local roll; or
 - (ii) an interstate roll, but 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 a relevant law, 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 person 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 currently is unable to satisfactorily carry out the inherent requirements of practice as an Australian legal practitioner;
 - (n) a matter declared under an Act to be a suitability matter.
- (2) A matter under subsection (1) is a suitability matter even though it happened before the commencement of this section.