

Legal Profession Uniform General Rules

Submission made by:

Victorian Legal Services
BOARD + COMMISSIONER

to the Legal Services Council
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Michael McGarvie
Legal Services Commissioner (Victoria) and CEO Legal Services Board (Victoria)

Uniform General Rule Number	Rule Name	Comments
1	Citation	Supported.
2	Commencement	Recommend that all the general rules commence on the same day.
3	Objective	Supported.
4	Authorising provision	Supported.
5	Definitions	Definition of 'information notice' – recommend that the notice also be required to state the findings on material questions of fact that led to the decision, referring to the evidence or other material on which those findings were based. Otherwise supported.
6	Suitability matters	<p>Recommend amending r 6(b) to include insolvency of an entity for which the person is responsible. This would capture some instances of 'phoenixing'.</p> <p>Recommend amending r 6(c) to delete "convicted or" as not necessary.</p> <p>Recommend amending r 6(f) to refer to "...person is or has been subject to a complaint, investigation..." to explicitly capture lawyers that have been the subject of numerous, insignificant complaints. That amendment will assist the DLRAs to make decisions in relation to systemic issues.</p> <p>Recommend the Legal Services Council (Council) develop a policy/guidelines in consultation with designated local regulatory authorities (DLRAs) to clarify r 6(m) including reference to mental health. The Victorian LSB+C has published relevant policies (attached). Otherwise supported.</p>
7	Government authority	The Uniform Law defines 'government authority' as including 'a public authority of the Commonwealth or of a jurisdiction'. 'Public authority' is not defined in the Victorian Public Administration Act 2004. As such, recommend that the Victorian LSB+C are declared to be within the definition of 'government authority' and that the Council consider amending to include other public authorities. Alternatively, recommend deleting this draft rule.
8	Professional associations excluded from being incorporated legal practices	Supported.

Uniform General Rule Number	Rule Name	Comments
9	Authorising provision	Supported.
10	Entitlement to certain titles	Given the different titles that Australian-registered foreign lawyers are entitled to use in different jurisdictions, recommend the Council develop guidelines/policies in consultation with DLRAs. Otherwise supported.
11	Exemption from prohibition on engaging in legal practice	Recommend amending r 11(1)(c) to refer to “legislative instrument” for clarification. Otherwise supported.
12	Authorising provision	Supported.
13	Application for grant or renewal of Australian practising certificate	Supported.
14	Consideration of application for grant or renewal of Australian practising certificate	<p>Recommend amending r 14(1)(a) to refer to “any application” rather than “a previous application”. To clarify that account can be taken of falsehoods discovered in a current (as opposed to previous) application.</p> <p>Recommend amending r 14(1)(g) to refer to “an Australian law” rather than “an Australian law relating to the legal profession”.</p> <p>Recommend amending r 14(1)(g) to refer to “...costs, expenses or other liabilities for which...” to capture tax payments, overpayment of legal costs, etc.</p> <p>Typo – in r 14(2) insert “Uniform Law,” for “Uniform,.”. Otherwise supported.</p>
15	Statutory condition—to engage in supervised legal practice	Supported.
16	Discretionary conditions on Australian practising certificate	<p>The Legal Profession Act 2004 (Victoria) (LPA) does not limit the LSB to specified conditions in the way that the proposed rules do. Although the proposed rules seem to cover most common conditions, it might be useful to give DLRAs a ‘catch all’ power such as ‘any other condition the DLRA considers appropriate.’</p> <p>Also recommend that the Council develop guidelines/policies to clarify r 16(1)(j) in consultation with DLRAs. Otherwise supported.</p>

Uniform General Rule Number	Rule Name	Comments
17	Duration of Australian practising certificate	<p>Rule 17(1)(b) effectively 'backdates' all renewed PCs to start 1 July. This is likely to create confusion about whether legal work was done as unqualified practice or not. For example, if the DLRA refuses to grant/renew a PC and the applicant appeals and succeeds on 1 August, under cl 100(4) of the Uniform Law the appeal doesn't stay the DLRA's decision. However, under r 17(1)(b) the certificate is in force from July.</p> <p>Recommend amending r 17(2) to include reference to the 'final determination' of the application as in s 2.4.5(3) and (4) of the LPA.</p> <p>Recommend amending r 17(2) to refer to the making of a 'valid' application. The LSB has had issues in the past with practitioners submitting incomplete applications which delay decision-making but the applicant's previous certificate continues in force while the Board chases up the missing information. If this amendment is made, the rules should also require the DLRA to notify the applicant when their application is not 'valid'.</p> <p>Also recommend amending r 17(2) to refer to "...for the renewal of an Australian practising certificate" and r 17(2)(a) to replace "grants" with "renews" and "grant" with "renew". Otherwise supported.</p>
18	Applicant for grant or renewal of Australian practising certificate not intending to practise in Australia	Supported.
19	Authorising provision	Supported.
20	Application for Australian registration certificate	Supported.
21	Grounds for refusing to grant or renew Australian registration certificate	Supported.
22	Discretionary conditions on Australian registration certificate	Supported subject to recommendations on r 16 above.

Uniform General Rule Number	Rule Name	Comments
23	Duration of Australian registration certificate	Supported subject to recommendations on r 17 above.
24	Notice by holder of certificate of automatic show cause event	The reference to two maximum periods is confusing. Recommend deleting the reference to 'maximum' in relation to the further period of 14 days in the note to this rule. Otherwise supported.
25	Notice by holder of certificate of designated show cause event	The reference to two maximum periods is confusing. Recommend deleting the reference to 'maximum' in relation to the further period of 14 days in the note to this rule. Otherwise supported.
26	Authorising provision	Supported.
27	Notice of intention to engage in legal practice	Recommend increasing to 14 days to allow sufficient time for the DLRA to process notices. Otherwise supported.
28	Notice of cessation of legal practice	Supported.
29	Provisions relating to notices	Supported.
30	Disclosure obligations	Supported.
31	Directors of incorporated legal practice and pro bono services	Supported.
32	Authorising provision	Supported.
33	Definition	Supported.
34	Maintenance of general trust account	Recommend amending r 34(a) to allow for practices that have existing trust accounts to maintain those accounts, rather than have to establish a new account. Otherwise supported.

Uniform General Rule Number	Rule Name	Comments
35	Withdrawal of trust money	For consumer protection purposes, recommend that r 35(1)(b) and (c) is amended to refer to 14 days rather than 7 days. This is appropriate as bills may be given by post and postal delivery is not as fast (now that there are two types of postal delivery). Also recommend that this rule be amended to note its connection to r 69 'Giving bills'. Otherwise supported.
36	Receipting of trust money	Recommend amending r 36(4) to replace "The original receipt must, on request, be given" with "A receipt must be given". This is essential for the protection of the consumers and the law practice. Otherwise supported.
37	Deposit records for trust money	Supported.
38	Computerised accounting systems—printed or other copies of trust records	Recommend amending r 38(2)(a) to replace "that is readable or reportable on demand" with "that is readable or printable on request". Also recommend amending r 38(4) to refer to "trust records unless they are able to be printed on request". Otherwise supported.
39	Computerised accounting systems—chronological record of information to be made	Supported.
40	Computerised accounting systems—requirements regarding systems	Recommend amending r 40(2)(a) to refer to "debit" rather than "debt". Otherwise supported.
41	Computerised accounting systems—back-ups	Supported.
42	Method of payment	Supported.
43	Trust account receipts cash books	Supported.
44	Trust account payments cash book	Supported.

Uniform General Rule Number	Rule Name	Comments
45	Journal transfers	Recommend amending r 45(1)(b)(iii) to replace “and” with “or” so it becomes an alternative to authorised transfer by an authorised principal. Otherwise supported.
46	Recording transactions in trust ledger accounts	Supported.
47	Reconciliation of trust records	Supported.
48	Trust ledger account in name of law practice or legal practitioner associate	Supported.
49	Notification requirements regarding general trust accounts	Draft r 49(2)(a) will require an enormous administrative process to be set up by the DLRA to record the details. The Vic LSB+C does not consider that this obligation would add any value. Trust account inspectors have the authority to examine law practice records to verify approved signatories. Recommend deleting r 49(2)(a). Otherwise supported.
50	Notification requirement regarding each general trust account	Supported.
51	Law practice closing down, closing office or ceasing to receive or hold trust money	Supported.
52	Trust account statements	For the benefit of consumers it is recommended that all persons with money in a law practice trust account at the end of a financial year receive a statement of transactions including the opening balance as at 1 July of the financial year and closing balance as at 30 June of the financial year. Recommend deleting r 52(5)(a) and (c). Otherwise supported.

Uniform General Rule Number	Rule Name	Comments
53	Trust account statements for commercial or government clients	Supported.
54	Statements regarding receipt or holding of trust money	Supported.
55	Trust money subject to specific powers	Supported.
56	Authority to receive trust money	Recommend amending r 56(b)(ii) to explicitly refer to cl 106(5) of the Uniform Law. Otherwise supported.
57	Disclosure of accounts used to hold money	Supported.
58	When, how and where money is received	Recommend consultation with Vic LSB&C in development of protocols. Otherwise supported.
59	Receipt of Controlled money	The sections/rules surrounding receipting of 'trust money' appear to be geared to reducing the work practices of the law firms, rather than providing consumers with sufficient supporting documentation. Recommend amending r 59(3) to require a copy of the receipt not a copy to be given to the person whether or not the person makes a request. Otherwise supported.
60	Withdrawal of controlled money from controlled money account	Supported.
61	Register of controlled money	Supported.

Uniform General Rule Number	Rule Name	Comments
62	External examiners	<p>This draft rule may not designate persons or a class as required by cl 156(1) of the Uniform Law.</p> <p>If a uniform position cannot be agreed – both jurisdictions are substantively different in this regard – recommend that the Council consult with DLRA to develop appropriate policies/guidelines to assist the DLRA to exercise this discretion.</p> <p>Also, recommend amending to allow designation of a class of persons as well as persons. Otherwise supported.</p>
63	Appointment of external examiner	<p>The current Victorian regulations require a law practice to seek approval from the Legal Services Board, before terminating its external examiner. This is a vital regulatory protection preventing law practices from sacking external examiners before they make an adverse report. This was included in the current Victorian regulations as it copies the Corporations Act provision created following many corporate collapses and prevents a law practice replacing an external examiner when it believes he or she is about to make an adverse audit report.</p> <p>Recommend amending to incorporate r 3.3.44(2)-(4) of the Legal Profession Regulations 2005 (Vic) to require prior approval of the DLRA before terminating the appointment of an external examiner.</p> <p>Also recommend amending para (a) and (c) to refer to 14 days rather than 30 days to enhance consumer protection by assisting the DLRA to monitor law practices' compliance with their obligations under the Uniform Law. Otherwise supported.</p>
64	Standard form reports by external examiners	<p>Recommend that the Council consult with DLRA to develop a uniform standard form report with reference to r 3.3.48 of the Legal Profession Regulations 2005 (Vic). Otherwise supported.</p>
65	Final external examination	<p>Recommend amending r 65(1) to refer to “an external examiner if one has not already been appointed to examine” to avoid implying that an examiner has not already been appointed. Otherwise supported.</p>

Uniform General Rule Number	Rule Name	Comments
66	External examiner's report	<p>In Victoria, reports must be lodged with the LSB by 28 February each year. This is different to the time period in NSW.</p> <p>Recommend that reports be required to be given to the DLRA by the end of February. This will give the DLRA an awareness of irregularities that may be relevant to the practising certificate renewal process. Otherwise supported.</p>
N/A	Duties of examiner	Recommend that the Council consult with the DLRA to develop policies/guidelines to clarify the duties of an external examiner in examining the trust records of a law practice.
67	Authorising provision	Supported.
68	Alternative disclosure for legal costs below higher threshold	Recommend deleting r 68(a) unless the Council has decided that the higher threshold is to be \$3,000. That amount has been set in the Uniform Law (sch 4 cl 18(4)). Otherwise supported.
69	Giving bills	<p>Practitioners should be able to satisfy their bill delivery obligations by emailing a copy of their bill to the person with whom they usually deal. Compliance with draft r 69(1)(d) would arguably require that an email address for the sending of bills be specifically agreed, which is an unnecessary additional regulatory requirement.</p> <p>Recommend amending r 69(1)(d) to allow bills to be given electronically to the usual email address given to the law practice by the client or an agent of the client.</p> <p>Recommend amending r 69(1)(b) to provide that a bill sent by post is taken to be given 3 days after it is posted. Otherwise supported.</p>
70	Interest on unpaid legal costs	Supported.
71	Costs assessment	Supported.
72	Authorising provision	Supported.
73	Minimum standards for professional Indemnity insurance	Recommend the Council consider each year whether this rule remains current. Otherwise supported.

Uniform General Rule Number	Rule Name	Comments
74	Notice to be given where certain legal services not covered by insurance	Supported.
75	Regulatory authority may inspect policies	Supported.
76	Exemptions	Recommend amending to include a government legal practitioner who engages in legal practice as an officer of a government authority. Also recommend amending to include a corporate legal practitioner who engages in legal practice only as an employee to their employer or a related entity. Otherwise supported.
77	Authorising provision	Supported.
78	Time of default	Supported.
79	Defaults to which Uniform Law does not apply	Recommend amending to also provide that Part 4.5 of the Uniform Law does not apply to a default of a law practice to the extent that the default occurs in relation to money entrusted to or held by a law practice for or in connection with: a managed investment scheme; or mortgage financing; undertaken by the law practice. Otherwise supported.
80	Making a claim	Recommend amending r 80(2) to refer to the fidelity authority of the relevant jurisdiction, rather than to the relevant fidelity authority. Relevant jurisdiction is defined in the Uniform Law (cl 219). Also recommend amending to insert a provision allowing a claimant to withdraw their claim against a fidelity fund. Otherwise supported.

Uniform General Rule Number	Rule Name	Comments
81	Claims	<p>Recommend deleting “or” from r 81(1)(a) so that (a) and (b) are not alternatives and recommend referring to an associate who is or was an Australian legal practitioner in r 81(3)(b).</p> <p>Recommend amending to insert provisions per s 3.6.12 ‘Investigation of claims’ and s 3.6.12 ‘Advance payments’ of the LPA. Otherwise supported.</p>
82	Advertisements	Supported.
83	Notification of delay in making decision	Supported.
84	Recommendations by the fidelity authority to other fidelity authorities	Recommend inserting a note connecting this rule to cl 252 of the Uniform Law. Otherwise supported.
85	Authorising provision	Supported.
86	Permitted legal services for managed investment scheme	Recommend moving this NSW-specific provision to the application law in NSW – it is duplicating a provision contained in the application law in Victoria and should not apply by default to every jurisdiction that chooses to participate.
87	Prohibited services and business—mortgages exempted from prohibition under section 258 (4) of Uniform Law	<p>This draft rule may not specify a mortgage or a class as required by cl 258(4)(c) of the Uniform Law.</p> <p>Recommend deleting this draft rule. Given the serious nature of the power in cl 258(4)(c) mortgages or a class of mortgages should only be specified in accordance with the rule-making process.</p>
88	Prohibited services and business—definition of financial institution	<p>This draft rule may not designate a corporation or other body or a class as required by cl 258(5) of the Uniform Law.</p> <p>Recommend deleting this draft rule. Given the serious nature of the power in cl 258(5) a corporation or other body or a class should only be specified in accordance with the rule-making process.</p>

Uniform General Rule Number	Rule Name	Comments
89	Register of investments	Supported.
90	Other registers	Supported.
91	Authorising provision	Supported.
92	Appointment of supervisor of trust money	Supported.
93	Notice of appointment	Recommend amending r 93(1)(e) to refer to “the designated local regulatory authority” rather than “the regulatory authority” as “regulatory authority” is not defined. Otherwise supported.
94	Appointment of manager	Supported.
95	Notice of appointment	Recommend amending r 95(1)(e) to refer to “the designated local regulatory authority” rather than “the regulatory authority” as “regulatory authority” is not defined. Otherwise supported.
96	Appointment of receiver	Supported.
97	Notice of appointment	Recommend amending r 97(1)(f) to refer to “the designated local regulatory authority” rather than “the regulatory authority” as “regulatory authority” is not defined. Otherwise supported.
98	Fees, legal costs and expenses	Supported.
99	Reports by external intervener	Supported.
100	Report to regulatory authority on disciplinary matters	Recommend amending heading to refer to ‘designated local regulatory authority’. Otherwise supported.
101	Authorising provision	Supported.
102	Delegation of Legal Services Council's functions	Supported.

Uniform General Rule Number	Rule Name	Comments
103	Authorising provision	Supported.
104	Australian Legal Profession Register	Recommend deleting “or may” from r 104(1) and consulting with designated local regulatory authorities on the development of the Australian Legal Profession Register.
105	Authorising provision	Supported.
106	General provisions about appeal or review—constructive decision	Supported.
107	Authorising provision	Supported.
108	Non-participant legal practitioner expecting to practise solely in a participating jurisdiction—cessation of exemption	Supported.
109	Non-participant registered foreign lawyer expecting to practise solely in a participating jurisdiction—cessation of exemption	Supported.
Form 1	Uniform standard costs disclosure form for barristers	Supported. Under the heading ‘Your rights include to:’ recommend deleting one reference to “Request an itemised (detailed) bill” as it appears twice.
Form 2	Uniform standard costs disclosure form for law practices (other than barristers)	Supported. Under the heading ‘Your rights include to:’ recommend deleting one reference to “Request an itemised (detailed) bill” as it appears twice.

RRP 017 Fit & Proper Person Policy – V2

- Introduction**
- 1.1 This policy is intended to provide guidance on the matters that should be disclosed to the 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 suitability matters. Section 1.2.6 of the Legal Profession Act 2004 sets out these matters which 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 practise. 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 and suitability 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 suitability matters other than whether the person currently has a material mental impairment.

Legislative Framework

Grant or renew a practising certificate

- 2.1 The following Board functions involve considerations of 'fit and proper person' and 'suitability'.
- 2.2 Under s.2.4.3, the Board may grant a practising certificate. Subsection 2.4.7(1) provides that the Board must not grant a practising certificate unless it is satisfied that the applicant is a fit and proper person to hold the certificate.
- 2.3 Subsection 2.4.7(2) provides that the Board must not renew a practising certificate if it is satisfied that the applicant is not a fit and proper person to continue to hold the certificate.
- 2.4 Subsection 2.4.4(1) provides that the Board, in considering whether or not the person is, or is no longer, a fit and proper person to hold a practising certificate, may take into account, amongst other matters, any suitability matter relating to the person.
- 2.5 Suitability matters are listed in s.1.2.6. This policy provides guidance on all suitability matters other than whether the person currently has a material

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- mental impairment.
- 2.6 This policy also provides guidance on the other matters listed in s.2.4.4(1).

Matters previously disclosed

- 2.7 Subsection 2.4.4(3) specifies that matters that have been previously disclosed in an application for admission to the legal profession and were determined not to be sufficient for refusing admission cannot be taken into account as a ground for refusing to grant or cancelling a practising certificate unless later disclosures demonstrate the matter is part of a course of conduct that may warrant refusal or cancellation.

Amend, suspend or cancel a practising certificate

- 2.8 Under ss 2.4.21 and 2.4.22, the Board may amend, suspend or cancel a practising certificate where it believes a ground exists to do so. Under s. 2.4.20(a) it is a ground that the holder is no longer a fit and proper person to hold the certificate.

Refusal to grant or renew, or amendment, suspension or cancellation of a practising certificate where a show cause event has happened

- 2.9 Under s.2.4.28(1), the Board may refuse to grant or renew or may amend, suspend or cancel a practising certificate where a show cause event (see s.1.2.1) has happened and the certificate holder has failed to show why they are a fit and proper person to hold a practising certificate despite that event.
- 2.10 Show cause events must be disclosed to the Board.
- 2.11 The Board may require the applicant or holder to provide any further information or documents, and to verify the information or documents by statutory declaration or another manner, specified by the Board.

Ask for a criminal record check

- 2.12 Under s.2.5.3, the Board may ask the Chief Commissioner of Police to perform 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 a fit and proper person to engage in legal practise.

Prohibit multi-disciplinary partnership with certain persons

- 2.13 Under s.2.7.50(2)(a), the Board may apply to the Supreme 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

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

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Professional misconduct

2.15 Under s. 4.4.3(1)(b) conduct of 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 (see s.4.4.4).

Policy

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.

Legal Profession Act considerations

3.2 Any relevant provisions of the Act, including:

- the matters raised in clauses 2.1 to 2.15 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.6.2.3).

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 Legal Profession Act 2004 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.

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.

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Confidentiality and Privacy

3.8 Information provided to the Board is handled under the Board's Privacy Policy and in accordance with the Information Privacy Act 2000 and the Health Records Act 2001 as well as the Legal Profession Act 2004. 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 and the Charter of Human Rights and Responsibilities Act 2006.

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' and 'suitability' matters. They are not intended to be applied inflexibly.

General principles

- 4.2 Any matter which 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 suitability 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, cancelling or suspending a practising certificate.
- 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.**

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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 (as set out in s. 2.4.16) should be disclosed. Serious offences (as defined in s. 1.2.1) fall under the definition of show cause event at s. 1.2.1 and therefore must be disclosed.

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.

Traffic offences

4.10 Minor traffic offences such as speeding do not need to be disclosed unless 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 do not need to be disclosed, including:

- parking offences.
- minor traffic offences.
- public transport offences.

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.

Social security and tax mispayments

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

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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.

Insolvency

4.16 Insolvency falls under the definition of show cause event at s. 1.2.1 and must therefore be disclosed. 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.1.2.1) 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 local 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.

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.

Legal Services **BOARD**

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**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 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.

RRP 007 Mental Health Policy – V1

- Introduction**
- 1.1 This policy sets out the Board's approach to lawyers with mental impairments (as defined in clause 4.3.7 below). The purpose of this policy is to encourage such lawyers to voluntarily seek appropriate treatment and to only require disclosure where the impairment affects the lawyer's capacity to engage in legal practice.
 - 1.2 The Board will treat lawyers with mental impairment issues fairly and sensitively. The Board is not concerned with those who are effectively managing mental impairment and there is no requirement to disclose in this instance. Nor does the Board require disclosure where lawyers have mental impairments which have no impact on their capacity to engage in legal practice.
 - 1.3 The Board appreciates that legal practise can place significant stresses and pressures on lawyers. There are a number of dedicated organisations and services that provide care and assistance for lawyers experiencing mental impairment issues. Along with family and close friends, the following are examples of the people and organisations that can play an important role in ensuring these stresses and pressures do not affect a lawyer's capacity to engage in legal practice:
 - Health practitioner;
 - LawCare;
 - BarCare;
 - beyondblue – the national depression initiative, providing comprehensive online information on the signs and symptoms of depression and anxiety and how to help someone;
 - The Black Dog Institute – a not-for-profit, educational, research, clinical and community-oriented facility offering specialist expertise in depression and bipolar disorder;
 - The Tristan Jepson Memorial Foundation – the Foundation's objective is to decrease distress, disability and the causes of depression and anxiety in the legal profession.
 - 1.4 Where disclosure to the Board is required, 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 lawyer is not fit to practice. The privacy of lawyers with mental impairments and the confidentiality of information disclosed will be protected in accordance with relevant laws.
 - 1.5 As guidance material, this policy does not impose binding obligations or rights. This policy clarifies the position of material mental impairment under existing legislation and case law. Any obligations noted in this policy are drawn from the Act.
 - 1.6 This policy complements the Board's Fit and Proper Person Policy to the extent that it deals with the material mental impairment aspects of 'fit and proper person' and 'suitability'.

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- Background**
- 2.1 There are a number of dedicated organisations and services that provide care and assistance for lawyers experiencing mental impairment issues. This Mental Health Policy provides guidance on the particular role of the Legal Services Board in relation to material mental impairment under the Legal Profession Act 2004.
 - 2.2 Under the Act, material mental impairment is a suitability matter that may be considered by the Board when granting, renewing, amending, suspending or cancelling a practising certificate. This is a clear reflection of the Board's objective to provide for the protection of consumers of legal services.
 - 2.3 Equally important, however, is the regulator's educative role in ensuring the legal profession is aware of, and appropriately addresses, issues of concern to the profession and to consumers of legal services.
 - 2.4 This policy notes these objectives, outlining responses to material mental impairment that are appropriately graduated to ensure that the ability of lawyers, who may have (or have had) a material mental impairment, to practice is not unnecessarily restricted.
- Legislative Framework**
- 3.1 Material mental impairment is relevant to Board functions in a number of areas.

Grant or renew a practising certificate

 - 3.2 Under s.2.4.3, the Board may grant a practising certificate. Subsection 2.4.7(1) provides that the Board must not grant a practising certificate unless it is satisfied that the applicant is a fit and proper person to hold the certificate.
 - 3.3 Subsection 2.4.7(2) provides that the Board must not renew a practising certificate if it is satisfied that the applicant is not a fit and proper person to continue to hold the certificate.
 - 3.4 Subsection 2.4.4(1) provides that the Board, in considering whether or not the person is, or is no longer, a fit and proper person to hold a practising certificate, may take into account, amongst other matters, any suitability matter relating to the person.
 - 3.5 Under s.1.2.6(1)(m), suitability matters include whether the person currently has a material mental impairment. Mental impairment includes alcoholism and drug-dependence, as defined in s.1.2.1(1). For further detail see clause 4.3.7 of this policy.

Matters previously disclosed

 - 3.6 Subsection 2.4.4(3) specifies that matters that have been previously disclosed in an application for admission to the legal profession and were determined not to be sufficient for refusing admission cannot be taken into account as a ground for refusing to grant or cancelling a practising certificate unless later disclosures demonstrate the matter is part of a course of conduct that may warrant refusal and cancellation.

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Amend, suspend or cancel a practising certificate

3.7 Under ss.2.4.21 and 2.4.22, the Board may amend, suspend or cancel a practising certificate where it believes a ground exists to do so. Under s.2.4.20(a) it is a ground that the holder is no longer a fit and proper person to hold the certificate.

Prohibit multi-disciplinary partnership with certain persons

3.8 Under s.2.7.50(2)(a), the Board may apply to the Supreme 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.

Matters other than material mental impairment

3.9 More information on 'fit and proper' as it relates to matters other than material mental impairment is provided in the Board's Fit and Proper Person Policy.

Suitability Reports and Health Assessments

3.10 The Act provides, in s.2.5.1(a)(ii), for health assessments and reports on those assessments to assist the Board to determine whether a person is fit and proper to hold a practising certificate.

3.11 Under s.2.5.4(2), the Board may require a person to undergo a health assessment if, under s.2.5.4(1), it believes on reasonable grounds that the person may have a mental impairment that may result in them not being a fit and proper person.

Confidentiality and Privacy

3.12 Limits on the use of health assessment reports are provided under s.2.5.8. The Act also, under s.2.5.9, imposes confidentiality obligations in relation to reports provided to the Board.

3.13 Information provided to the Board is handled under the Board's Privacy Policy and in accordance with the Information Privacy Act 2000 and the Health Records Act 2001 as well as the Legal Profession Act 2004. 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

3.14 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 and the Charter of Human Rights and Responsibilities Act 2006.

Policy & Guidelines

4.1 There are three common ways in which mental impairment comes to the attention of the Board:
4.1.1 Lawyers raise mental impairment issues in direct approaches to the Board.

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4.1.2 Applicants disclose mental impairment issues when applying for the grant/renewal of practising certificates.

4.1.3 Mental impairment issues arise in relation to complaint handling and other regulatory activities performed under the Act.

4.2 Direct approaches to the Board

4.2.1 There is no requirement for lawyers to disclose where a condition is managed and has no impact on the lawyer's capacity to engage in legal practice. However, direct approaches to the Board provide a good opportunity for lawyers to raise possible mental impairment issues before they start to negatively affect the lawyer's capacity to engage in legal practice and/or lead to complaints against the lawyer.

4.2.2 The Board may suggest the lawyer seek advice from an external agency, such as those mentioned in clause 1.3.

4.2.3 Such a suggestion is not binding on either the Board or the lawyer. Confidentiality and privacy obligations are set out in clauses 3.12 and 3.13 above.

4.3 Grant/renewal applications

4.3.1 Lawyers may raise mental impairment with the Board when they apply for the grant and/or renewal of practising certificates.

4.3.2 This application process provides another opportunity for the Board (and/or its delegates) to liaise with applicants on the professional management of any material mental impairment which the applicant may have, or may have had.

4.3.3 Whether an applicant is a fit and proper person to engage in legal practice is one of a number of questions that are relevant to the Board's consideration of an application. More detail on 'fit and proper' as it relates to matters other than material mental impairment is provided in the Fit and Proper Person Policy.

4.3.4 The possible material mental impairment of an applicant is explicitly relevant to the Board's consideration of applications as a 'suitability matter'. Suitability matters are those which the Board may take into account when considering whether or not an applicant is, or is no longer, a fit and proper person to hold a practising certificate. Suitability matters include whether the lawyer currently has a material mental impairment (see clause 4.3.7 below).

4.3.5 The particular circumstances of each application will be relevant to the Board's decision to exercise its legislative power to consider suitability matters.

4.3.6 Unlike most suitability matters listed in the Act, the question of whether the lawyer currently has a material mental impairment may be professionally relevant to the lawyer's capacity to engage in legal practice rather than their conduct or character.

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When will a lawyer fall within s.1.2.6 in relation to mental impairment?

- 4.3.7 The Board will generally consider a lawyer currently has a material mental impairment (ie falls within s.1.2.6(1)(m)) if they have a medical condition that:
- is characterised by significant disturbance of thought, mood, perception or memory (including alcoholism and drug dependence); and
 - that, without management, has and continues to, or is likely to continue to, adversely affect the lawyer's capacity to engage in legal practice.
- 4.3.8 Disclosures made by the lawyer could provide the Board with reasonable grounds to believe that the lawyer may have a mental impairment that may result in them not being a fit and proper person to engage in legal practice or hold a practising certificate. See the below section on 'Suitability Reports and Health Assessments'.

Board responses following consideration of possible mental impairment

- 4.3.9 After considering all relevant information, the Board may:
- take no further action;
 - either formally or informally, seek an undertaking or impose/amend a condition on the lawyer's practising certificate; or
 - refuse to grant/renew, or suspend/cancel the lawyer's practising certificate.
- 4.3.10 Unless deciding to take no further action, the Board will generally discuss possible responses with the lawyer (in the presence of the lawyer's support person or legal representative if the lawyer wishes) in an attempt to negotiate agreed future action that will adequately protect consumers.

No further action

- 4.3.11 The Board will generally take no further action if satisfied the lawyer:
- does not have a mental impairment, or
 - has a mental impairment which does not affect their being fit and proper to engage in legal practice, or
 - has a mental impairment that may affect their being fit and proper to engage in legal practice but the impairment is not material because:
 - the impairment presents a low risk to consumers or others; and
 - the impairment is adequately controlled; and
 - the lawyer has a good record of compliance with treatment.

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Seeking undertakings or imposing conditions

- 4.3.12 The Board will generally seek undertakings or impose conditions if satisfied that:
- the undertaking or condition would likely result in the lawyer being fit and proper to engage in legal practice; and
 - the lawyer is likely to comply with the undertaking or condition.
- 4.3.13 The Board will generally seek undertakings rather than impose conditions as undertakings are not recorded on the face of the practising certificate or in the register of legal practitioners.

Imposing conditions

- 4.3.14 The Board may impose a condition where:
- the restriction is ordinarily imposed by way of a condition (not authorised to receive trust money, practice other than as principal, engage in supervised legal practice, etc); and/or
 - the lawyer refuses to provide an undertaking; and/or
 - the Board considers it necessary for the protection of consumers.

Undertakings or conditions

- 4.3.15 Reasonable or relevant undertakings/conditions may include (but are not limited to) the lawyer:
- attending an appropriate health practitioner or other support service (that may be specified) for treatment;
 - authorising the Board to communicate with the treating health practitioner or support service;
 - using their best endeavours to provide reports from the treating health practitioner or support service at specified intervals;
 - complying with a treatment plan recommended by the treating health practitioner;
 - abstaining from alcohol, drugs and/or gambling;
 - undergoing specified screening tests;
 - limiting the nature/extent of their legal practice as specified (work part-time, engage in supervised legal practice or practice as an employee, etc);
 - authorising the Board to communicate with a specified person about the lawyer's legal practice (employer, supervisor, mentor, etc);
 - undergoing a further health assessment at a specified interval, or intervals.

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Time periods for restrictions

- 4.3.16 Restrictions and compliance monitoring will generally be applied for three years unless the Board considers a different period appropriate.
- 4.3.17 The Board may reduce the nature/extent of restrictions and/or monitoring (at the lawyer's request) if the lawyer:
- demonstrates compliance with restrictions; and
 - provides a supporting report from a health practitioner.

Non-compliance with restrictions

- 4.3.18 When a lawyer does not comply with restrictions, the Board may consider increasing the nature/extent of the restrictions or monitoring or prohibiting the lawyer from practice.
- 4.3.19 The Board will generally discuss potential non-compliance action with the lawyer before taking that action..

Suspending or cancelling, or refusing to grant or renew a practising certificate

- 4.3.20 The Board will generally refuse to grant/renew or will suspend/cancel a practising certificate if:
- an undertaking/condition would be unlikely to result in the lawyer being fit and proper to engage in legal practice; or
 - the lawyer is unlikely to comply with the undertaking/condition.
- 4.3.21 Circumstances in which practising certificate decisions may be appropriate include (but are not limited to) where:
- mental impairment is severe;
 - the lawyer denies their mental impairment despite clear medical advice to the contrary;
 - there has been material and/or repeated non-compliance with treatment plans, undertakings and/or conditions;
 - the Board considers it necessary to protect consumers or others.

4.4 Complaints-handling and other regulatory activities

- 4.4.1 The Board may become aware that a lawyer may have a mental impairment either in performing its regulatory functions or from performance of regulatory functions by the Legal Services Commissioner, its delegates or other regulators.

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Suspension or deferral of compliance or enforcement activity

- 4.4.2 When the Board gains such an awareness it may (where practicable) suspend or defer any compliance or enforcement action relating to the lawyer until it has determined whether the lawyer has a material mental impairment.
- 4.4.3 Regardless of the Board's determination, the existence of a material mental impairment will not necessarily preclude the Board from taking appropriate compliance or enforcement action.

If the lawyer does not have a material mental impairment

- 4.4.4 If the Board determines the lawyer does not have a material mental impairment, the Board may commence or resume any suspended or deferred compliance or enforcement action.

If the lawyer does have a material mental impairment

- 4.4.5 If the Board determines the lawyer does have a material mental impairment, the Board may:
- take the mental impairment into account; and
 - discuss any cancelled or deferred compliance or enforcement action with the lawyer;
- before commencing or resuming such action.

Interaction with disciplinary activities

- 4.4.6 As soon as the Board becomes aware that a lawyer may have a material mental impairment, the Board will generally:
- notify the Commissioner that the lawyer may have a material mental impairment;
 - request any relevant information held by the Commissioner;
 - provide relevant information to the Commissioner if there is a disciplinary investigation or proceeding on foot.

Suitability Reports and Health Assessments

- 5.1 When determining a lawyer's suitability to hold a practising certificate, the Board may consider whether a mental impairment may result in the lawyer not being a fit and proper person to engage in legal practice. The Board may require a health assessment to assist it to make this determination.
- 5.2 Each health assessment decision must be based on the individual facts and circumstances of each case.

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General principles

- 5.3 In managing health assessments, the Board will:
- properly protect consumers while supporting mentally impaired lawyers to practise, or to continue to practise, where possible;
 - treat mental impairment as a health issue rather than a professional standards issue;
 - encourage lawyers to voluntarily seek appropriate health care;
 - treat lawyers with mental impairments fairly and sensitively;
 - protect the privacy of mentally impaired lawyers as far as possible while properly protecting consumers.

When will a health assessment be required?

- 5.4 The Board will generally require a lawyer to undergo a health assessment when:
- It believes on reasonable grounds that the lawyer may have a mental impairment that may result in him or her not being a fit and proper person to engage in legal practice; and
 - There is insufficient probative information available to enable the Board to determine what (if any) restrictions on engaging in legal practice would be likely to result in the lawyer being a fit and proper person to engage in legal practice, despite the impairment.

What are reasonable grounds?

- 5.5 The Board will generally consider:
- information provided to the Board by or on behalf of the lawyer;
 - information obtained by the Board in the course of performing functions under the Act;
 - information provided to the Board by a local or interstate regulatory authority;
 - information provided to the Board by the courts;
 - information provided to the Board by the Police, Director of Public Prosecutions or any other relevant public agency;
 - publicly available information obtained by the Board.

What is a mental impairment that may result in a lawyer not being a fit and proper person to engage in legal practice?

- 5.6 See clause 4.3.7 above.

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Reports requested before health assessment

- 5.7 To help determine whether a health assessment is required, the Board may request a lawyer provide a report (at the lawyer's expense) from a treating health practitioner.
- 5.8 The Board will generally require the report to include:
- the health practitioner's qualifications;
 - the nature and extent of the mental impairment;
 - the extent (if any) to which that impairment may result in the lawyer not being a fit and proper person to engage in legal practice;
 - the treatment the lawyer is receiving to manage that impairment;
 - the lawyer's compliance with that treatment;
 - recommendations (if any) of practising certificate conditions the Board could impose, or undertakings the Board could seek, that should enable the lawyer to be fit and proper to engage in legal practice, including duration and means of monitoring compliance; and
 - whether the health practitioner considers disclosure of the report may be prejudicial to the lawyer's mental health or well-being.
- 5.9 The Board will generally not pursue such a report if the treating health practitioner considers providing the report would materially damage their therapeutic relationship with the lawyer. Requiring a health assessment would be appropriate in those circumstances.

Health assessment process

Selection of health assessor

- 5.10 The Board may seek advice from the Medical Board of Australia on an appropriate specialist to conduct a health assessment.

Disclosure to the health assessor

- 5.11 The Board will usually disclose to the health assessor:
- a copy of any available reports by health practitioners; and
 - a summary of any other relevant information available.

Informing the lawyer

- 5.12 Having decided to require a health assessment, the Board will provide the lawyer with an information notice outlining:
- the name and qualifications of the health assessor;
 - the date, time and place for the assessment (noting that multiple appointments may be needed in reaching such assessment);
 - the lawyer's right to seek review of the Board's decision to require a health assessment;

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- the health assessor's obligation to provide a copy of the report to the lawyer or (if disclosure may be prejudicial to the lawyer's mental health) to the lawyer's nominated medical practitioner;
- the restrictions on the use, including admissibility, of the report; and
- the applicable confidentiality obligations.

Board responses following receipt of report

5.13 See clauses 4.3.9 to 4.3.21 above.

Policy Management /Implementation

6.1 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
- privacy policy
- foreign lawyer registration policy
- fit and proper person policy.

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.

The Board and its delegates will ensure that their relevant employees have access to current legislation, case law and relevant Board policies and guidelines.