

Section 57 of the Legal Profession Act 2007 – Procedures following the delivery of a Notice of a Serious Offence

1. Introduction

- 1.1 This document sets out the Society's procedure after it receives notice from a legal practitioner to whom it has issued a current practising certificate (certificate holder), under s57 of the *Legal Profession Act 2007* (the Act) that they have been charged with a serious offence to ensure the Society keeps under consideration the fitness to practice of the certificate holder up to the determination of the charges.
- 1.2 The Society, in undertaking this function and in assessing the conduct giving rise to the charges, must have regard to protecting the public interest and confidence in the administration of justice and the protection of consumers of the services of the legal profession.

2. Legislative Framework

- 2.1 Under s51(1) of the Act, the Society may grant a practising certificate. Subsection 51(4)(b) provides that the Society must not grant a practising certificate unless it is satisfied that the Applicant is a fit and proper person to hold the certificate. Subsection 51(5)(b) provides that the Society 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.
- 2.2 It is a statutory condition of a practising certificate that the certificate holder must give notice to the Society within 7 days if they are charged with a serious offence as defined the in Act.
- 2.3 A serious offence is defined in schedule 2, the Dictionary to the Act as:-
 - a. an indictable offence against a law of the Commonwealth or any jurisdiction, whether or not the offence is or may be dealt with summarily; or
 - b. an offence against a law of another jurisdiction that would be an indictable offence against a law of this jurisdiction if committed in this jurisdiction, whether or not the offence could be dealt with summarily if committed in this jurisdiction; or
 - c. an offence against a law of a foreign country that would be an indictable offence against a law of the Commonwealth or this jurisdiction if committed in this jurisdiction, whether or not the offence could be dealt with summarily if committed in this jurisdiction.
- 2.4 Section 60(a) provides that it is a ground for amending, suspending or cancelling a certificate if the certificate holder is no longer a fit and proper person to hold the certificate.
- 2.5 Under s61, the Society may amend, suspend or cancel a practising certificate (the proposed action) where it believes a ground exists to do so. This action may only occur after the Society has given the person a Show Cause Notice and, after considering all written representations, the Society still believes a ground exists to take the proposed action.
- 2.6 Section 63 provides that the Society may immediately suspend a practising certificate where there is a Show Cause Event, (see schedule 2, the Dictionary to the Act). the Society believes there is a ground mentioned in s60 to justify the suspension or cancellation under section 61 or there is any other ground the Society considers to warrant the suspension in the public interest.
- 2.7 Subsection 46(2) provides that the Society, in considering whether or not a 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.
- 2.8 "Suitability Matters" are dealt with in ss9 and 46(2) and include subsection 9(1)(a), whether the person is of good fame and character, subsection 9(1)(c), whether the person has been convicted of an offence

- in Australia or a foreign country and s46(2)(g) such other matters as the Society thinks appropriate.
- 2.9 Conviction is defined in s11 of the Act to include a finding of guilt and the acceptance of a plea of guilty.
 - 2.10 That a certificate holder has been charged with a serious offence is not a suitability matter as defined in section 9 but it may be “other matters” the Society thinks appropriate as set out in section 46(2)(g) of the Act.
 - 2.11 Under s80 of the Act the Society may require a certificate holder in the course of a consideration under s60, 61 or 63 to provide to it documents or information.
 - 2.12 If the Society decides to amend, suspend or cancel a certificate, it must give the certificate holder an Information Notice about the decision pursuant to ss61(3) or 63(4), whichever is relevant to the decision. The certificate holder may then apply to the Queensland Civil and Administrative Tribunal (QCAT) for a review of the decision.

3. A Fit and Proper Person

- 3.1 Section 46 of the Act provides that, in deciding whether a certificate holder is a fit and proper person to continue to hold a practising certificate, the Society is required to consider each of the “suitability matters” set forth in s9(1) of the Act to the extent any such matter is appropriate along with any other matters the Society considers relevant. See *MCF* [2015] QCA 154. Section 46 also lists other matters to be considered. The relevant matters in a determination regarding a charge for a serious offence are contained in s9(1) (a) (whether the person is currently of good fame and character) and s46(2)(g) (other matters the Society considers appropriate).
- 3.2 That a certificate holder has been charged with a serious criminal offence is not *prima facie* evidence that person is not a fit and proper person to continue to hold a practising certificate or that there are grounds to amend or suspend that certificate. It is, however, a matter relevant to consider in deciding if a certificate holder is a fit and proper person to continue to hold a practising certificate. The nature of the allegations involved, the extent and circumstances of the alleged offending in question, its relationship to the offender’s professional life, and the behaviour of the offender before, during and after the legal process which result from that charge are all relevant to a consideration of the person’s fitness: *MCF* (ibid).
- 3.3 The question of fitness to practice is “whether the [Society] is justified in holding out the [certificate holder] as a fit and proper person to be entrusted with the duties and responsibilities of a solicitor”: *Southern Law Society v Westbrook* (1910) 10 CLR 609 (Griffith CJ); approved in *A Solicitor v Council of the Law Society of New South Wales* [2004] HCA 1. The statutory power to amend, suspend or cancel a practising certificate is exercised not to punish the legal practitioner, but to protect the public: *New South Wales Bar Association v Stevens* [2003] NSWCA 95 at [108], citing *Clyne v. New South Wales Bar Association* (1960) 104 CLR 186 at 201-202 and *New South Wales Bar Association v. Evatt* (1988) 117 CLR at 183-184.
- 3.4 In *New South Wales Bar Association v Stevens* (supra at [108-110]) Spigelman CJ identified four interrelated aspects of the public interest to which the power to affect practising certificates protects:-
 - Clients must feel secure in confiding their secrets and entrusting their most personal affairs to lawyers.
 - Fellow practitioners must be able to depend implicitly on the word and behaviour of their colleagues.
 - The judiciary must have confidence in those who appear before the courts.
 - The public must have confidence in the legal profession by reason of the central role the profession plays in the administration of justice
- 3.5 To find that the certificate holder is not a fit and proper person to continue to hold a practising certificate, the Society must be satisfied that all the available material demonstrates that the continued holding of a practising certificate by the practitioner pending the determination of the charges presents such an unacceptable risk to the public interest that it is necessary the certificate be suspended. Regard must be had to protecting the public interest and confidence in the administration of justice and the protection of consumers of the services of the legal profession.
- 3.6 The presumption of innocence will also need to be considered as the practitioner has only been charged with the offence(s) and not convicted. In *Victorian Lawyers RPA v. Young* [2001] VSC 28 Gillard J stated at [29] “of course the presumption of innocence must be observed”.
- 3.7 In *Law Institute of Victoria v. Kyriackou* (Legal Practice) [2013] VCAT 735, McNamara J., Vice President, stated at [73]-[74]:

“Next, I consider the issue of quantum of proof. In *Briginshaw v. Briginshaw* [1938] HCA 34 (1938) 60 CLR 336, 363 in what has become a celebrated formulation, Sir Owen Dixon said:

‘When in a civil proceeding a question arises whether a crime has been committed, the standard of persuasion is, according to the better opinion, the same as upon other civil issues ... but consistent with this opinion weight is to be given to the presumption of innocence and exactness of proof is expected’.

His Honour said that indirect inferences were insufficient to establish proof on the balance of probabilities in these circumstances. Earlier in his judgment, His Honour said:

‘The truth is that, when the law requires the proof of any fact, the Tribunal must feel actual persuasion of its occurrence or existence before it can be found.’

- 3.8 In balancing these issues, the consideration is whether the available material concerning the conduct that lead to a criminal charge against a practitioner and any other relevant behaviour (including rehabilitative measures, if applicable) demonstrates that the continued holding of a practising certificate by the certificate holder presents such an unacceptable risk to clients, the public generally, the administration of justice or public confidence that the practitioner will properly discharge their functions that the certificate should be suspended, cancelled or some condition imposed.

4. Policy and Procedure

- 4.1 That a certificate holder has been charged with a serious offence is a matter that will cause the Society to consider if the certificate holder is a fit and proper person to continue to hold a practising certificate pursuant to either ss61 or 63 of the Act. Notices cannot issue pursuant to both sections simultaneously. A decision must be made as to which section is relevant depending on the severity of the allegations and the threat to the public interest.

5. Provision of the notice and inquiries

- 5.1 Upon delivery to the Society by a certificate holder of a notice pursuant to s57, that notice will be referred to the General Manager Professional Leadership (General Manager). The General Manager will provide a copy of this document to the certificate holder.
- 5.2 The General Manager will then expeditiously obtain from the certificate holder the available material relevant to the charge(s) especially the content of the police court briefs as and when available. Resort will be had if necessary to s80 of the Act which provides the Society with power to obtain a document or information.
- 5.3 The certificate holder has a duty to cooperate in this endeavour, Rule 43.1 of the *Australian Solicitors Conduct Rules 2012* provides:-

“Subject only to his or her duty to the client, a solicitor must be open and frank in his or her dealings with a regulatory authority.”

6. Consideration whether to issue a Show Cause Notice

- 6.1 Upon completing those enquiries the s57 notice and accompanying material will be submitted to the Council of the Society or its delegate (Executive Committee of Council) to consider whether it believes a ground exists to amend, suspend or cancel the certificate holder’s certificate and, if so, which of those actions ought to be proposed. If the Council holds that belief and makes such a resolution, a Show Cause Notice will issue to the certificate holder under s61(1).
- 6.2 Such grounds exist if the Council believes the certificate holder is no longer a fit and proper person to continue to hold the certificate.
- 6.3 Believes is not a word defined in the Act, nor the *Acts Interpretation Act 1954*. Its ordinary dictionary meaning when used as in s61 is “to be of opinion, think, suppose” (Australian Concise Oxford 7th Ed. p88); “to have a conviction that a person or thing is, has been, or will be engaged in a given action or involved in a given situation” (Dictionary.com). To believe is not to have absolute proof. It is to reach a conclusion on the basis of information. That conclusion must be one based in reason. It must not be an irrational conclusion, it must be a conclusion reached in reason based on identifiable grounds.
- 6.4 In reaching the belief regard will be had to *Briginshaw v Briginshaw* [1938] 60 CLR 336 at 362:-
- “The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters “reasonable satisfaction” should not be produced by inexact proofs, indefinite testimony, or indirect references.”*
- 6.5 This does not alter the standard of proof required, rather it is a statement that the strength of the evidence necessary to satisfy that standard will vary according to what is sought to be proved and the gravity of the consequences flowing from that proof. So “while the standard of proof in a civil case remains the balance of probabilities, the matters to be considered by the tribunal of fact may be of such seriousness that clear

and cogent evidence may be required before there is reasonable satisfaction that the allegations have been made out on the balance of probabilities” (*GLS v PLP* [2012] VCAT 221 at [39]).

- 6.6 In this instance the consequence of the determination is that a Show Cause Notice issue and, as a result, a certificate holder will be asked to supply an explanation. Therefore the strength of the evidence necessary to found the belief will rank low on the scale necessary to make out the requirement to believe.
- 6.7 On determining that question the Council or the Executive Committee of Council may take into account these factors:-
- The age, reputation, character and disciplinary record of the certificate holder;
 - The nature of the offences alleged;
 - The available material concerning the alleged conduct that gave rise to the charges including the strength of that case on the available material, the time elapsed between the date of the alleged offence and that date of charge;
 - The connection between legal practice and the alleged offences;
 - The actions of the certificate holder since being charged, including their cooperation with the Society;
 - The position of the certificate holder regarding the offences charged.
- 6.8 If the Council or the Executive Committee of Council believes the public interest as defined in *Stevens* (supra) is under unacceptable threat by the continued practice of the certificate holder pending determination of the charges then a Show Cause Notice will issue pursuant to s61(1).
- 6.9 If the requisite belief is induced the proposed action to be taken against the certificate holder for the purpose of the Show Cause Notice must be identified. Cancellation will rarely be justified when there are undetermined charges. Any threat to the public interest by continued practice in this situation may be able to be cured by amendment to the certificate by the imposition of conditions depending on the alleged offences. Depending on the alleged offences and the threat to the public interest and consumer confidence in the legal profession may only be able to be cured by suspension of the certificate holder’s practising certificate.
- 6.10 The Council or the Executive Committee of Council must give reasons for its decision. Any Show Cause Notice issued will reflect those reasons.
- 6.11 The material available in relation to the charges will evolve with time. That a Show Cause Notice does not issue at one point in time does not mean there will not be grounds to do so subsequently the General Manager is to keep abreast of those developments and if a material change in the circumstances previously considered by the Council or the Executive Committee of Council occurs, the matter, with the fresh material will be submitted to the Council or the Executive Committee of Council for reconsideration.
- 6.12 Any Show Cause Notice must state the proposed action, the grounds for proposing to take the action, an outline of the facts and circumstances that forms the basis for the belief and invites the certificate holder to make written representations to the Society within a time of not less than 28 days as to why the proposed action should not be taken.

7. Immediate Suspension or Amendment

- 7.1 Section 63 of the Act provides for immediate suspension or amendment of a practising certificate while the show cause process takes place. The length of the suspension or amendment is until the earlier of the time at which the Society informs the practitioner of its decision by Information Notice pursuant to s61(3) of the Act or 56 days after the Information Notice is given. The basis for immediate action is that the person is no longer fit and proper and that it is necessary to suspend or amend the certificate immediately to protect the public interest rather than to proceed solely along the procedure at s60 – 61.
- 7.2 Section 63 operates so that if immediately the Society is notified of the charge pursuant to s57 of the Act, it is of such a view that immediate suspension is warranted, s63 is utilised. Any suspension under that section only operates until the Society gives an Information Notice under s61 or 56 days have passed. If the matter is delayed to any significant extent, this operates against the use of s63 as it would be considered there was no emergent situation requiring immediate suspension or amendment. It must be considered that there is an emergent situation requiring immediate suspension or amendment.
- 7.3 The operation of this section’s equivalent under the New South Wales *Legal Profession Act 2004* was addressed in *Dennis v Law Society of New South Wales* [2014] NSWSC 1487 at [55].
- 7.4 Such a suspension, amendment or cancellation would have a significant effect upon the certificate holder. It is an immediate alteration to their position without a hearing. Thus the Briginshaw Principle referred to above requires clear and cogent evidence of sufficient strength upon which the Council or the Executive Committee of Council can decide:-
- a. It believes there is any ground mentioned in s60 that would justify the immediate amendment or suspension of the local practising certificate under s63; and
 - b. It considers it is necessary in the public interest to take the action immediately

- 7.5 The Council or the Executive Committee of Council must first determine the question of fitness bearing in mind the consequences of the decision and the action it justifies. The required strength of the evidence to induce the belief to act under s63 is greater than that required to issue a Show Cause Notice under s61(1). There will be cases where the strength of the evidence means action under s61(1) is justified but not under s63.
- 7.6 If the Council or the Executive Committee of Council believes there are grounds as mentioned in s60 (e.g. not a fit and proper person) then the Council must move to the second point; it considers it is necessary in the public interest to take the action immediately. These two tasks are necessarily intertwined because the question of fitness is predicated upon the protection of the public interest.
- 7.7 The point of difference is in the requirement that it be necessary to take the required action immediately rather than to allow the matter to proceed through the Show Cause process while the certificate holder remains in practice.
- 7.8 “Consider” is a verb. Its most apt definition here is to “be of opinion” (Australian Concise Oxford 7th Ed. p217). Again it must be an opinion reached reasonably.
- 7.9 In a different but equally serious context the High Court has observed that “necessary ... is a strong word” (*Hogan v Australian Crime Commission* [2010] HCA 21; 240 CLR 651 at [30] per French CJ, Gummow, Hayne, Heydon and Kiefel JJ). In this context it connotes a relatively high degree of satisfaction that the [immediate] suspension should be ordered pending the pursuit of a [charge of serious criminal offence]. It can be contrasted with a power to make such orders as the tribunal thinks fit”. See *Dennis* (supra) at [55] citing Beech-Jones J in *Berger v Council of the Law Society of NSW* [2013] NSWSC 1080.
- 7.10 The public interest to be considered is that defined in *Stevens* (supra).
- 7.11 If immediate action is ordered the Show Cause process will operate concurrently. Whenever immediate action is ordered the Council or the Executive Committee of Council finds there are grounds for the issue of a Show Cause Notice.
- 7.12 An immediate amendment or suspension of a certificate takes effect when the certificate holder is given an Information Notice of the decision. The certificate holder may make written representations to the Society about the suspension or amendment. The Society must consider those representations. The Society may revoke the immediate suspension or amendment at any time whether in response to the written representations of the certificate holder or otherwise.
- 7.13 The Society may also apply to QCAT to extend the period of suspension or amendment a further period of not more than 56 days after the date of the Tribunal’s order. The Society must give the certificate holder an Information Notice about its decision to apply to QCAT for an order extending the period of the suspension or amendment.
- 7.14 The Council or the Executive Committee of Council must give reasons for its decision and ensure that any Information Notice issued reflects those reasons.

8. Return of the Show Cause Notice

- 8.1 A Show Cause Notice issued to a certificate holder must give at least 28 clear days for a response. The Show Cause Notice will specify a time in which a response must be made. The Society will give due consideration to requests for an extension of time in which to respond to the Show Cause Notice. If no response has been received by the Society 10 days after the expiry of the time specified for the response and the Society has received no request for an extension of time, a determination will be made as to what action it will take without further notice to the certificate holder.
- 8.2 The certificate holder may make submissions after the due date in these circumstances and the Society will, if a decision has not already been made, consider them in making its decision.
- 8.3 The Society aims to make a determination in a Show Cause matter within 56 days of the issue of the Show Cause Notice to the certificate holder.
- 8.4 Upon the return of the Show Cause Notice the Council or the Executive Committee of Council must decide if it believes grounds exist to take the proposed action.
- 8.5 This means a reconsideration of the matters taken into account at the time the decision was taken to issue the Show Cause Notice, any further material that has come to light and the response by the certificate holder to the Show Cause Notice

- 8.6 The certificate holder must have had the opportunity to consider all of the material to be considered by the Council or the Executive Committee of Council and make a response to it in their submissions.
- 8.7 The strength of the evidence required to act in this consideration will be higher than that required to issue a Show Cause Notice. The consequences to the certificate holder are cancellation, suspension or amendment of their certificate. It may be that, even though a Show Cause Notice issued, no action is taken.
- 8.8 In making that consideration the Council or the Executive Committee of Council may take into account the matters at paragraph [6.7]. The Council or the Executive Committee of Council must consider the submissions made by the certificate holder. If the certificate holder has not given a response that may be taken into account. If the certificate holder claims as a reason for not responding, in full or in part, to the Show Cause Notice the privilege against self-incrimination or penalty privilege, the claim will be noted and no adverse interest will be drawn to the certificate holder from that position. The determination will be made on the material available.
- 8.9 The decision by the Council or the Executive Committee of Council must be upon all the facts and circumstances at the time of making the decision.
- 8.10 If the Council or the Executive Committee of Council has the requisite belief then it must decide what action to take:-
- a. If the Show Cause Notice stated the proposed action was to cancel the certificate the Council or the Executive Committee of Council may either cancel, suspend or amend the certificate;
 - b. If the Show Cause Notice stated the proposed action was to suspend the certificate the Council or the Executive Committee of Council may either suspend or amend the certificate;
 - c. If the Show Cause Notice stated the proposed action was to amend the certificate the Council or the Executive Committee of Council may only amend the certificate.
- 8.11 The Council or the Executive Committee of Council must give the certificate holder an Information Notice concerning the action to be taken on the certificate. The action takes effect from the time the certificate holder is given the Information Notice. The giving of this Information Notice ends any suspension or amendment pursuant to s63 of the Act (if taken) that had not already been revoked or lapsed. An Information Notice is not required if no action is to be taken and there has been no action taken against the certificate holder under s63 but the certificate holder must be advised of the decision to take no action as soon as possible.
- 8.12 The Council or the Executive Committee of Council must give reasons for its decision at all stages of this process and ensure that any Information Notice issued reflects those reasons. The Information Notice must advise the certificate holder that they may apply to QCAT for a review of the decision, provide the decision, the reasons for the decision and the number of days the person has to apply for the review.
- 8.13 That a Show Cause Notice has been considered and no action taken does not mean there will be no further consideration of the certificate holder's fitness to practice before the determination of the charges for the serious offence(s). The material available in relation to the charges will evolve with time. The General Manager is to keep abreast of those developments and if a material change in the circumstances previously considered by the Council or the Executive Committee of Council occurs, the matter, with the fresh material is to be submitted to the Council or the Executive Committee of Council for reconsideration.