

'Fit and Proper Person' Test

Introduction

The 'fit and proper person' requirement is one of the several qualifying or 'suitability' conditions (typically along with a bachelor's degree, professional training and the professional exam) that aspiring candidates may be required to pass to enter the profession. This entrance requirement aims to promote high ethical standards and enhance the profession's reputation for trustworthiness. This title will consider:

- The key terms and concepts;
- The content and aims of the 'fit and proper person' requirement;
- The main challenges in, and recommendations for, appropriately administering the requirement; and,
- Use of the 'fit and proper person' requirement in disciplining existing members of the profession.

Terms and Concepts

Character can be defined as a given individual's stable personality traits, including their personal values, emotional dispositions and cognitive habits, insofar as these bear on their future behaviour.¹ *Good character* refers to the personal qualities that lead to a person consistently acting ethically – such qualities are 'virtues', while their opposites constitute 'vices'.² While generally stable, character can change over time and an individual can both lose, and regain, the status of 'good character'. Various terms can be used to express the 'fit and proper person' requirement, including 'good character', 'moral character', 'fit to practice', 'suitable to practice' and 'of good reputation'.³ In fact, all these terms are at least somewhat misleading, as the focus of such tests is not upon good character, but upon ensuring the absence of behaviour that suggests bad character (such as crime and malpractice).⁴

History

The use of moral character as a professional credential is a longstanding practice. For lawyers, scholars date the requirement back to the Roman *Theodosian Code* and, in its Anglo-American form, back to 13th century England.⁵ The requirement is widespread in contemporary professions, especially in law, but it is not an automatic feature of professional integrity systems.⁶

¹ For extended discussion, see Ian Freckelton, "'Good Character" and the Regulation of Medical Practitioners' (2008) 16 *Journal of Law and Medicine* 488, 489-94.

² This understanding links with a longstanding strand of moral philosophy that dates at least back to Aristotle's virtue ethics: see Stanford Encyclopaedia of Philosophy, *Virtue Ethics* <<https://plato.stanford.edu/entries/ethics-virtue/>> (accessed 16 October 2017). This notion of character is not without controversy, as will be noted below.

³ See, e.g., Freckelton, above n 1. These terms are all closely related, but may not be synonymous, with 'fit and proper person' generally connoting emphasis on suitability for a role, rather than with good character generally.

⁴ Alice Woolley, 'Tending the Bar: The "Good Character" Requirement for Law Society Admission' (2007) 70 *The Dalhousie Law Journal* 28.

⁵ Deborah Rhode, 'Moral Character as Professional Credential' (1985) 94 *Yale Law Journal* 493.

⁶ Freckelton provides the example of medical practice in New Zealand where (unlike the UK and Australia), the legislation provides specific grounds for determining that a practitioner is not fit for registration: Freckelton, above n 1, 495.

Uses, Procedure and Content

The 'fit and proper person' requirement typically involves a candidate submitting an application, affidavit and character references to the relevant professional organisation or regulatory body at the time of admission to practice. It may also include an interview process. Requested information varies considerably across professions and jurisdictions, but tends to centre on criminal records (especially felonies), violations of other institutional codes of conduct (for example, academic, military, and public office codes), employment records, bankruptcies, mental illnesses and drug or alcohol dependencies.⁷ Particular attention is usually given to values and virtues directly pertinent to future professional practice,⁸ but this focus can widen to issues of reputation and status as a role-model (for example, for teachers).⁹ Applicants may also be asked to supply any other information that a 'reasonable applicant' might regard as not being favourable when considering their fitness and propriety to enter the profession.

Other more context-specific factors that may be considered in evaluation of past indiscretions include: the seriousness of the indiscretion, the time since the indiscretion; whether the indiscretion was isolated or part of a pattern; whether the ethical failing driving the indiscretion appears relevant to professional practice; evidence of later remorse and rehabilitation (and other indicia of good character);¹⁰ and whether the applicant disclosed the matter. In making their decisions, committees tend to place significant weight on the candidate's standing as a witness throughout the admissions process.¹¹

After admission, the good character test is usually part of the standard employed by professional bodies to discipline practitioners and its application then leads to a range of determinations such as suspension, expulsion or limitations/conditions on practice (such as doctors not treating female or child patients).¹² On the basis of these criteria, the disciplinary body might work with – or oppose – major organisational employers (such as hospitals and schools) as they make their own determinations about employee wrongdoing. Where an individual practitioner has been 'struck-off' but seeks re-entry, the 'fit and proper person' test will be again applied, in this case to the period between expulsion from practice and request for re-admission. Here, evidence about remorse and rehabilitation is most determinative. When a practitioner has not exhibited self-awareness about their past behaviour and why it was wrong or made efforts in the intervening time to demonstrate the development 'good' character, their application to re-enter the profession has been denied.

⁷ For a detailed analysis of US law (as at 1985), see Rhode, above n 5, 593-603.

⁸ A 'nexus' of personal behaviour to the professional role: Carrie Menkel-Meadow, 'Private Lives and Professional Responsibilities? The Relationship of Personal Morality to Lawyering and Professional Ethics' (2000) 21 *Pace Law Review* 374. See also Freckelton, above n 1, 499.

⁹ Menkel-Meadow, above n 8, 380.

¹⁰ See Rhode, above n 5, 537.

¹¹ Woolley, above n 4, 51-2.

¹² See Rhode, above n 5; Freckelton, above n 1.

Most professional bodies administering the requirement rely on self-reporting, asking candidates to themselves supply the desired information, including personal character references. However, criminal record, driving record and social services checks are sometimes performed and in special cases, psychological evidence can be presented, and hearings held.

Aims of the Requirement

The 'fit and proper person' requirement can aim to:

1. Ensure high ethical standards in professional work guarantee the safety of vulnerable clients (including patients, students etc) and promote the integrity of the institutions (such as courts) that depend on professional practice.
2. Promote social trust in professionals and public awareness of professional ethics and values.
3. Enhance the public reputation, prestige, honour and social standing of the professional group.

Justifications for pursuing the first two objectives are straightforward. In the course of their duties, professionals deal with vulnerable clients who may desperately require effective professional services, need to expose their personal affairs (and perhaps bodies) to the professional, and not be in any position to evaluate the quality of professional help received.¹³ With these concerns in mind, any measures that can ensure high ethical standards will work to protect these vulnerable clients and to promote the important social institutions (such as courts and markets) that rely on professional's integrity for their efficiency, effectiveness and advancement. High standards will in turn promote the profession's trustworthiness, giving potential clients the confidence to rely upon and seek out professional services.¹⁴ As well, a 'contractual' justification for these standards can be employed – namely that they are a fair return for the prestige and monopoly enjoyed by the profession.¹⁵ However, as discussed in the next section, the third objective is heavily criticized by commentators.

Challenges and Critiques of the 'Fit and Proper Person' Requirement

While the 'fit and proper person' requirement is often considered a straightforward and common-sense part of a profession's integrity system, effective and judicious administration of the requirement faces several challenges.

1. *The 'Fit and Proper Person' Requirement as a Self-Interested Strategy*

The third objective of the 'fit and proper person' test, enhancing the honour of the professional group, is regarded by many commentators as illegitimate. Even supposing this goal could be objectively and consistently evaluated in applicants, it is not clear how its use as a cultural showpiece to elevate the group's social standing – as opposed to improving its actual trustworthiness through exacting standards

¹³ Breakey notes four separate layers of vulnerability that can apply to professionals' clients: Hugh Breakey, 'Supply and Demand in the Development of Professional Ethics' (2016) 15 *Research in Ethical Issues in Organizations* 1, 7-9.

¹⁴ Rhodes highlights the importance of trustworthiness for professions, particularly in the context of medicine Rosamond Rhodes, 'Understanding the Trusted Doctor and Constructing a Theory of Bioethics' (2001) 22 *Theoretical Medicine* 493.

¹⁵ Freckelton, above n 1, 488; Breakey, above n 13, 16-9.

of practice – is an appropriate rationale for excluding new members.¹⁶ Indeed, this objective may seem to be motivated by the profession's desires for economic monopoly and regulatory autonomy.¹⁷

2. *Concerns about Links between Present Character and Future Behaviour*

The underlying premise of the 'fit and proper person' requirement is that character is the 'well-spring of professional conduct in lawyers'.¹⁸ However, contemporary social psychology has highlighted how strongly situations and context can determine human behaviour, and illustrated the surprising lack of individuals' 'cross-situational consistency' – that is, the fact that a person proves honest in one situation (for example, avoiding lying) may not correlate with their behaving honestly in another situation (for example, avoiding cheating).¹⁹ A reflection on history reinforces this point: Mahatma Gandhi, Franklin Roosevelt and Martin Luther King all possessed significant personal failings and yet all worked hard, and often effectively, for justice in the world.²⁰

This lack of cross-situational consistency has relevance for 'fit and proper person' requirements. While past behaviour remains the best predictor of future behaviour, professional bodies must be wary of attributing global virtues and vices to candidates, rather than focusing on the specific traits necessary for professional action.

On this basis, three concerns arise with the 'fit and proper person' requirement. First, even expert psychologists can struggle to predict future behaviour from current examinations. The causal connections between past and future action are often unclear, especially when the external situation changes. Second, even if effective prediction was possible for forensic psychologists, professional committees lack the capabilities to reliably access and investigate relevant information, and then to analyse it scientifically. Third, the more committees consider global virtues and personal behaviour, the more they intrude into private parts of a person's life.

Use of the criteria for good character as a disciplinary device carries its own problems. On the one hand, the stakes of an adverse finding are much higher – impacting upon a subject's income, career and even sense of identity, perhaps acquired after decades of service. This makes it essential that standards are consistent and public, so that professionals at least have clear expectations about the boundaries between their private and public activities.²¹ On the other hand, a member's breach of proper professional conduct carries far

¹⁶ E.g., Rhode, above n 5, 493, 512; Woolley, above n 4, 60.

¹⁷ This criticism has its roots in the 1970s' writing of Magali Larson, *The Rise of Professionalism: Monopolies of Competence and Sheltered Markets* (Transaction Publishers, revised ed, 2013).

¹⁸ Woolley, above n 4, 30.

¹⁹ For a measured analysis of the claims of 'situationism', see Woolley, above n 4, 63-6. For an illustration of how situational factors can impact upon the various stages of ethical decision-making, see Hugh Breakey, 'Building Ethics Regimes: Capabilities, Obstacles and Supports for Professional Ethical Decision-Making' (2017) 40 *University of New South Wales Law Journal* 322.

²⁰ Menkel-Meadow, above n 8, 393.

²¹ This is particularly important in some professions, such as teaching. See, e.g., Queensland College of Teachers, *Professional Boundaries: A Guideline for Queensland Teachers* (July 2017) <<http://qct.edu.au/pdf/Professional%20Boundaries%20-%20A%20Guideline%20for%20Queensland%20Teachers.pdf>> (accessed 16 October 2017).

greater predictive power for future breaches, as compared with long-past indiscretions in a different context, suggesting that public safety and professional trustworthiness would be improved by greater invigilation of accredited professionals.²² In the event, professional organisations (like the US bar) tend to judge existing professionals to a standard much lower than that to which they apply to applicants. Linking back to the self-interest critique above, since this policy benefits the existing membership both by excusing their indiscretions and by limiting market competition by entrants, allegations of hypocrisy and double standards are inevitable.²³

3. *Inconsistent and Arbitrary Standards*

While organizations tend to consider themselves administering self-evident and common-sense standards, commentators have documented the extraordinary variation in standards – variations that occur not only across state lines,²⁴ but even in the decisions of single institutions.²⁵ Without doubt, historical criteria for good character requirements look at best arbitrary, if not outright unjust. Anglo-American professional practice has historically refused entry to women, minorities, adulterers, radicals, bankrupts, Catholics, tradesmen and homosexuals, and has been highly sensitive to public notoriety, political activism and crimes of ‘moral turpitude’, rather than substantive wrongdoing.

The test is ‘not value neutral’ and ‘has changed over time’.²⁶ For example, unpaid income tax was not seen as relevant to good character until recently. A present-day addition is the requirement to disclose mental health issues. This requirement exists in the context of high levels of psychological distress reported among existing professionals and students studying ‘professional’ degrees, and research on the role professional education and practice play in contributing to this distress. It is not clear, then, whether an admission board’s purpose here is to ‘protect’ the public or to support its members.²⁷ Since it is a category of disclosure, it would seem to be about ‘protecting’ the public and there is evidence of the correlation between professional breaches and the onset of mental health symptoms and addiction.²⁸ Moreover, the requirements now clarify that only acute and serious mental health problems need to be disclosed. Nonetheless, ‘status’ (here mental health status) is not evidence of ‘conduct’ or past behaviour showing an impairment or incapacity to perform the inherent requirements of the job.²⁹ It may be applied as a discriminatory barrier to entry.³⁰ It is certainly another example of applicants being increasingly asked to supply personal details about their lives.³¹

²² Rhode, above n 5, 546.

²³ Rhode, above n 5, 547-9, 85.

²⁴ Francesca Bartlett and Linda Haller, ‘Disclosing lawyers: Questioning law and process in the admission of Australian lawyers’ (2013) 41 *Federal Law Review* 227.

²⁵ See Rhode, above n 5, 591; Woolley, above n 4; Menkel-Meadow, above n 8, 370.

²⁶ Bartlett and Haller, above n 24, citing Gino Dal Pont, ‘Ethics: Fit to Practice’ (2007) 81 *Law Institute Journal* 76.

²⁷ Bartlett and Haller, above n 24, 247.

²⁸ For examples of such cases, see Bartlett and Haller, above n 24, 247.

²⁹ Bartlett and Haller, above n 24, 248.

³⁰ Bartlett and Haller, above n 24, 252-5.

³¹ Bartlett and Haller, above n 24, 235.

4. *Procedural and Governance Problems*

The use of arbitrary and uneven standards leads to both legal uncertainty for the applicant about what is to be disclosed and unpredictability in decision-making. This combines with other governance failures, such as a lack of transparency (if not outright secrecy) about what the applicable standards are, how decision-makers will weigh up countervailing factors and (somewhat paradoxically) whether and how the information will be kept confidential.³² Apart from cases where judgments are challenged in courts and tribunals, decisions often are unaccountable and can clearly depart from the purpose for which the requirement was originally introduced.³³

5. *Logistical Challenges*

Professional organizations administering the 'fit and proper person' screening often suffer from an inadequacy of time, resources, staff and sources of information. These factors contribute to the unpredictable results of the decision-making and to a lack of transparency about the process. Commentators have also noted concerns with the timing of the screening, which can seem to come both too early and too late – before applicants have faced the specific situational pressures of professional practice, but after they have invested in years of education and training.³⁴

Best Practice

Some commentators have argued that, given the costs, challenges and shortcomings faced by the 'fit and proper person' requirement, the screening should be altogether abandoned, and the resources directed into policing the abuses of existing professionals.³⁵ However, the requirement clearly has some legitimate uses. There are plainly at least some cases where granting an applicant entry into the profession would be reckless, given their history.³⁶ With this in mind, several recurrent recommendations for best practice in designing and administering the 'fit and proper person' requirement are made in the literature.³⁷ The 'fit and proper person' screening process should:

1. Keep the examination tightly focused on past behaviours and existing traits that are like those used in professional practice and ethical decision-making, rather than distracted by more global character traits (or more personal peccadilloes) or desired, affiliative traits among the profession as a group. As well as keeping a strong link between the criteria and the desired outcome of improving professional standards of practice, this narrower focus also helps with logistics and administration challenges.

³² Bartlett and Haller, above n 24, 262.

³³ See Woolley, above n 4, 39.

³⁴ Rhode, above n 5, 515. See also Woolley, above n 4, 75.

³⁵ Rhode, above n 5, 585. Rhode points out that many of the most worrying candidates would be filtered out by other elements of the education, employment and accreditation system.

³⁶ Woolley, above n 4, 71-2.

³⁷ See Woolley, above n 4; Rhode, above n 5, 584-92. Rhode also offers some well-argued caution about the efficacy of these and other reforms.

2. Use objective measures (legal outcomes, findings of prior institutional investigations) wherever possible to avoid inconsistency and unpredictability in decision-making. Ideally, it is best to conduct the screening on an audit basis, rather than using self-reporting.
3. Maximize transparency and accountability. As well as improving the legitimacy of the process, improved governance also allows candidates, professionals, the public and aspiring university students to understand the profession's expectations.
4. At the same time, there needs to be anonymity for the individual applicant and, potentially, practitioner facing disciplinary action. For instance, an applicant may be identified, and deliberations published even when they are ultimately admitted, which can 'haunt a person professionally' and lead to confidential information being exposed.³⁸ The need for confidentiality and privacy applies to data storage as well.

Summary

The 'fit and proper person' requirement is a common feature of many professional accreditation systems. It can serve important functions, helping to improve professional standards of practice and to promote the trustworthiness of the profession. However, for it to fulfil these functions effectively and ethically, the screening processes must be designed and administered with care by keeping a tight relationship between the types of prior misconduct it examines, and the values and virtues required in professional practice.

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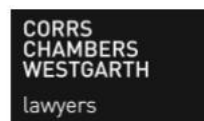
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³⁸ Bartlett and Haller above n 24, 262.