

SUPREME COURT OF SOUTH AUSTRALIA

(Full Court)

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IN THE MATTER OF LISA JANE BARRETT (No 2)

[2021] SASCFC 38

Judgment of The Full Court

(The Honourable President Livesey, the Honourable Justice Blue and the Honourable Justice Bleby)

20 September 2021

PROFESSIONS AND TRADES - LAWYERS - QUALIFICATIONS AND ADMISSION - OTHER MATTERS

Application for restricted access orders in relation to certain documents and parts of documents.

In support of her application for admission as a legal practitioner, the applicant disclosed a number of documents to the Board of Examiners and the Court. Some of those documents contained confidential and personal information. Restricted access orders over those documents were previously granted on an interim basis, pending the hearing of the application. At the hearing, the applicant sought restricted access orders in relation to certain of those documents and parts of documents.

Held (by the Court):

1. The nature and notoriety of the events in the applicant's history support strongly the public interest in the transparency of the Court's processes in considering and determining her application for admission. The matters subjective to the applicant that relate to those events are an integral element of both the Board's and the Court's deliberations.

2. Subject to some specific matters, the restricted access orders are revoked.

3. The applicant is to file redacted versions of certain, identified documents. Those documents will be received on an unrestricted access basis. The unredacted versions will be dealt with only on a court access basis.

Legal Practitioners Act 1981 (SA) s 15(1); Health and Community Services Complaints Act 2004 (SA) s 75; Uniform Civil Rules 2020 (SA) r 32.2, referred to. B, RD v Channel Seven Adelaide (2008) 103 SASR 478; Re Harrison: Application for Readmission (2002) 84 SASR 120; Re JN Taylor Holdings Ltd (In liq) (2007) 62 ACSR 695; In Re Vadasz (1988) 146 LSJS 455; In the matter of Lisa Jane Barrett [2021] SASCFC 37; In the Matter of Claire Amy Morel [2015] SASCFC 20; Goldberg v Ng (1995) 185 CLR 83; Attorney-General (NT) v Maurice (1986) 161 CLR 475, considered.

Applicant: LISA JANE BARRETT Counsel: MR J WELLS QC - Solicitor: DMAW LAWYERS

Interested Party: LAW SOCIETY OF SOUTH AUSTRALIA Counsel: MR S MCDONALD SC

Hearing Date/s: 02/09/2021, 03/09/2021

File No/s: SCCIV-20-107

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IN THE MATTER OF LISA JANE BARRETT (No 2)
[2021] SASCFC 38

Full Court –Application for Admission: Livesey P, Blue and Bleby JJ

1 **THE COURT:** On 3 September 2021, Lisa Jane Barrett (‘the applicant’) was admitted as a barrister and solicitor of the Supreme Court of South Australia by order of this Court, pursuant to s 15(1) of the *Legal Practitioners Act 1981* (SA).¹

2 At the hearing of the application, Mr Wells QC, on behalf of the applicant, applied for the continuation of restricted access orders in relation to certain documents filed in this matter. These orders had previously been made on an interim basis. Mr Wells QC further applied for restricted access orders in relation to other documents before the Court. The applications were made on the ground that the documents in question contain confidential information.

3 The various documents relate to the question of the fitness of the applicant for admission as a legal practitioner. The issues they address are described briefly in the Court’s reasons for admitting the applicant as a practitioner. Mr Wells QC acknowledged that much of the information contained in the documents produced in support of the application to the Board, and the Board’s Reports and Recommendations, is already in the public domain. It follows that there is no confidentiality to be maintained over that information. The focus of the application was those aspects of the material that Mr Wells QC described as the applicant’s own explanations, reflections and submissions: that is, those matters arising in the context of the relevant history which are subjective to her. Some of these matters are undoubtedly quite personal.

4 The application, as initially formulated, sought restricted access orders over all materials filed in respect of the application for admission, and otherwise placed before the Court, on the basis that what was said to be confidential could not be separated from the information in the public domain. The submission was that the objective matters and the record of the applicant’s subjective experience were intermixed.

5 Time constraints prevented completion of the hearing of that application on 2 September 2021. When the hearing resumed on 3 September 2021, Mr Wells QC recast the application, identifying only specific documents or parts of documents sought to be redacted and made subject to such an order.

General considerations

6 This Court is charged with the responsibility of admitting legal practitioners, overseeing the conduct of legal practitioners and, where necessary, striking the names of legal practitioners from the roll. It is required to determine whether a

¹ *In the matter of Lisa Jane Barrett* [2021] SASCFC 37.

person is a ‘fit and proper person’ to act as a legal practitioner in various contexts. These contexts include: determining whether a person should be admitted as a practitioner under s 15 of the *Legal Practitioners Act 1981* (SA), whether a practitioner’s practising certificate should be suspended under s 20AJ, whether the name of a practitioner should be struck off the roll under s 89 and whether a person whose name has been struck off the roll should be readmitted as a legal practitioner under s 15.

7 The question whether a person is or remains entitled to practise the law is a matter of clear public interest.

8 It is generally in the public interest that proceedings be conducted in public and be subject to public scrutiny.² This is particularly so in the context of the exercise of this Court’s jurisdiction over legal practitioners. In general, when the Court determines that a practitioner’s practising certificate should be suspended, a practitioner’s name should be struck off the roll, or a practitioner whose name has been struck off the roll should be readmitted, those proceedings should be conducted in public.

9 Mr Wells QC submitted initially that when the Court is considering an application for initial admission as a legal practitioner, the starting point is that the application is premised on confidentiality. While the application as recast on the second day of hearing only sought redactions from the public record of certain documents and passages in documents, it remains helpful on the application as recast to consider the extent to which obligations of confidence intrude into the application process.

10 Rule 28 of the *Rules of the Legal Practitioners Education and Admission Council 2018*, made pursuant to the *Legal Practitioners Act 1981* (SA), provides:

In exercising any power, discretion or function granted by these rules, LPEAC, the Board and the Law Society will have regard to guidelines prepared by the Law Admissions Consultative Committee contained in Appendix D.

11 Guideline 3, contained in Appendix D, sets out ‘relevant principles’ that the Admitting Authority will apply when determining fitness for admission. These principles emphasise the onus on the applicant and the honesty and candour with which the applicant is expected to make disclosure, as well as referring to the applicant’s present understanding and estimation concerning the applicant’s past conduct. Guideline 3(e) then reads:

Any disclosure you make that may be relevant to whether you are currently able to carry out the inherent requirements of practice is confidential.

12 The Board is required to have regard to that assurance of confidentiality. That assurance is not given as a *quid pro quo* for the applicant’s honesty and candour.

² *B, RD v Channel Seven Adelaide* (2008) 103 SASR 478 at [15]-[16] (Doyle CJ, White and Layton JJ agreeing).

Honesty and candour are expected in any event. For the same reason, ss 20AG and 20AH of the *Legal Practitioners Act 1981* (SA), in the case of a show cause event as defined, place a duty to disclose information on an applicant for a practising certificate and a holder of a practising certificate, respectively.

13 In the ordinary course, an applicant may expect that disclosures to the Board will be kept confidential. However, the Guidelines provide no absolute assurance of confidentiality; nor could they. The matters disclosed to the Board under this regime are likely to be referred to in the Report and Reasons of the Board.

14 Moreover, as occurred in this case, an applicant's Originating Application to the Court for admission as a legal practitioner must be accompanied by an affidavit demonstrating the applicant's eligibility for admission. The process commenced by this Originating Application is not governed by the Guidelines. The assurance of confidentiality associated with disclosures made to the Board contained in the Guidelines, whilst demonstrative of the public interest in the maintenance of that confidentiality, necessarily becomes subject to other, competing public interests which inform the Court's treatment of that information.

15 Chief amongst these is the principle of open justice. The articulation of this principle is well-understood.³ So too is the framework for recognising an exception to the application of the principle, specifically where the Court reasonably believes a departure from open justice to be necessary in order to serve the ends of justice.⁴

16 The principle does not apply differently where an originating application of this kind is, in effect, of an *ex parte* nature, that is, where the applicant comes before the Court armed with a favourable report of the Board of Examiners. In that case, reasons for granting an application will usually not be given, the matter not being contested. However, the Court is not prohibited from giving reasons on an application for admission.

17 The role of the Court in maintaining public confidence in the legal profession will in some cases recommend that reasons be given when discharging its functions as the admitting authority. There are many instances of the Court having done so on applications for readmission.⁵ A common reason for this is that there is, on the public record, a case to answer as to whether the applicant is a fit and proper person. This might arise, for example, from a previous decision of the Court removing the practitioner's name from the roll.

18 However, challenges to public confidence in the fitness and propriety of a person to be admitted as a legal practitioner need not only arise in circumstances where that person's name has previously been removed from the roll. A concern may well arise on account of some other aspect of a person's history. A simple

³ *Re JN Taylor Holdings Ltd (In liq)* (2007) 62 ACSR 695 at [5] (Debelle J).

⁴ *Re JN Taylor Holdings Ltd (In liq)* (2007) 62 ACSR 695 at [6] (Debelle J).

⁵ *Re Harrison: Application for Readmission* (2002) 84 SASR 120; *In Re Vadasz* [1988] SASC 1044; (1988) 146 LSJS 455; *In the Matter of Claire Amy Morel* [2015] SASFC 20.

example would be of a person previously convicted of fraud offences who applies for admission for the first time. The criminal history is a matter of public record. The public interest in the openness of the Court's processes in determining whether that applicant is a fit and proper person is manifest.

19 Not all matters that raise questions about a person's fitness for admission as a legal practitioner are criminal in nature. The applicant's disclosed history, which has attracted considerable public attention and elements of which are the subject of published Findings on Inquest by the State Coroner, provide a case in point.

20 The nature and notoriety of the events in the applicant's history support strongly the public interest in the transparency of this Court's processes in considering and determining her application for admission. The matters subjective to the applicant, to use that shorthand expression, are an integral element of both the Board's and this Court's deliberations. They inform the question of the applicant's present fitness and propriety against the background of her personal history.

21 Public confidence in the legal profession requires, in these circumstances, transparency in the admission process. There is an obvious public interest in the maintenance of confidentiality over matters disclosed with an undertaking of confidence. However, that undertaking could never be absolute. In the present case, the balance of the public interest supports strongly both the giving of reasons by this Court on the application for admission and, subject to some specific matters, revocation of the restricted access orders.

Specific redactions

22 The reformulated application sought specific redactions of documents or parts of documents on a number of grounds. We address each of the grounds briefly, below. Following that, we set out the limited redactions we are prepared to order in respect of the documents.

Personal information

23 A number of redactions are sought on the basis that they contain personal information relating either to the applicant or to third parties and in respect of which there is no public interest in their revelation. These extend to financial and health circumstances of the applicant, and personal details of third parties.

24 We cannot be sure that some of the names and personal details of the third parties identified are not in the public domain in the context of the matters considered on the application for admission. However, it appears that a number of these individuals had their identities protected in earlier proceedings relating to the applicant. In any event, we consider that the public interest would not be served by the publication or republication of those matters. Similarly, purely personal matters of the applicant will be redacted.

25 The application for redactions on the ground of personal information extended to a psychological report about the applicant dated 21 September 2020, prepared by Dr Jack White ('the White report'). This report is highly relevant to the application for admission. It contains a great deal of information relating to the applicant's subjective experiences of the matters otherwise on the public record that are relevant to the application. In our view, the public interest is not, on balance, served by maintenance of confidentiality over the White report. However, the report contains specific reference to a matter personal to the applicant which does not inform her application for admission. We will order redaction of those passages in the White report.

26 This conclusion extends to other documents that refer to the contents of the White report and which, in turn, make reference to that personal matter.

Letters from the Health and Community Services Complaints Commissioner

27 These letters concern matters that are now on the public record. However, they are marked 'confidential' and 'not for public release'. This expression of confidentiality is made in accordance with the prohibition in s 75 of the *Health and Community Services Complaints Act 2004* (SA):

75—Preservation of confidentiality

- (1) A person must not record, disclose or use confidential information gained by the person through involvement in the administration of this Act, unless the person does so—
 - (a) when necessary for the purposes of this Act; or
 - (b) when expressly authorised or required under this or another Act; or
 - (ba) when necessary for the purposes of a corresponding law; or
 - (c) when expressly authorised, in writing, by the person to whom it relates; or
 - (d) when required to do so by a court or tribunal constituted by law; or
 - (e) when expressly authorised or required under the regulations.

Maximum penalty: \$5 000.

- (2) For the purposes of this section, the following persons are involved in the administration of this Act:
 - (a) the Commissioner;
 - (b) a conciliator;
 - (c) a professional mentor;
 - (d) another staff member;

(f) a member of a committee established under this Act.

- (3) This section does not apply to the recording, disclosure or use of statistical or other information that could not reasonably be expected to lead to the identification of a person.

28 The applicant provided these documents to the Board in support of her application and in compliance with her obligation of disclosure. Doing so did not breach any obligation of confidentiality. The applicant is not a person involved in the administration of the *Health and Community Services Complaints Act 2004* (SA). The matters addressed in these letters are relevant to her application for admission as a practitioner. There is no basis for making a restricted access order in respect of these letters.

Correspondence marked ‘confidential’ or ‘without prejudice’

29 These documents concern proceedings between the Midwifery Board of Australia and the applicant. Their subject matter is in the public domain. Their disclosure to the Board by the applicant was appropriate. As with the letters from the Health and Community Services Complaints Commissioner, the public interest does not support the maintenance of their confidentiality in these proceedings.

Legal professional privilege

30 The affidavit of the applicant affirmed in support of her application for admission recounts an event of obtaining legal advice in relation to her work as a ‘birth advocate’. It is uncontentious that the relevant passage gives an account of legal advice provided to the applicant, and that legal professional privilege attached to that advice in the first instance. Mr Wells QC submitted that insofar as the applicant’s disclosure of this advice in her affidavit amounted to a waiver of privilege, it was a waiver for a limited purpose only, being the consideration by the Board and the Court of her application.

31 Disclosure of the affidavit to the Court was necessary for the Court to consider the application and the Board’s report and recommendation. While it may be correct to say that the waiver was for a limited purpose, that purpose necessarily extended to the Court’s processes, which are open until ordered otherwise. The advice is recounted in the context of the applicant explaining her reaction to it and consequent actions.

32 That disclosure occurred against the background of the statement of confidentiality in Guideline 3(e), set out above. The relevance of that guideline in the present context is that as a background circumstance, it supports the proposition that the necessary waiver of legal professional privilege was for a limited purpose only and was not an intentional general waiver.⁶ While this

⁶ See *Goldberg v Ng* (1995) 185 CLR 83 at 95 (Deane, Dawson and Gaudron JJ).

intentional waiver extended to facilitating disclosure to this Court, the processes of which are generally open, it remained for a limited purpose.

33 The question is then whether the circumstances of the disclosure should impute a general waiver of legal professional privilege. An imputed waiver will occur when, by reason of some action on the part of the holder of the privilege, it would be unfair to maintain it.⁷ The affidavit being provided in support of an application for admission, maintenance of the privilege more generally would not appear to cause unfairness in the sense in which this has been discussed in the authorities. For example, there is no opposing litigant who might be misled by a failure to disclose it further.

34 On the materials before the Court, it is clearly arguable that there has been no general waiver of privilege. The Court gave very little weight to the reference to legal advice in the affidavit on the application for admission. There is no countervailing public interest in the reference to and discussion of legal advice being disclosed openly, and any arguably remaining privilege then being lost. The paragraph disclosing and discussing the legal advice the applicant received will be redacted.

Restricted access orders and redactions

35 It follows that we decline to order the continuation of the restricted access orders made pending the hearing of the application. We revoke the restricted access orders previously made by the Court in this matter, being:

- Order 2 of 3 July 2020;
- Orders 1, 2 and 3 of 28 October 2020; and
- Order 1 of 24 June 2021.

36 For the reasons appearing above, we order the applicant to file redacted versions of the documents identified below. These documents will be received on an unrestricted access basis. The Court will then receive those redacted documents in evidence on the application.

37 The unredacted versions of those documents are to be dealt with only on a court access basis within the meaning of rule 32.2 of the *Uniform Civil Rules 2020* (SA).

38 Some documents the subject of the application are contained in the Case Book, but have not been filed and consequently do not have an FDN. The table below identifies the documents by reference to the Case Book page (and FDN

⁷ *Goldberg v Ng* (1995) 185 CLR 83 at 95-98 (Deane, Dawson and Gaudron JJ); *Attorney-General (NT) v Maurice* (1986) 161 CLR 475 at 481 (Gibbs CJ), 487-488 (Mason and Brennan JJ).

where applicable) or, where a document is not reproduced in the Case Book, FDN only:

Case-Book Page	Document	Parts to be redacted
3	Originating Application (FDN 1)	Applicant's address, phone number and email address
4		3 rd and 4 th lines under heading 'Applicant's address'.
5	Affidavit of Lisa Jane Barrett affirmed 16 December 2019	Applicant's address, phone number and email address
6		Applicant's address on first line (commencing 'I, Lisa Jane Barrett...')
8		Applicant's address, phone number and email address
11		Whole page
12		Applicant's address on top right of the page
14		Applicant's address on top right of the page
16		Applicant's letter to the Board dated 10 February 2020
20	7 th paragraph (commencing 'I received...'): 2 nd to 6 th sentences inclusive; 10 th paragraph (commencing 'I then received').	
40	Affidavit of Lisa Jane Barrett affirmed 25 September 2020 (FDN 12)	Address panel
41-42		Paragraphs [6] to [19] inclusive
46-47		Paragraph [67]
48		Paragraphs [81] to [83] inclusive
48		Paragraphs [85] to [86] inclusive
48-49		Paragraphs [88] to [94] inclusive
49		Paragraph [96]
50		Paragraph [101] to [102] inclusive
50		Paragraph [106]
52		Paragraphs [135] to [142] inclusive
349		Second Affidavit of Kylie Lauren Dunn affirmed on 25 September 2020 (FDN 14)
356	Exhibit KLD-3: Paragraph numbered 26, headed 'Other matters'.	

358		Exhibit KLD-4: seventh line in box entitled ‘Assessment Summary’
363		Exhibit KLD-4: first paragraph (commencing, ‘She said they...’) <ul style="list-style-type: none"> • 2nd dot point, 2nd sentence (commencing, ‘She said...’); • Last dot point, 1st sentence (commencing, ‘19-year-old...’)
364		Exhibit KLD-4: whole paragraph immediately under heading ‘2.4 Health History’.
370		Exhibit KLD-4: first two sentences of final paragraph, commencing ‘Ms Barrett reported that...’
371		Exhibit KLD-4: final sentence on page 371
372		Exhibit KLD-4: second paragraph, final sentence, commencing ‘Over the...’
383-8	Affidavit of Janet Taylor dated 1 April 2021	Exhibit JT-1 (personal details and referees): <ul style="list-style-type: none"> • Whole of first box on page 383 entitled ‘personal details’; • Whole of box on page 385 entitled ‘emergency contact details’; • Whole of box on page 386 entitled ‘referees’; • Whole of page 388.
397	Fourth affidavit of Kylie Lauren Dunn dated 7 April 2021	Exhibit KLD-5: <ul style="list-style-type: none"> • paragraph [3]
398		<ul style="list-style-type: none"> • paragraph [13]
400		Exhibit KLD-6: <ul style="list-style-type: none"> • 9th paragraph, commencing ‘Lisa has...’
411	Submissions on behalf of Lisa Barrett	Paragraph 45, indented quote, third sentence, commencing ‘Over the...’
430-3		Exhibit LJB1:

	Report of Master Bochner dated 23 July 2021	<ul style="list-style-type: none"> • Applicant's address, phone number and email address on page 430; • 3rd and 4th lines under heading 'Applicant's address' on page 431; • Applicant's address, phone number and email address on page 432; • Applicant's address on first line (commencing 'I, Lisa Jane Barrett...') on page 433
435		Applicant's address, phone number and email address
438		Whole page
445		Exhibit LJB3, applicant's address on top right of the page
469	Second Affidavit of Lisa Jane Barrett dated 16 June 2021	Address panel
473	(FDN 26)	Paragraph [16]
FDN	Document	Parts to be redacted
FDN 16	Third Affidavit of Kylie Lauren Dunn affirmed on 12 October 2020	Paragraphs [8] to [16] inclusive

39 We grant liberty to apply within 14 days of publication of these reasons to the parties for the purpose of rectifying this list in accordance with these reasons, in case any passage identifying personal information of the nature of those redacted has been omitted inadvertently, and for any incidental orders necessary to give effect to these reasons.