Warts and all:
The impact of candour in assessing character for admission to the legal profession*

[1] A person who seeks admission to the legal profession must be a fit and proper person to be admitted.[1] One aspect of that criterion is that the person is of good fame and character.[2] Past conduct has invariably been treated by admitting bodies as indicative of a person's character and suitability for undertaking the professional duties and responsibilities of a lawyer.

[2] Admission procedures require the applicant to disclose relevant past conduct. The applicant's candour in disclosing past conduct or lack of candour about past conduct may affect the outcome of the admission application.

[3] Reference will be made to categories of past conduct that may be relevant in determining whether an applicant for admission is of good character. The effect of the applicant's candour about past conduct on the assessment of the applicant's character will then be examined.

[4] In considering cases in which candour has played a significant role in determining whether an applicant is successfully admitted to the legal profession, the issue arises whether the emphasis on candour has overshadowed the assessment of the applicant's character by reference to past misconduct.

Past conduct

[5] Whether an applicant for admission is of good fame and of good character invites a wide-ranging enquiry. The categories of past conduct that **may** be of relevance to the admitting body's task are extensive. Some guidance may be provided by the statutory provisions covering admission where there is a list of matters relating to suitability for admission.[3] Obvious conduct that must be disclosed includes convictions for dishonesty offences, convictions for other types of criminal offences, guilty pleas to criminal offences that do not result in the recording of convictions, academic misconduct in the course of University studies, bankruptcy or other insolvency, investigations by the Australian Securities and Investments Commission of companies associated with an applicant, any restriction on an

applicant's right to engage in legal practice in another jurisdiction, whether an applicant is the subject of a restraining or other type of order directed at preventing domestic violence, and persistent traffic breaches.[4] The need to disclose other past conduct might not be as obvious to an applicant, but if it has the potential to be relevant to the admitting body's consideration of the application, it must be disclosed.[5] This includes criminal proceedings which have not resulted in convictions,[6] prior history of depression and a suicide attempt,[7] and an unresolved contempt allegation arising out of litigation conducted personally by the applicant.[8]

Candour in disclosing past conduct

[6] The critical role played by candour in disclosing past conduct was emphasised by the High Court in *Re Davis*.[9] Although that decision was concerned with the removal of the appellant's name from the roll of barristers after admission, it was the appellant's lack of candour about past conduct for the purpose of his admission that was the basis of the decision. The appellant had been admitted as a barrister in 1946 without disclosing to the two solicitors who provided certificates as to his character or to the Barristers' Admission Board, when he applied to the Board to be a student-at-law and then for admission, that he had been convicted of breaking and entering. He committed the offence in 1934 when he was 20 years old. Subsequently he had led a life of scrupulous honesty. The appellant's conviction was revealed to the Supreme Court of New South Wales in 1947. The appellant had to show cause why he should not be disbarred. The appellant obtained affidavits attesting to his character from the two solicitors that had previously provided certificates as to his character, the Attorney-General for New South Wales, a professor of law, a minister of religion and a detective constable of police. The court ordered that the appellant be disbarred and that his name be removed from the roll of barristers. The appeal to the High Court was dismissed.

[7] Latham CJ accepted that by the time the appellant sought admission he may have become a person of good fame amongst those who then knew him, but dealt with character in these terms:[10]

> "But intrinsic character is a different matter. A man may be guilty of grave wrongdoing and may subsequently become a man of good character. If the appellant had frankly disclosed to the Board and to the two solicitors the fact of his conviction, that disclosure would

> have greatly assisted him in an endeavour to show that he had retrieved his character. But his failure to make such disclosure in itself, apart from the conviction, excludes any possibility of holding that he was in 1946, or had become in 1947, a man of good character."

[8] Dixon J referred to the expression "good fame and character" as denoting "the reputation and the more enduring moral qualities" of the candidate for admission.[11]

[9] Dixon J expressed doubt that a person who had been guilty of the crime of housebreaking for the purpose of theft could ever be qualified to be a barrister.[12] Dixon J based his decision, however, on what the appellant's lack of candour about his criminal conviction revealed about his character:[13]

> "But a prerequisite, in any case, would be a complete realization by the party concerned of his obligation of candour to the court in which he desired to serve as an agent of justice. The fulfilment of that obligation of candour with its attendant risks proved too painful for the appellant, and when he applied to the Board for his certificate he withheld the fact that he had been convicted."

[10] The judgments in *Re Davis*[14] linked the appellant's lack of candour in disclosing relevant past conduct with his character. That decision illustrated the use that could be made of an applicant's candour (or lack of candour) about past conduct as a guide to the applicant's present character.

[11] Full and frank disclosure of past conduct can be taken as showing an applicant's insight as to the relevance of that past conduct for admission purposes which itself may make a difference to the admitting body's decision on whether the applicant is a fit and proper person to be admitted as a legal practitioner.[15]

Recent decisions on lack of candour in disclosing past conduct

[12] Even if the prosecution of an applicant for a criminal offence did not result in a conviction, the circumstances that resulted in the charge or even the circumstances surrounding the prosecution may reflect on the character of an applicant. The New South Wales Court of Appeal in *The Prothonotary of the Supreme Court of New South Wales v Del Castillo*[16] did not set out principles for when an applicant for admission should disclose any charge of which the applicant had been acquitted, but did observe that it was the prudent and desirable course for an applicant for

admission to disclose at least the fact of the charge and the acquittal and to offer to supply any further details required by the admitting body.[17]

[13] Mr Del Castillo was acquitted of the charge of murder in the Australian Capital Territory in 1992. The deceased had died as a result of a knife wound that occurred during an altercation between the applicant and the deceased. The acquittal was explained by accident. The applicant had given evidence at his trial. The applicant was admitted as a legal practitioner in New South Wales in July 1998. At no stage did he disclose in his application for admission in New South Wales that he had been tried for murder and acquitted. The applicant who was about 60 years old also sought admission in the Territory, relying on the steps that he had taken for admission including the Legal Workshop course at the Australian National University, rather than relying on his admission in New South Wales. The Legal Practitioners Admission Board of the Territory raised the issue of the applicant's trial for murder. The applicant swore an affidavit in which he explained that he had been advised by one of the lecturers at the Legal Workshop that he did not have to disclose the charge of murder, as he had not been convicted, and that he had been given similar advice by his solicitor. The applicant's application for admission was adjourned to November 1998. The applicant had not notified the court in New South Wales that he had not disclosed that he had been prosecuted for murder and acquitted. The Full Court refused his application for admission as a legal practitioner in the Territory on the basis that the applicant's status as a legal practitioner in New South Wales would need to be resolved, before the court would be in a position to make a final decision on his fitness to be admitted in the Territory.[18] The applicant's appeal to the Full Court of the Federal Court was dismissed.[19]

[14] Eventually the Prothonotary of the Supreme Court of New South Wales applied to have Mr Del Castillo's name removed from the roll of New South Wales legal practitioners. There were two grounds that were pursued on the hearing before the Court of Appeal. One was that during the investigation of the circumstances of the death of the deceased the applicant lied or misled the investigating police and his counsel. The other was that the conduct of the applicant, following the stabbing of the deceased, in leaving the scene, concealing the whereabouts of the weapon used and not ensuring appropriate assistance was rendered to the deceased, was

inconsistent with his being a person of good fame and character. The Prothonotary had included a ground in the application that the applicant did not in the certificate of character supporting his application for admission disclose to the Admission Board any details of the trial in 1992, but that ground was not pursued in the Court of Appeal. It was noted by the Court of Appeal, however, that the applicant's failure to disclose had to be viewed in the light that he was making simultaneous applications for admission in two jurisdictions and at least in one of those jurisdictions, the Australian Capital Territory, the fact of the charge was well known in legal circles.[20]

[15] The Prothonotary accepted that the Court of Appeal should proceed on the basis that the applicant was innocent of the charge of murder and did not seek to call any witness who had given evidence at the murder trial. The applicant's evidence at the murder trial was admitted before the Court of Appeal without any limitation on the uses to which it might be put in the application. Although the balance of the transcript of the evidence at the trial was before the Court of Appeal, it was admitted as evidence of the extent of disclosure made by the applicant to the New South Wales Legal Practitioners Admission Board in January 1999 and for what it demonstrated were the issues at the murder trial that were relevant to the grounds before the Court of Appeal. The applicant gave evidence and was cross-examined before the Court of Appeal. Most of the leading judgment in the Court of Appeal given by Heydon JA analysed the evidence of the applicant at the murder trial and before the Court of Appeal for the purpose of dealing with the issues that were before the Court of Appeal. The Court of Appeal was not satisfied that the conduct of the applicant whilst in a state of panic and stress after the altercation and stabbing in 1991 and the errors of judgment made by the applicant in what he told the police and his lawyers showed a lack of fitness to be a legal practitioner at the time of the hearing before the Court of Appeal.[21] The application was dismissed and the Prothonotary was ordered to pay the applicant's costs.

[16] The focus of the Court of Appeal in determining whether the applicant should remain on the roll of legal practitioners was what his past conduct that resulted in the charge of murder and the circumstances surrounding the prosecution of that charge revealed about the applicant's character and what was its continuing relevance. That detailed examination was in contrast to the manner in which the

Full Court of the Australian Capital Territory disposed of the applicant's admission application on the basis that the New South Wales court would need the opportunity to consider the applicant's status. Disclosure at the outset by the applicant in relation to both admission applications about the murder charge may have curtailed the litigation that ensued.

[17] The applicant for admission as a solicitor in *Re H* [22] had been registered as a nurse. He was dealt with in 1992 for conduct discreditable to a registered nurse. The Nurses' Registration Board found the charges established and placed the applicant on 12 months probation. Subsequently in 1997 he retrieved the address of a female patient and attended at her home. The woman complained to the hospital on the same day. At first the applicant denied the conduct, then made up a story about why he was in the vicinity of the patient's home and then disclosed that he had been under the impression that he had been invited to her home. On the basis that he used confidential information for private purposes, he pleaded guilty before the relevant professional conduct body and his registration as a nurse was cancelled. He subsequently pleaded guilty in 2000 to performing a nursing service contrary to the *Nursing Act*. He was fined, ordered to pay costs, but no conviction was recorded.

[18] On application for admission to the Solicitors' Board, the applicant answered "No" to the question "Prior to the date of this statement have you been convicted of any criminal offence whether in Queensland or elsewhere?" That answer was technically correct. A former work colleague of the applicant sent an objection to the Solicitors' Board in respect of the applicant's admission, because of his lack of professionalism while a registered nurse. The Board then made further enquiries and ascertained the details of these incidents in the applicant's nursing career. The Board had the applicant independently psychiatrically examined. The psychiatrist identified features of the applicant's psychiatric condition that reduced the applicant's fitness to practise and suggested that he complete a course of psychotherapy. The applicant had been working as a law clerk for over 12 months prior to seeking admission and his admission was supported by those with whom he was working. The applicant had undergone a course of counselling with his psychiatrist.

[19] In the Court of Appeal, the Chief Justice noted that the aggregation of the series of incidents between 1991 and 1999 showed that the applicant lacked appropriate professional judgment and discretion.[23] The Chief Justice stated:[24]

> "Of considerable additional concern, is the feature that the applicant did not initially disclose these significant matters to the Board when making his application. He certainly should have been aware of the seriousness of the Board's approach to such applications, and the seriousness of the court's ultimate determination of them. An applicant for admission is obliged to approach the Board, and later the court, with the utmost good faith and candour, comprehensively disclosing any matter which may reasonably be taken to bear on an assessment of fitness for practice.
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> … By taking a strong line in a case like this, the court must take the opportunity to emphasize the primacy of the pro-active obligation of an applicant to make candid, comprehensive disclosure. If it emerges an applicant has not, in some significant respect, been frank with the court, then the application should ordinarily be rendered doubtful at least."

[20] The applicant's application for admission was dismissed, although the court left open the possibility that the applicant may be in a position to prove his fitness for admission after further psychiatric treatment and the passing of time.[25]

[21] *Re H* is a good example of how the lack of relevant disclosure by an applicant for admission affected the court's view of the applicant's past conduct. The application was able to be disposed of by placing weight on the applicant's lack of candour about his relevant past conduct, rather than resting the decision solely on what an analysis of the past conduct revealed about the applicant's character. A similar approach was taken in *Thomas v Legal Practitioners Admissions Board*[26] where the appellant had appealed against the decision of the Board to oppose his application for consent to enter into articles of clerkship. The appellant had disclosed that he had pleaded guilty to a "debt charge" in 1995/96 in the Magistrates Court, at which time no conviction was recorded and no probation or community service was ordered. What the appellant had failed to disclose was that he had been charged on nine counts of dishonestly obtaining property over a period of almost three months and was fined $2,500 with no convictions being recorded. Although fraudulent misappropriation was indicative of unsuitability to practise as a lawyer, the Chief Justice acknowledged that the appellant had been on the way to demonstrating

fitness from his subsequent conduct, but found that the manner of the appellant's disclosure of the criminal offences justified the Board's decision, and stated:[27]

> "Although the criminal offences were committed some years ago, the manner of the applicant's disclosure of them constitutes very recent evidence of his unsuitability to practise, for want of appreciation of the need to arm the Board with all the information relevant to the performance of its publicly important role."

[22] How lack of candour can become the focus of a proceeding concerning the fitness of a legal practitioner to practise, rather than the underlying conduct of the legal practitioner that provoked the inquiry into the practitioner's fitness, is illustrated by the decision in *A Solicitor v Council of the Law Society of New South Wales*.[28] The appellant was admitted as a solicitor in 1987. He suffered a number of personal setbacks in 1997 and suffered depression. He was in a relationship with a woman who had four children. He committed four offences of indecent assault on two of his partner's daughters. The offences occurred in April – May 1997. They involved removing the children's clothing, rubbing on the back, buttocks and stomach, and on one occasion touching a victim on the outside of the vagina. The children were aged 12 years and 10 years. The appellant admitted the offences, pleaded guilty and was sentenced to three months' imprisonment in February 1998. In May 1998 his appeal to the District Court was allowed, the sentence was quashed, and in lieu he entered into a recognisance to be of good behaviour for three years. In April 2000 the appellant married his partner who supported him at all stages of the proceedings. The appellant had undergone psychiatric counselling and treatment.

[23] In July 1998 the Law Society resolved to institute disciplinary proceedings against the appellant based on his four convictions for indecent assault. Those proceedings were discontinued in October 2000, because of a procedural deficiency. In May 2000, one of the victims of the 1997 offences made further allegations of a similar nature against the appellant. The appellant denied those allegations and the charges were heard in October 2000. He was convicted on 7 November 2000 and sentenced to imprisonment for two years. The appeal in April 2001 was successful and the convictions were quashed.

[24] When the disciplinary proceedings were discontinued in October 2000, the Law Society wrote to the appellant referring to the four convictions for the 1997 offences, indicating that it was considering further action and inviting submissions.

After the appellant had been convicted of the new charges and sentenced, the appellant wrote to the Law Society endeavouring to convince it not to take action based on the 1997 conduct, but the appellant did not mention the 2000 convictions and sentence. The Law Society commenced proceedings in the Supreme Court in May 2001 alleging that the 1997 conduct was professional misconduct and seeking the removal of the appellant's name from the roll of legal practitioners. It was not until August 2001 that the appellant disclosed the 2000 charges and the successful appeal. The Law Society then added a further charge of professional misconduct based on the appellant's failure to disclose the 2000 convictions to his professional association, notwithstanding that they were ultimately set aside. The Court of Appeal made declarations that the appellant was guilty of professional misconduct, based on both the convictions for the 1997 offences and the failure to disclose that he had been convicted on 7 November 2000 of further charges of aggravated indecent assault on a person under the age of 16 years, when the appellant was aware that the Law Society was actively considering whether disciplinary action should be taken against the appellant in respect of previous similar convictions. The Court of Appeal therefore found that the appellant was not a fit and proper person to be a legal practitioner and removed his name from the roll. The appellant appealed to the High Court.

[25] The High Court agreed with the Court of Appeal's finding that it was professional misconduct for the appellant not to disclose the 2000 convictions in the correspondence with the Law Society in relation to his professional status.[29] The Court found that the appellant's professional obligations to the Law Society required him to disclose facts that were material to the Law Society's decision as to what action to take against him, and stated:[30]

> "Frankness required the disclosure of the convictions and sentence, even if he regarded them as unjust, and hoped (or even expected) that they would be overturned on appeal. Furthermore, the appellant's duty of candour in his dealings with the Law Society was a professional duty, and its breach was professional misconduct."

[26] The High Court did not conclude, however, that the 1997 offences should be characterised as professional misconduct. Although the conduct involved a breach of trust on the part of the appellant in respect of his partner's children, the nature of the trust, and the circumstances of the breach, were remote from anything to do with

professional practice and did not justify the characterisation of the appellant's personal misconduct as professional misconduct.[31] The High Court took into account the evidence as to the appellant's character and rehabilitation, the exceptional circumstances in which the 1997 offences were committed and the appellant's efforts to obtain professional advice and assistance and concluded that, on the basis of the facts of the 1997 conduct and the finding of professional misconduct in relation to the appellant's lack of candour in correspondence with the Law Society about the 2000 convictions, it would have been appropriate for the Court of Appeal to have ordered the appellant's suspension from practice, but that such an order would not have extended past the time of the High Court's judgment.[32] As the appellant had not renewed his practising certificate since the 1998-1999 year, the decision of the High Court not to impose any further sanction meant that the appellant had been unable to practise for about five years.

Conclusion

[27] A person's conduct may reveal the character, or aspects of the character, of the person. When an applicant for admission discloses past conduct, there are two sources of information about the applicant's character: the past conduct itself, but also the extent and manner of the disclosure about the past conduct.

[28] The approach in *Re Davis*[33] of using the applicant's candour (or lack of candour) about relevant past conduct as a guide to the applicant's present character continues to apply, as shown in recent decisions in which candour about past conduct by the applicant for admission as a legal practitioner was an issue.[34]

[29] Candour about past conduct gives the admitting body the opportunity to consider carefully the relevance of the past conduct to the applicant's character for the purpose of admission. Candour gives the applicant a better chance of having past misdeeds not treated as an impediment to admission than if there were lack of candour.[35] What a lack of candour about relevant past conduct reveals about the applicant's character allows the court to reject the application on that basis, without dwelling on the past conduct. In substance, however, as decisions such as *Re H*[36] show, reliance on lack of candour to refuse an application for admission is used as shorthand way of concluding that the past conduct remains of concern or that the

requirement for admission that the applicant be of good character is not satisfied at the time of the application for admission. As the litigation involving Mr Del Castillo shows,[37] lack of candour about past conduct will not in an appropriate case preclude the detailed examination of that past conduct, when that is what is required for the assessment of the character of the applicant.

[30] There is an emphasis in the cases on the need for an applicant for admission to disclose past relevant conduct. As that candour is directly relevant to testing the applicant's character, it does not follow that the emphasis on candour has overshadowed the assessment of the applicant's character by reference to past misconduct.

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1 s 31(1) *Legal Profession Act* 2007 (Qld)

2 s 9(1)(a) *Legal Profession Act* 2007 (Qld)

3 ss 9 and 31(2) *Legal Profession Act* 2007 (Qld)

4 Some examples of these types of obvious conduct are *Barristers' Board v Khan* [2001] QCA 92, *Re Bell* [2005] QCA 151, *Frugtniet v Board of Examiners* [2005] VSC 332, *Re Deo* [2005] NTSC 58, and *Re Liveri* [2006] QCA 152.

5 *S v Legal Practice Board of Western Australia* (2004) 29 WAR 173, 184 – 185 [47]

6 *Jackson (formerly Subramaniam) v Legal Practitioners Admission Board* [2007] NSWCA 289

7 *S v Legal Practice Board of Western Australia* (2004) 29 WAR 173, 184-185 [47]

8 *Re Bell* [2005] QCA 151 at [15]

9 (1947) 75 CLR 409

10 (1947) 75 CLR 409, 416-417

11 (1947) 75 CLR 409, 420. Refer to the discussion on the concept of good fame and character in *Clearihan v Registrar of Motor Vehicle Dealers in the Australian Capital Territory* (1994) 117 FLR 455, 459 and *Prothonotary of the Supreme Court of NSW v P* [2003] NSWCA 320 at [17].

12 (1947) 75 CLR 409, 426

13 (1947) 75 CLR 409, 426

14 (1947) 75 CLR 409

15 *Re Evatt* (1987) 92 FLR 381, 383, 384

16 [2001] NSWCA 75

17 [2001] NSWCA 75 at [24] per Heydon JA

18 *Re Del Castillo* (1998) 136 ACTR 1, 8 [35]

19 *Re Del Castillo* (1999) 89 FCR 120

20 [2001] NSWCA 75 at [24]

21 *The Prothonotary of the Supreme Court of New South Wales v Del Castillo* [2001] NSWCA 75 at [57], [61], [71], [82], [99]

22 [2002] QCA 129

23 [2002] QCA 129 at [25]

24 [2002] QCA 129 at [26] – [27]

25 [2002] QCA 129 at [30], [38]

26 [2005] 1 Qd R 331

27 [2005] 1 Qd R 331, 335

28 (2004) 216 CLR 253

29 (2004) 216 CLR 253, 272 [30]

[30] (2004) 216 CLR 253, 272-273 [30]

[31] (2004) 216 CLR 253, 274 [34]

[32] (2004) 216 CLR 253, 275 [37]-[40]

[33] (1947) 75 CLR 409

[34] *Re H* [2002] QCA 129, *S v Legal Practice Board of Western Australia* (2004) 29 WAR 173, *Re Bell* [2005] QCA 151, *Frugtniet v Board of Examiners* [2005] VSC 332, and *Re Deo* [2005] NTSC 58

[35] *Re H* [2002] QCA 129 at [27] and [36], *Thomas v Legal Practitioners Admissions Board* [2005] 1 Qd R 331, 335

[36] [2002] QCA 129

[37] *Re Del Castillo* (1998) 136 ACTR 1, *Re Del Castillo* (1999) 89 FCR 120 and *The Prothonotary of the Supreme Court of New South Wales v Del Castillo* [2001] NSWCA 75