

## **Safe from whom? Criminal conviction, fitness to teach and the public interest.**

Kristen Wischer  
Independent Education Union (Victoria Tasmania)  
120 Clarendon St, South Melbourne  
[kwischer@ieuvictas.org.au](mailto:kwischer@ieuvictas.org.au)

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In December 2015 the Victorian Civil and Administrative Tribunal (VCAT) handed down a decision overturning the Victorian Institute of Teaching's decision to refuse an application for registration on the basis that it would be contrary to the public interest to allow the applicant teacher to be registered.

The refusal was based on the applicant having a serious criminal conviction. This paper will look at the facts of the case, the process by which the VIT arrived at its decision to refuse registration and the reasons for the VCAT decision. More broadly, the paper will consider questions raised by the case:

- How is the public interest defined?
- On what basis can it be determined that an applicant for registration to teach is not fit to teach due to past criminal conduct?
- Where fitness to teach is established, how is the abstract notion of protecting the public interest considered in light of a finding of guilt or criminal conviction?
- How are the competing interests of protecting the reputation of the profession and the safety of the community balanced against the benefits of rehabilitation?
- Do the provisions of the *Education Training and Reform Act 2006* provide appropriate and fairly balanced protections for the teaching profession and community and also the individual seeking registration?
- What safeguards are appropriate when registration is granted?

The case of *Salter v Victorian Institute of Teaching* [2015] VCAT 2045 provides valuable insights into the question 'Safe from whom?' when evaluating the implications for students, parents, staff and the community of permitting a teacher with a criminal conviction to teach.

### **The Institute's decision**

The Victorian Institute of Teaching (the Institute) is established under the *Education Training and Reform Act (Vic) 2006* (the Act). Its purpose amongst other objectives, is to make provision for '*the recognition and regulation of the teaching profession and the maintenance of standards of professional practice for that profession.*'

Under this auspice, the Institute is the regulatory body that determines whether a first time applicant for registration will be granted registration. In addition, the Institute also maintains provision of ongoing registration and can investigate, discipline and impose conditions on registration in cases where fitness to teach has been questioned either as a result of

misconduct or ill health. In the most serious circumstances, the Institute has the power to cancel registration.

This paper focuses on initial registration, however, all of the functions of the Institute around registration, are based on ensuring only those considered fit and proper- and thereby 'safe' to educate Victorian students, are permitted to teach.

In considering first time registration, the Institute may grant registration if the applicant has demonstrated the relevant criteria of having the appropriate qualifications and produced evidence of suitability to teach and achieved the standards of professional practice required to teach. Part 2.6.9 provides that the Institute may register an applicant if the criteria are met and there are no grounds under which the Institute may refuse registration.

The grounds for refusal are

- (a) that the character of the applicant is such that it would not be in the public interest to allow the applicant to teach in a school
- (b) that the applicant has been convicted or found guilty of a sexual offence or an indictable offence in Victoria or an equivalent offence in another jurisdiction
- (c) that the applicant has been convicted or found guilty of an offence where the ability of the applicant to teach in a school is likely to be affected because of the conviction or finding of guilt **or where it is not in the public interest to allow the applicant to teach in a school because of the conviction or finding of guilt**

The Applicant sought first time registration as a teacher following completion of her degree in 2014. She graduated with excellent results and received glowing reports from her placement supervisors, indeed her main supervisor stated she had 'very advanced skill levels for a teacher who had not graduated and that she was more advanced as a teacher than most graduate teachers'. She was a mature age student, being 37 when she first sought registration in September 2014. On her application form to the Institute, the Applicant included, as required by the form an acknowledgement of a criminal conviction. She provided the basic detail of the conviction in a statutory declaration.

The Institute sought further details of the conviction, including a request for a copy of the criminal record check. This took the Applicant some time- it needed to be requested from Spain where the offending occurred. It also needed to be translated into English. This revealed the full extent of the offence- the applicant had been found guilty of trafficking 5 kilograms of cocaine and sentenced to 9 years jail in 2008 with the year waiting for trial counting towards the sentence. The Applicant was also fined €190,293. Further information provided by the Applicant set out that she had been caught at Barcelona airport, en route from Rio to London with cocaine that had been arranged to be trafficked by a sophisticated drug ring operating out of Uganda, where the Applicant had been living. The Applicant pleaded guilty and served 4 years of her sentence in Spanish jails before being released for good behaviour and her fine was also waived.

The Applicant returned to Australia in 2011 and moved back to the country town of Beechworth, to be close to family and where she grew up. She determined after a period of recouping her health, to study to become a teacher. She had spent her career to this point as an English language teacher, mostly in China. The Applicant was also multi-lingual- being fluent in Indonesian, Chinese, French and Spanish.

Once the Institute was fully aware of the nature of the conviction, it advised the applicant by letter that it was considering not granting registration for all of the reasons set out above. It invited the applicant to provide further information that may support registration. The Applicant in the course of the next months provided a detailed statement explaining how the offending occurred and what she had done to rehabilitate herself since. This included adopting a completely healthy lifestyle, being in a stable relationship and working in her local community. Most importantly, the Applicant provided in total 20 references from friends, colleagues, medical professionals and the teachers with whom she done her placement.

All spoke of a woman who was dedicated to becoming a teacher, showed great aptitude for it and who had moved with insight and commitment away from the circumstances that lead to her offending. The documentation provided by the Applicant painted a picture of a person who was eminently qualified and suited to teaching. She demonstrated that she had a great deal to offer the profession and students. The extent of her rehabilitation was also clear. She stated that she would be able to cope with scrutiny if asked about her past and believed with supportive employers that any risk could be managed. This was supported, in writing, by two employers who had offered her work before it became apparent that registration would not be granted and by the teachers with whom the Applicant had done her placement.

In addition, at the request of the Institute, the Applicant submitted to an independent psychiatric examination. The medico-legal assessment found the ‘the offending is characterised as an error of judgement of significant proportion rather than a defect of character. The psychiatric assessment was that there was no more than a negligible risk of reoffending and *‘there is no foreseeable or imminent risk to the community or specifically children under her care, supervision and authority.’*

After all of the above information was received by the Institute, a final internal decision was made with respect to whether registration would be granted. The Institute determined that the applicant had shown that she was fit to teach and accepted that the Applicant’s ability to teach in a school was not likely to be affected because of the conviction or finding of guilt. However, it found on the second limb of s2.6.9(2)(c) that it would not be in the public interest to allow the applicant to teach in a school because of the conviction or finding of guilt. Registration was denied.

The decision was conveyed by letter dated 14 July 2015 and set out the facts considered by the Institute. It did not however, elaborate on any determination about the public interest, save to state *‘the Council determined to refuse to grant registration... on the basis that the public interest in protecting the Victorian community, maintaining proper standards of conduct for the profession and protecting the reputation and standing of the profession outweighed the interests of permitting you to practise as a registered teacher.’*

Unlike situations where the Institute can propose to impose sanctions or restrictions on a practicing teacher’s registration, there is no opportunity for a formal or informal hearing for a first time applicant. There is therefore no formal written decision generated where the reasoning behind the decision is elaborated. The only course for review of this type of decision was to go to VCAT.

## **The VCAT decision**

The IEU represented the Applicant at an administrative review at VCAT. The decision was reviewed de novo by a regular panel member and a specialist sessional member who was a registered teacher. This meant the quality of the decision making was not reviewed, but rather that the VCAT panel considered the request for registration afresh on the facts. Under cross examination, the Applicant provided further details of the circumstances surrounding the offending and conceded that her behaviour and decisions were inexcusable and involved a course of action over a period of about six weeks that extended beyond the criminal activity for which the Applicant was convicted. Nevertheless, the picture of a young woman going 'off the rails' for a brief but terrible period and then reclaiming her life remained consistent throughout the hearing.

The question of managing risk if the applicant was working in a school was also addressed by the evidence of the teachers with whom the applicant did her placement. The Applicant herself spoke eloquently of what she would do if confronted by a concerned parent or curious student. She explained that her experience, especially while in jail, had brought home to her the absolutely corrupting effect of drug use and involvement, especially for women. In the course of the hearing, it would be fair to say a further public interest was identified- the capacity for the Applicant to be an advocate against drug use.

## **Fitness to Teach**

A significant part of the VCAT decision entailed referring to precedent as to how to assess fitness to teach and then examining the Applicant's evidence to assess whether she was indeed fit to teach.

While an assessment of fitness to teach is not directly on point with an assessment of the public interest, there is however, overlap between the two assessments. A favourable assessment of fitness is likely to help identify the broader public interest to be supported.

Case law provides guidelines that were relied upon by both parties at the hearing. In *McBride v Walton* [1994] NSWCA 199, a checklist of considerations with respect to criminal conviction and fitness to practice were set out which have been adopted in a number of cases and were utilised in the Salter case:

- Whether the misconduct can be satisfactorily explained as an error of judgement rather than a defect of character
- The intrinsic seriousness of the misconduct and its relevance to practicing
- Whether the misconduct should be viewed as an isolated episode or whether it is characteristic of the practitioner
- Any motivation which may have given rise to the proven episode of misconduct
- Underlined qualities of character shown by other acts of misconduct and
- Whether the practitioner's conduct after the proven episode of misconduct demonstrates that the public and professional confidence may be reposed in him (or her) to uphold and observe the high standards required of a medical practitioner

In *Ziems v Prothonotary of Supreme Court of New South Wales* (1957) 97 CLR 279 it is established that the conviction alone is not conclusive of the final issue. It is necessary to

look at all the facts surrounding the conviction and what has transpired since conviction. Evidence of rehabilitation and reclaiming of good character are also to be considered.

*‘It may be after sufficient time has passed the applicant can satisfy the Tribunal that his/her purgation is complete, repentance is real and determination to act uprightly and honourable so secure that he or she may be fairly entrusted’*

The paragraph goes on to say that the Court has a duty to itself and the rest of the profession, its suitors and to the whole community to be careful not to accredit any person as worthy of public confidence who cannot satisfactorily establish his/her right to that credential. This connects closely to the public interest of protecting the reputation of the profession discussed above.

The VCAT panel referred in its decision to each of the criteria set out in *McBride v Walton* in light of the evidence before the Tribunal with respect to the character of the Applicant, her efforts to rehabilitate herself and any future risks.

Set against the seriousness of the crime and the lack of insight and judgement that led to engaging in criminal activity was a wealth of evidence to show insight, remorse, reform and most importantly no indication that the behaviour would be repeated in the future. This led in my opinion, to a correct determination that the Applicant was fit to teach.

### **The Public Interest**

VCAT handed down a decision on 24 December 2015 providing that the Applicant should be registered with the condition that she inform any prospective or actual employer of what had occurred. The decision stated with respect to the public interest *‘We accept that the applicant would be a great asset as a teacher in country Victoria with her multi-lingual skills. It would be against the public interest to deprive the people of the Hume area of Victoria of their children being able to be taught by the Applicant.’*

Again, while very little was written in the VCAT decision about the public interest, it nevertheless must have been considered. The following part of this paper discusses some of the possible methods that may be used by decision makers in determining the public interest.

### **The identification and weighing of interests**

Clearly, every case will depend on its facts and there will always be arguments for both sides of the equation – on first blush, I imagine many people, and particularly parents of school age children would react with horror if told their child was to be taught by a convicted drug trafficker who had spent time in jail. The reaction is completely understandable.

Statutory decision makers are, however, required by nature of their roles to apply greater rigour to the decision making process. They are also able to command extensive information upon which to base their decision. In this case, the Applicant provided incredibly extensive and candid information about her life, health, experience and rehabilitation.

Where legislation stipulates that the public interest must be considered in making a decision, it is important to identify and then weigh up what the public interest **is** and then what is **in** the public interest. Chris Wheeler’s article *‘The Public Interest Revisited- We know it’s important*

*but do we know what it means?* (AIAL Forum No. 72) provides very helpful analysis for assessing the public interest for the purposes of administrative decision making. Wheeler recommends that where legislation confers the decision making authority with the requirement to consider the public interest in the decision making process, the first place to look to determine what those interests are is the conferring legislation. In this case the ‘maintenance of standards for the practice of the profession’ is identified by the Act.

Clearly, this is broad and leads to a series of further questions about what those standards are. Wheeler also recommends going to secondary sources, such as policy. The Institute elaborates and promotes the objectives of the Act via a range of means, the chief being through the standards contained in *The Victorian Teaching Profession Code of Conduct and Ethics* that set out the expectations and professional standards for a teacher. These documents may also be useful in determining what the public interest is with respect to what sort of person is deemed to be acceptable to enter the profession.

There also needs to be consideration of interests that sit outside of those identified in the Act. The interests of the broader community must also be identified and given weight in the decision making process.

In essence, the Applicant’s quest for registration must be seen as a balancing of interests both specific to the profession of teaching and of broader community interests.

### **So what in these circumstances is the public interest?**

Clearly, the profession should be protected from the risk of allowing completely unsuitable individuals to practice. Not only the profession should be protected but also the broader community and in education, the school and student community, as was identified in the Institute’s decision letter. It would be difficult to argue that those with a criminal conviction connected to child abuse should be allowed to teach and indeed the Act prevents this from occurring. It would also be difficult to argue that a person with a serious conviction who has not shown genuine insight, remorse and undertaken real rehabilitation would be suitable to teach young people.

In this case, the matter was set on a knife edge of distinction- a fully rehabilitated, insightful, talented graduate with an undeniably serious conviction was to be either granted or denied entry to her chosen profession based on an assessment of what was in the public interest and what was not. In this case, it is not difficult to identify a number of public interests relevant to the purposes of the Act and to the school community and the broader community.

It is in the public interest to:

- have qualified suitable teachers
- encourage language teachers to commit to teaching in rural Victoria
- ensure children have positive role models in their teachers
- ensure children and their school communities are safe from exposure to drug use and activity
- make it clear that drug use and the criminal activity that surrounds drug use is not acceptable or desirable in any way
- protect the reputation of the profession
- protect the community

- support the rehabilitation of people with criminal convictions in their past

I am sure other interests could be identified. The task then is to give appropriate weight to each interest and to provide a balanced approach to the decision making outcome. The wording of the Act also requires consideration of what is not in the public interest. Allowing a person who poses an unacceptable risk to young people to teach is not in the public interest.

Wheeler's process suggests a structure for identifying the public interest- identify the relevant population, identify the relevant public interests applicable to the decision at hand and then assess and weigh each interest including conflicting or competing public interests.

The decision maker should avoid taking into account interests that are private, personal, which gratify curiosity, which reflect personal preferences, parochial interests and partisan political interests.

### **Potential conflicts**

While there was no evidence to indicate bias in this case, the Institute is the peak regulatory body of the profession and the gatekeeper to the profession. As such, the Institute has reputational interests of its own. There's an inherent risk in making a decision that may expose the decision maker itself to public criticism for not upholding the standards of the profession adequately.

When weighing competing interests sometimes it is appropriate to prioritise interests. Where there is to be a loser- look at how that individual will be affected but also how the community at large will be affected. This was particularly relevant in this case. For the individual- there was the desire to pursue her chosen profession, to earn income from it, to contribute her skills and talents to students and to continue on the path of being a fully contributing individual in society. For the community it is primarily the safety of children and protection from potential risk or poor models of behaviour. The reputation of the profession is closely linked to this- but contains something more.

I consider one of the chief underlying tensions in this case was between the assessment of the Applicant as an individual who sought to teach and the more difficult to define and ascertain notion of protecting the reputation of the profession. While it was not given particular attention in the case, it was apparent that employers in particular, were very alive to the risks of media attention. Of course, the Applicant is at greatest risk of harm from media attention, but the reputation of a school is also precious and to be guarded. It was very clear that public standing of teachers and the schools they teach in was present in the minds of employers.

Where decisions are being made in this grey area, it is particularly important for public officials to be able to demonstrate that their decision was made on reasonable grounds, including which public interest issues were considered and the reasons why a particular interest was given precedence.

I would advocate for a clearer articulation of the process for determining the public interest, which could be achieved by the Institute adopting a published policy and/or guidelines for making that assessment.

### **Access to justice and anonymity**

In my view one of the procedural shortcomings of the Act, is that the above process occurs behind closed doors and does not require elaboration of the process by which a determination of what is or is not in the public interest to be provided to the applicant beyond a decision letter. The advantage of the VCAT hearing was that evidence could be produced and tested in open court and this formed the basis, along with consideration of precedent, of the decision.

However, this case illustrated a further issue with respect to the privacy and identity of the Applicant.

The Act does not provide first time applicants with the opportunity of internal review and therefore does not afford anonymity that can be granted to teachers subject to internal formal hearings. Review of a decision to deny a first time applicant registration is only possible via VCAT. It is only in exceptional circumstances that identity of an applicant will be suppressed under the *Open Courts Act 2013*. In this case, where the identity of third parties was not required to be protected, there proved to be no ground for the identity of the Applicant to be suppressed or redacted. Public notoriety, despite and in fact in part because of the VCAT decision formed a risk that the Applicant had to be willing to face. The publication of the VCAT decision may mean it will be difficult for the Applicant to find work as a teacher despite her success at VCAT. In fact, her case some 6 months after the decision, was aired in print and radio. It returns us to the question of whether the public interest as determined by VCAT- to allow a promising graduate to teach- was actually capable of being served. Perhaps with the elapse of time, this will become possible.

One solution for the problem of public identification in order to be registered in the circumstances of criminal conviction would be for the Act to be amended to allow for an internal hearing to be conducted. The Institute has far greater capacity to determine whether to grant anonymity than a court or tribunal governed by the *Open Courts Act*.

### **Safe from whom**

Finally, I consider that safeguards around granting and maintaining registration in the Act are otherwise generally appropriate. The Act provides extensive mechanisms to protect and ensure the standards of the profession and thereby the interests of the community. Teachers are subject to criminal checks, ongoing registration is dependent on satisfying fitness to teach and maintaining the standards of the profession. Conditions can be applied to registration- in this case, the requirement of disclosure of the conviction to any future employer. The Act also provides for health assessments and a condition of registration can be to submit to regular medical treatment and or further education. The Applicant offered and would have happily accepted a shorter initial period of registration and to submit to extra supervision as a condition of registration. These would all have been appropriate measures that would have balanced the competing interests of this case.

This case illustrates the difficulty in determining what is required to ensure the safety and interests of the education community when faced with competing public interests. Our legal system, policy makers and public servants are all essential to ensuring people entering and remaining in the teaching profession may be trusted by the community. To do so, however, they must be guided and informed by that elusive beast – the public interest.