The Commissioner of Police for the State of South Australia v Steven Dodd **[2023] SALC 51**

LICENSING COURT OF SOUTH AUSTRALIA

THE COMMISSIONER OF POLICE FOR THE STATE OF SOUTH AUSTRALIA

v

DODD, Steven

JURISDICTION:	Application for a Review of or an Appeal from a decision of the Commissioner
CASE NO/S:	LC-23-00014
HEARING DATE:	18 May 2023 Written submissions 4 May 2023, 9 May 2023
JUDGMENT OF:	His Honour Judge BP Gilchrist
DELIVERED ON:	21 June 2023

The Commissioner of Police for the State of South Australia v Daniel Fontana [2023] SALC 30
Midwinter v Commissioner for Consumer Affairs [2006] SADC 93
Benjamin Aspey [2022] SALC 82
Richard Modistach [2022] SALC 93
The Commissioner of Police for the State of South Australia v Beau Amodeo [2023] SALC 50
A Solicitor v Council of the Law Society of New South Wales [2004] HCA 1; (2004) 216 CLR 253
R v Jongsma [2004] VSCA 218
R v Fellows [1997] 2 All ER 548
Re Dr Stephanopoulos [2006] MPBV 12
Medical Board of Australia v Black [2016] VCAT 892
Legal Practitioners Conduct Board v Power [2013] SASCFC 118
Ex parte Tziniolis; Re Medical Practitioners Act (1966) 67 SR (NSW) 448

REPRESENTATION:

Counsel:
Applicant: Acting Sergeant M Osterstock
Respondent: No appearance
Intervenor: Ms C Harrison

Solicitors:
Applicant: Commissioner of Police
Respondent:
Intervenor: Crown Solicitor's Office

1 This is an application for review made by the Commissioner for Police (the Police Commissioner) in connection with a decision by a delegate of the Liquor and Gambling Commissioner (the delegate) to grant the respondent, Steven Dodd, approval as a responsible person for the purposes of the *Liquor Licensing Act 1997.* The Police Commissioner contends that the approval should not have been granted and that this Court should make an order rejecting Mr Dodd's application for approval.

2 Underpinning the Police Commissioner's concern is Mr Dodd's conviction in 2010 of possessing child pornography and his finding of guilt, without conviction, of failing to comply with his reporting conditions in 2014.

3 Pursuant to s 97(1) of the Act a business conducted under a liquor licence must, whilst open to the public, be personally supervised and managed by a responsible person. That person can be either a director of the licensee or a person approved as a responsible person. As was observed by this Court in *The Commissioner of Police for the State of South Australia v Daniel Fontana*:[1]

> It is an important position. The person is "responsible" for the business and is obliged to ensure that it is properly supervised and managed.[2]

4 The combined effects of s 97 and s 55 of the Act are such that to be approved as a responsible person the person must be found to be a fit and proper person. Section 55(1) of the Act gives a licensing authority certain instructions regarding making that determination. It provides:

> In deciding whether a person is a fit and proper person for a particular purpose under this Act, a licensing authority must take into consideration—
>
> (a) the reputation, honesty and integrity (including the creditworthiness) of the person; and
>
> (b) the reputation, honesty and integrity of people with whom the person associates; and
>
> …
>
> (d) any other factor relevant to the particular purpose to which the decision relates, <u>including any relevant offence of which the person has been convicted or found guilty</u>. (Emphasis added mine)

[1] [2023] SALC 30.
[2] Ibid at [2].

5 In light of this it is necessary to canvass in some detail the circumstances regarding Mr Dodd's offending.

6 In early 2008 police in New South Wales, which is where Mr Dodd then resided, executed a search warrant on Mr Dodd's premises and a number of electronic devices were seized. A subsequent search of these devices revealed that Mr Dodd possessed multiple photographs and videos of children between the ages of 2 and 15 involved in a range of sexual activities with adults including oral, anal, vaginal and penile sex as well as photographs of children in bondage and nude female children in provocative poses. In 2010 Mr Dodd was sentenced to a period of 13 months imprisonment for possession of child pornography and was directed to regularly report to the police upon his release. Mr Dodd claimed, that in respect of the offence of failing to comply with his reporting conditions in 2014, the fact that he was discharged without conviction revealed that it was a technical breach. He said that it was occasioned because the relevant police station was experiencing operational and procedural inefficiencies and that he had in fact made reasonable efforts to comply with his reporting obligations.

7 Mr Dodd works part time in a cellar door at a winery and he sought approval as a responsible person in connection with that role.

The proceedings before the delegate

8 Upon the lodgement of Mr Dodd's application for approval, the Police Commissioner filed a notice of intervention under s 28AA of the Act. Section 28AA(2)(a) expressly empowers the Police Commissioner to intervene in connection with the issue of a person's fitness and propriety for the purposes of the Act. As a result Mr Dodd was invited by the delegate to make written submissions in support of his application, which he did so by email dated 7 November 2022.

9 In his submission Mr Dodd said that he was deeply ashamed of his offending and had been burdened with regret and remorse for nearly 14 years and that it is something that he was always mindful of. He said that he understood the severity and graphic nature of the offending. He stated that it occurred because of bad choices that he made when dealing with a relationship breakdown at the time, and his own depression and anxiety. He said that instead of seeking professional help he chose to indulge in an addiction which he took too far and ultimately hurt many people around him me and ruined his career in the Australian Defence Force. He said that since then his attitude towards life and his behaviours, conduct and morals, had strengthened and through ongoing support he felt that he had become reformed and that he was not the same person as he was when he committed the offence.

10 Mr Dodd supplied character references from people he claimed were aware of his offending. They attest to him having admirable qualities.

11 Mr Dodd also made the point that his job at the cellar door of a winery was such that he would have very little contact with children and what contact he did have was likely to be when children were in the company of their parents or guardians.

12 The delegate stated that she was provided with guidance as to the issue of "fitness and propriety" through the judgment of Judge Lovell (as he then was) in *Midwinter v Commissioner for Consumer Affairs*.[3]

13 The delegate took from that case that in determining fitness and propriety she needed to:

> Consider the activities in which the applicant is or will be engaged and the ends to be served by those activities. What is relevant for consideration depends on the statutory context and the qualifications directly relevant to the particular vocation.
>
> If the applicant has been involved in breaches of the law and/or has a propensity towards offending against the law such matters must be regarded as of importance.
>
> The nature and seriousness of previous convictions will necessarily vary in their importance bearing in mind the significance that those convictions must necessarily have in relation to the type of work envisaged by the particular licence sought. In some cases, previous criminal convictions may be crucial to the decision process.

14 The delegate stated that the decision made it clear that the assessment of whether a person is fit and proper needs to be made in light of the role they are seeking to occupy rather than just a general character assessment. She noted that Mr Dodd was seeking approval as a responsible person to supervise and manage licensed premises such that his offence history therefore needed to be considered from that perspective. She noted that generally the core responsibilities of a responsible person under the Act includes ensuring the responsible service of alcohol and supervising and managing patron behaviour, sometimes in high risk situations where patrons may be intoxicated. She accepted that from this perspective a licensing authority would exercise caution in approving persons with a propensity to violence, issues with alcohol consumption, and persons with a history of illicit drug use. She then observed that the connection with child sex offending was not quite as clear, given that the majority of customers at licensed venues are adults, and where minors do attend, they are generally in the company of a responsible adult.

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[3] [2006] SADC 93.

15 The delegate noted that the police relied upon two decisions of this Court being *Aspey*[4] and *Modistach*[5] where, in the context of sexual offending involving a child, this Court ordered disqualification, albeit that in *Aspey* it granted liberty to apply. The delegate then wrote:

> Whilst the criminal history of Mr Dodd is of a similar nature, in that involves child sexual offending, I am of the opinion that it does not reach the same threshold as these two matters that were recently before the Court. Whilst the offending is still of a very serious nature it is not at the same level as persistent sexual abuse or unlawful sexual intercourse. This is reflected by the sentence imposed on Mr Dodd, being an imprisonment sentence of 13 months. This was also an isolated offence. There was no offending of this nature prior and there has been no offending since, there is no evidence of a pattern of this type of offending. Apart from the failure to comply with reporting obligations, in which the Court decided to record with no conviction, indicating the Court considered the offending on the lower end of the scale, the applicant has no other offence history.

16 The delegate thought it significant that in *Aspey* the Court granted liberty to apply. She reasoned that this reflected the Court's view that although the conduct was considered repugnant, the Court was of the opinion that there may be an opportunity for Mr Aspey to regain his approval in the future, presumably once sufficient time has passed. She noted that in this case 14 years have passed since the offending (and 12 since his conviction). She stated that in her opinion 14 years was a sufficient passage of time to be satisfied that Mr Dodd has indeed turned his life around and the risk he poses to the public has significantly lessened. She accepted that Mr Dodd had shown genuine remorse and that he had an understanding of his actions. She thought that the impact it has had on his everyday life for the past 12 years, further strengthened her view that he had turned his life around and was no longer the same person he was when he committed the offence.

Submissions on review

17 The Police Commissioner's submissions were the same as those made in *The Commissioner of Police for the State of South Australia v Beau Amodeo* (*Amodeo*).[6] He contends that this type of offending is such that a convicted sexual offender could never satisfy the criteria necessary for approval under the Act.

18 The Liquor and Gambling Commissioner's submissions were also the same as those made in *Amodeo*. The thrust of them is that fitness and

[4] *Benjamin Aspey* [2022] SALC 82.
[5] *Richard Modistach* [2022] SALC 93.
[6] [2023] SALC 50.

propriety must not be judged at large but rather it should be with matters linked to the duties and responsibilities of a responsible person firmly in mind. Whilst the Liquor and Gambling Commissioner accepted that an applicant's antecedent history was highly relevant when assessing fitness and propriety, a criminal record does not necessarily preclude a person indefinitely, from obtaining approval under the Act. The Liquor and Gambling Commissioner submits that the delegate's decision was correct and that application for review should be dismissed.

Consideration

19 In determining how to deal with an application for approval under the Act, it is important to recognise that the role of a licensing authority is not punitive. Subject to the criteria contained in s 55 of the Act, the guiding principle is whether it is in the public interest to grant the approval.

20 The primary submission made by the Police Commissioner is to the effect that the public interest could only be served by concluding that prior sexual offending per se is inconsistent with a finding of fitness and propriety. Whilst I accept that prior sexual offending would ordinarily be inconsistent with a finding of fitness and propriety, I think the decision of the High Court in *A Solicitor v Council of the Law Society of New South Wales*[7] recognises this will not always be so. In that case the High Court unanimously allowed an appeal by a legal practitioner who had been convicted of aggravated indecent assault on persons under the age of 16 and found that he was a fit and proper person for the purposes of the *Legal Profession Act 1987* (NSW). The Court made the point that what is required is a close consideration of the nature of the offending, the circumstances underpinning it, and the evidence of rehabilitation. In that case the offending occurred in the context of the applicant suffering from anxiety and exhaustion. The offending was not especially egregious. The victims of his offending were his stepdaughters and he had since reconciled with them and their mother. There was compelling evidence that he was fully rehabilitated. And he had effectively been suspended from legal practice for a period of five years before his case was determined by the High Court. Whilst the case was decided on its own facts the Court's decision recognises that sexual offending, even against minors, does not necessarily permanently shut the door on obtaining a finding of fitness and propriety.

21 As was noted in *Amodeo*, there is a public interest in encouraging people to redeem and rehabilitate themselves. On the other hand it also must be recognised that although possession of child pornography does not necessarily involve any physical sexual misconduct it is nevertheless an

[7] [2004] HCA 1; (2004) 216 CLR 253.

odious crime. As was observed by the Victorian Court of Criminal Appeal in *R v Jongsma*:

> The argument that mere possession of such material of itself harmed nobody overlooked the method of its production, by which little children are made to behave in a manner that is utterly repugnant, degrading and at odds with what should be the innocence of childhood. That behaviour was provoked because there was a market for images of that sort. Anybody who entered that market as a customer perpetuated the wickedness that was its foundation and raison d'être.[8]

22 It is therefore not a victimless crime. Moreover, a person's interest in child pornography raises the risk that the person will act out the images viewed.

23 In addition, this Court is permitted to know that there is a "public revulsion against paedophilia in all its forms" and that there is "an enormous public disquiet at the potential which the internet offers for the international transmission of pornography, in particular for those whose perverted tastes include collecting and viewing indecent photographs of children."[9]

24 A survey of decisions across a range of jurisdictions indicates that against a background of sexual offending involving child pornography exceptional circumstances must exist to enable a finding of fitness and propriety.

25 In *Re Dr Stephanopoulos*[10] the Medical Practitioners Board of Victoria allowed a neurosurgical trainee, who when nearing the end of his training period, downloaded and stored large amounts of child pornography and was subsequently convicted of possessing child pornography, to be registered as a medical practitioner subject to stringent conditions. In that case there was compelling and unchallenged expert evidence from eminent mental health professionals in the area of sex offending that Dr Stephanopoulos was not a paedophile and that there is a very low risk of him re-offending. The evidence also established that the offending occurred in the context of dysfunctional responses to stress and work pressures.

26 In *Medical Board of Australia v Black*[11] the Victorian Civil and Administrative Appeals Tribunal had before it a cardiologist, Dr Black, who in May 2014 pleaded guilty and was convicted of two charges of knowingly possessing child pornography that comprised of a range of images and movies. There was evidence that his offending was against a

[8] [2004] VSCA 218 at [14].
[9] *R v Fellows* [1997] 2 All ER 548 at 559 per Evan LJ.
[10] [2006] MPBV 12.
[11] [2016] VCAT 892.

background of trauma and depression related to his own abuse as a child. He was drawn to the material not for any reason of sexual gratification but out of a distorted preoccupation with the experience of sexual molestation, in the context of the psychological consequences and harm caused by his own experience as a child. He recognised himself that he needed help well before the events giving rise to the charges, seeking assistance and treatment from a psychiatrist from 2011 onwards. The Tribunal noted that there had been profound personal and professional consequences for Dr Black. The Tribunal accepted expert evidence that established that Dr Black was not a paedophile; he was at low risk of re-offending; that he was at zero risk of a contact offence; and that through the treatment he had sought and continued to receive he had developed insight into the personal factors that contributed to his offending. The Tribunal was persuaded that in the circumstances a formal reprimand, a short period of suspension, and the imposition of strict conditions was sufficient to allay the public's concerns.

27 In *Legal Practitioners Conduct Board v Power*[12] the Full Court of the Supreme Court of South Australia had before it Mr Power who was a young solicitor. On an occasion in 2010 he invited friends to a party at his house where a guest discovered a hidden camera in the toilet cubicle. This led to his arrest for filming without consent. While being interrogated by police he told them that if they examined his laptop they would find footage from other occasions on which he filmed individuals in private situations and images of child pornography. That led to an examination of his laptop computer which revealed thousands of images of child pornography. There was evidence that Mr Power had stunted sexual development and as a deeply religious person he was troubled by his homosexuality, and it was in that context that his offending occurred. The evidence established that he did not meet the diagnostic criteria for paedophilia and his accessing both child and adult pornography was voyeuristic sexual behaviour and not predatory behaviour. It was accepted that he was rehabilitated and posed no risk. Mr Power had voluntarily relinquished his practising certificate in March 2010. The issue before the Court was whether it should be re-instated in 2013. His application for re-admission was supported by detailed references provided by members of the legal profession, including judicial officers, all attesting to his good character and undoubted legal ability. The Full Court accepted that Mr Power was genuinely remorseful and has demonstrated contrition and insight into his conduct. It acknowledged that he had taken positive steps towards rehabilitation and addressing the conflict he faced between his religious beliefs and his sexuality. It found that he was unlikely to re-offend. It noted that he was 30 years of age, had a promising legal career ahead of him, and had numerous character references which spoke to his

[12] [2013] SASCFC 118.

good character and professional record. But it took the view that the public would not have complete confidence in him in light of his recent serious convictions. It held that a suspension was not sufficient either to protect the public or to maintain the public's confidence in the proper regulation of the legal profession and the administration of justice. But the Court then added:

> We take the view that because of his young age, his guilty pleas in the Criminal Court, his successful attendance of the course at Owenia House and his undoubted legal ability, the practitioner appears to be a candidate for re-admission to legal practice within a relatively short time. That would very much depend on what happens in the meantime. His actions and how he applies himself over the next few years are likely to be influential in any subsequent application for re-admission.[13]

28 It must be accepted that these cases concerned the medical and legal professions and that the bar to establish fitness and propriety in connection with these occupations is arguably a good deal higher than in connection with positions such as a responsible person for the purposes of the Liquor Licensing Act. But the fact remains that this type of sexual offending casts a serious shadow over a person's character and in that context I repeat what I said in *Amodeo* that in the case of prior sexual misconduct, the observations made by Walsh JA in *Ex parte Tziniolis; Re Medical Practitioners Act*, are of particular significance.

> Reformations of character and of behaviour can doubtless occur but their occurrence is not the usual but the exceptional thing. One cannot assume that a change has occurred merely because some years have gone by and it is not proved that anything of a discreditable kind has occurred. If a man has exhibited serious deficiencies in his standards of conduct and his attitudes, it must require clear proof to show that some years later he has established himself as a different man.[14] (Emphasis mine)

29 With respect, I think that the delegate erred in granting Mr Dodd approval. Mr Dodd's offending was grave. I have not seen the images that gave rise to his conviction, and I feel relieved that I am not required to do so. But the brief description that emerges from the police report indicates that they were repulsive and at the higher end of the scale of child pornography. This is reflected by his sentence of imprisonment. In downloading child pornography Mr Dodd knowingly broke the law. The range of depraved images accessed by him suggests that at the time of his offending he was acting in an acutely sexually deviant way. Collectively these matters raise the possibility that there is a risk Mr Dodd could in the future act in a

[13] Ibid at [41].
[14] (1966) 67 SR (NSW) 448 at 461.

sexually predatory way. As was observed in *Amodeo* the potential of harm to patrons of licensed premises from the predatory behaviour of those in positions of authority in those premises, irrespective of whether the harm is proved on a balance of probabilities, would be a powerful public interest consideration and the mere possibility of that harm would be a relevant matter for the licensing authority in determining fitness and propriety. To now hold him out as a fit and proper person for the purposes of the Act would require clear proof that he is a different man. In this case that proof amounts to little more than his say so that he has indeed turned his life around and poses no risk to the public. With respect, clearer proof was required.

30 That said, although there are some parallels with this case and *Amodeo*, there are some significant differences. In this case the offending appears to have occurred against a background of depression and anxiety. There appears to be little doubt that Mr Dodd has insight into the gravity of his offending and is remorseful. Having lost his position in the armed forces as a result of his offending he has doubtless suffered great shame that serves as an ongoing reminder of the consequences of his offending. Apart from the issue regarding his reporting obligations, which on all accounts was essentially a technical default, he has otherwise not attracted any interest from the police. The references that he tendered to the delegate are impressive. They indicate that apart from his serious offending, he is otherwise a person of good character. If there was expert evidence that indicates that Mr Dodd is not a paedophile and that he has genuinely rehabilitated himself, subject to making the approval interim, and subject to imposing a condition upon the approval that limited it to him working as a responsible person at a cellar door, it would, in my opinion, be open to grant the approval.

31 For the reasons explained in *The Commissioner of Police for the State of South Australia v Daniel Fontana* there would be a sense of unfairness in immediately allowing the application for review with the result that Mr Dodd's approval would be immediately revoked. I do not think that the public interest would be compromised by me adjourning further consideration of this application for review for a period of three months with the police having liberty to apply. This will enable Mr Dodd to explore securing expert evidence that might persuade me to do other than to set aside the delegate's order and revoke his approval.