QCAT

Queensland Civil and Administrative Tribunal

CITATION:	*Legal Services Commissioner v XBN* [2016] QCAT
PARTIES:	Legal Services Commissioner (Applicant/Appellant) v XBN (Respondent)
APPLICATION NUMBER:	OCR164-16
MATTER TYPE:	Occupational Regulation matters
HEARING DATE:	21 September 2016
HEARD AT:	Brisbane
DECISION OF:	**Justice DG Thomas, President** Assisted by: **Mr Ken Horsley, Legal panel member** **Ms Julie Cork, Lay panel member**
DELIVERED ON:	12 December 2016
DELIVERED AT:	Brisbane
ORDERS MADE:	**1. The application for a non-publication order is granted.** **2. The respondent is publicly reprimanded.** **3. The respondent is to pay the applicant's costs assessed on a standard basis, on the Supreme Court Scale under the *Uniform Civil Procedure Rules* 1999 (Qld) in the manner that the costs would be assessed were the matter in the Supreme Court of Queensland. The costs so assessed will be paid by equal monthly instalments over a period of 24 Months.**
CATCHWORDS:	PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – PROFESSIONAL MISCONDUCT AND UNSATISFACTORY PROFESSIONAL CONDUCT – OTHER MATTERS – where the legal services Commissioner charged the respondent with several charges including

disreputable conduct for engaging in behaviour considered offensive and provocative and filing a misleading affidavit in Court – where the respondent has suffered from mental illness most of his life – where the respondent accepted the charges but argued that his mental illness excused that conduct – where the cases say mental illness is a mitigating factor – whether the conduct of the practitioner can be excused due to mental illness

PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – DISCIPLINARY PROCEEDINGS – APPLICATION FOR NON-PUBLICATION ORDER – where the applicant applied for a non-publication order in relation to his name and identifying details – where medical evidence provided that publication would cause adverse mental health effects – where order only made in exceptional circumstances – where the applicant argues it goes against the objective of the *Legal Profession Act* 2007 (Qld) – whether in the circumstances a non-publication order should be granted

Australian Solicitors Conduct Rules 2012 r 5.1.2, 17.1, 19.1
Legal Profession Act 2007 (Qld) ss 418, 419, 420, 443(3), 462, 472, 477
Queensland Civil and Administrative Tribunal Act 2009 (Qld) ss 7(2), 66
Uniform Civil Procedure Rules 1999 (Qld)

Adamson v Queensland Law Society Incorporated [1990] 1 Qd R 498
BRJ v Council of New South Wales Bar Association [2016] NSWSC 146
Council of the New South Wales Bar Association v Fitzgibbon
Kyle v Legal Practitioners Complaints Committee (1999) WASCA 115
Legal Practitioners Conduct Board v Ardalich [2005] SASC 478
Legal Services Commissioner v CBD [2011] QCAT 401
Legal Services Commissioner v Madden (No 2) [2008] QCA 301
Legal Services Commissioner v Mellick [2016] QCAT

Legal Services Commissioner v Sing [2007] LPT 004
Legal Services Commissioner v Yarwood [2015] QCAT 208
Prothonotary of Supreme Court of New South Wales v Christopher Ronald Fitzsimons [2012] NSWSC 260
Robinson v Law Society of New South Wales (Supreme Court of New South Wales, Court of Appeal Unreported 17 June 1997)

APPEARANCES and REPRESENTATION (if any):

APPLICANT: Nicholson, M. counsel instructed by the Legal Services Commissioner

RESPONDENT: Hughes, I. from Hopgood Ganim Lawyers on behalf of the respondent

REASONS FOR DECISION

[1] The Legal Services Commissioner ("Commissioner") has brought the following charges against the respondent:

a) Charge 1 - disreputable conduct. By email dated 3 April 2013, the respondent engaged in conduct, in the course of practice, by making offensive and provocative statements about the complainant which were likely to bring the profession into disrepute.

b) Charge 2 – failing to act independently. The respondent failed to maintain his professional independence by making statements based solely on his client's instructions.

c) Charge 3 – providing a misleading affidavit to the Federal Magistrate's Court. The respondent filed an affidavit dated 4 April 2013 in the Brisbane Registry of the Federal Magistrate's Court on 4 April 2013. The contents were deceptive.

d) Charge 4 – disreputable conduct. The respondent sent multiple copies of correspondence to the Legal Services Commission and elsewhere that were erratic, offensive and unprofessional. In doing so the respondent failed to take all reasonable care to maintain the integrity of the Legal Profession and was likely to bring the profession into disrepute.

e) Charge 5 – disreputable conduct. The respondent sent emails to the Legal Services Commission and elsewhere that were erratic, offensive and unprofessional. In doing so he failed to take all reasonable care to maintain the integrity and reputation of the Legal Profession and was likely to bring the Profession into disrepute

f) Charge 6 – breach of fundamental ethical duties and disreputable conduct. By the respondent's correspondence to the Legal Services Commission between 21 August 2013 and 22 January 2014, he engaged in conduct which would demonstrate that he is not a fit and proper person to practise law.

g) Charge 7 – breach of section 443(3) of the *Legal Profession Act* 2007 (Qld) ("LPA") – failure to comply with notice – professional misconduct. The respondent failed to comply with a written notice issued on 28 October 2013 by the Legal Services Commissioner pursuant to s 443(3) of the LPA.

[2] The parties filed an agreed statement of facts[1] with respect to the charges contained in the disciplinary application.

[3] The respondent says that the factual obligations are not challenged, however, the legal consequences of those facts are challenged.[2]

[4] The respondent asserts that he was not responsible for his conduct by reason of mental illness.[3]

[5] Based upon his mental illness only, the respondent has not accepted that the facts give rise to professional misconduct or unsatisfactory misconduct. Were it not for his mental illness, the respondent would admit that the facts give rise to unsatisfactory professional conduct. [4]

Application for a Non-Publication Order

[6] The respondent was directed by the Tribunal on 21 September 2016 to file any medical evidence relating to the issue of non-publication of the respondent's name and identifying details.

[7] In response to this direction, the respondent's representative filed an affidavit annexing a medical report from Dr Calder-Potts[5] which states:

> "the respondent has a diagnosis of Bi-Polar Affective Disorder which is currently stable. However, I think that any public disclosure of his name and his particulars would have an adverse effect on his mental health, increasing his anxiety and possibly leading to an exacerbation of his depressive symptoms. In view of the brittleness of his mood disorder I would recommend that the respondent's identifying details be withheld in any judgement (sic) about his professional misconduct."

[8] Section 656D of the LPA allows the Tribunal to make an order prohibiting the publication of information, including information stated in the order that

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1 Agreed Statement of Facts dated 18 March 2016.
2 Respondent's submission dated 13 April 2016, paragraph 2,
3 Ibid, paragraph 4.
4 Ibid, paragraph 32.
5 Affidavit of Ian David Michael Hughes sworn 6 October 2016 Exhibit IDH-01 Report of Dr Kevin Calder-Potts dated 4 October 2016.

relates to the disciplinary application, the hearing or an order of the Tribunal.

[9] The QCAT Act also prescribes for the making of a non-publication order pursuant to section 66, although limitations apply.

[10] Section 7(2) of QCAT Act provides that the requirements of an enabling Act prevail over the provisions of the QCAT Act to the extent of any inconsistency.

[11] The Legal Services Commissioner has responded to the respondent's application referring to:

a) Section 472(1) of the LPA which provides that an applicant must keep a discipline register about disciplinary action taken under the Act against an Australian legal practitioner in relation to a law practice employee;[6]

b) Section 472(2) of the LPA which provides that the discipline register must include the full name, address or former business address, home jurisdiction and particulars of the disciplinary action taken;[7]

c) Section 472(4) of the LPA which states that the discipline register must be available for public inspection;

d) Section 90 of the *Legal Profession Regulation* 2007 (Qld) which provides that the date and jurisdiction of the person's first and each later admission to the legal profession must be included in the discipline register; and

e) Sections 477 of the LPA which whilst providing that the provisions of Part 4.11 (Publicising disciplinary action) are subject to any order made by a Tribunal which regulates the disclosure of information, it also provides that the name and other identifying particulars of the person against whom the disciplinary action was taken, the law practice who employs or employed the person, and the kind of disciplinary action taken must be recorded in the disciplinary register and may be otherwise publicised under part 4.11.[8]

[12] The Commissioner further submits that:

a) A non-publication order would undermine the intention of the LPA and would not fulfil the objectives of the Act which is public accountability and transparency of the disciplinary process.[9]

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6 Submissions in reply non publication order on behalf of the applicant filed 19 October 2016, paragraph 10.
7 Ibid, paragraph 11.
8 Ibid, paragraph 14.
9 Ibid, paragraph 24.

b) The respondent does not meet the threshold under the LPA or the QCAT Act;[10] and

c) The only evidence provided by the respondent is a medical report by Dr Calder-Potts. The fact that disclosure would exacerbate the respondent's depressive symptoms is not sufficient to reach the threshold for non-publication.[11]

[13] The Commissioner refers to:

a) the case of *Legal Services Commissioner v Sing*[12] and comments from de Jersey CJ, where his Honour remarked that the Tribunal should be careful not to elevate the practitioner's private interest over the public interest which should predominate in the making of a non-publication order;[13]

b) the case of *Kyle v Legal Practitioners Complaints Committee*[14] where the Court of Appeal referred to the importance of openness in the administration of justice when dealing with the professional conduct of practitioners; and

c) the case of *Legal Services Commissioner v CBD* ('CBD')[15] and comments from President Wilson regarding the increased risk of suicide of the respondent were his name to be published. The Commissioner submits that this case is distinguishable as Dr Calder-Potts' report demonstrates there is a possibility leading to an exacerbation of the respondent's depressive symptoms and there is no increased risk of suicide as was the case in CBD.

Discussion – non publication order

[14] The making of a non-publication order in relation to disciplinary proceedings by the Tribunal is the exception and not the rule. An order will only be made in special circumstances where the Tribunal considers that such an order is necessary.

[15] Section 66 of the QCAT Act prescribes the circumstances under which a non-publication order can be made and one of the relevant factors is whether the order would avoid endangering the physical or mental health or safety of a person.[16]

[16] A recent case where the Tribunal has dealt with an application for a non-publication order in the legal disciplinary sector is that of *Legal Services*

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10 Ibid, paragraph 27.
11 Ibid, paragraph 28.
12 [2007] LPT 004.
13 Submissions in reply non publication order on behalf of the applicant filed 19 October 2016, paragraph 25.
14 (1999) WASCA 115.
15 [2011] QCAT 401.
16 *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) s 66(2)(b).

Commissioner v XBY.[17] This case was mentioned by the Commissioner at the hearing.

[17] In *Legal Services Commissioner v XBY*, the respondent presented evidence that publication of his name and identifying details was likely to significantly negatively impact on his mental health and undo what he had achieved over the past few years in improving his mental health. A non-publication order was granted in those circumstances.

[18] The respondent was diagnosed with a delusional disorder and managed under an involuntary treatment order in 2014.[18] Further, he displayed symptoms of mania including persecutory delusions.[19] He has suffered from mental illness most of his life and submits that he has worked hard to overcome this mental illness.

[19] The respondent's situation is a tragic one. He has been the victim of a childhood in which he was abused, leading to the seeds of the mental illness he suffered in later life.

[20] The submissions put forward by the respondent and the reports of both Dr Zdral and Reddan state that the respondent has a good relationship with his treating team and his mental illness is being successfully treated. Dr Reddan stated:

> "it is unusual to observe an individual with a Delusional Disorder, particularly of the paranoid subtype, develop the degree of therapeutic alliance that the respondent has developed with his treaters."[20]

[21] The report of Dr Zdral concludes that the respondent regularly attends appointments with his case manager and psychiatrist and focuses on a healthy lifestyle and diet.[21] His recovery has been so successful that the respondent would be able to resume work as a legal practitioner.[22]

[22] The further report of Dr Calder-Potts states that the publication of the respondent's name and identifying details would have an adverse effect on his mental health and possibly lead to an exacerbation of his depressive symptoms. This evidence has not been challenged by the Commissioner.

[23] Given that the publication of the practitioner's name is likely to endanger the respondent's mental health, the health related criteria outlined in section 66(2)(b) of the QCAT Act is satisfied.

[24] As to the submissions of the Commissioner:

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17 [2016] QCAT 102.
18 Submissions on behalf of the respondent filed 13 April 2016, paragraph 10.
19 Ibid, paragraph 16.
20 Report of Dr Reddan dated 9 April 2015.
21 Ibid, paragraph 20.
22 Ibid, report of Dr Zdral.

a) The provisions of the LPA contemplate the making of an order regarding non-disclosure and prescribe the information which, despite the making of the order, must be recorded in the discipline register.[23]

b) The clear intention of the LPA, in so far as the discipline register is concerned, is preserved by reference to the requirements contained in section 477(2) of the LPA.

c) As to public accountability and transparency, the object is not to punish the practitioner, but to protect the public. An aspect of this object is deterrence of other practitioners. This can, in circumstances contemplated by s 66(2) of the QCAT Act, be achieved by publishing the sanction and outlining the findings in relation to the particular conduct which leads to the sanction. In circumstances where one of the requirements of section 66(2) is met as a pre-condition to the non-publication order, the broad objectives can be achieved without including the practitioner's name. The definition of the unacceptable conduct and the description of the penalties are equally clear with or without the name of the practitioner. This, of course, is only the case where the requirements of s 66(2) are fully met and should not be seen as detracting from the objective of the Act which is to secure a level of transparency, accountability and independence not previously thought to have been present. A non-publication order will only be made in very limited circumstances, as defined by the Act.

[25] In the circumstances, the Tribunal orders that information which might enable the practitioner to be identified not be published except to the parties in these proceedings.

Unsatisfactory Professional Conduct or Professional Misconduct

[26] Section 418 of the LPA provides that unsatisfactory professional conduct includes conduct that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner.

[27] Professional misconduct includes unsatisfactory professional conduct if the conduct involves a substantial or consistent failure to reach or keep a reasonable standard of competence and diligence.[24]

[28] Contravention of Legal Professional Rules is capable of constituting unsatisfactory professional conduct or professional misconduct.[25]

[29] In *Adamson v Queensland Law Society Incorporated*[26] Thomas J formulated the test for professional misconduct as:

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23 *Legal Profession Act* 2007 (Qld) s 477(2).
24 *Legal Profession Act* 2007 (Qld) s 419(a).
25 Ibid, s 420(1)(a).
26 [1990] 1 Qd R 498 at 507.

> "The test to be applied is whether the conduct violates or falls short of, to a substantial degree, the standard of professional conduct observed or approved by members of the profession of good repute of competency."

The Conduct

Charge 1

[30] The conduct which is said to give rise to the charge was that the respondent made statements in one email dated 3 April 2013 to the following effect:

> "Frankly we are staggered with the contents contained therein (sic) and we find your facsimile to support our proposition that your client is a vexatious litigant and totally obsessed with this matter;
>
> In our view this portrays an ex-husband that has not been able to move on from his failed marriage which is having a detrimental effect on our client.
>
> These children are only 8 years old and our client has grave concerns that your client will continue to retain solicitors for the next 10 years until the children are 18. You would agree that both our clients need to work together for the sake of the children. We note you have failed to address the contravention issues which in our view hold your client as person out (sic) that will continue to put his own needs first above those of the children."

[31] The Commissioner asserts that the contents of the email were discourteous, offensive and provocative and in breach of rule 5.1.2 of the *Australian Solicitors Conduct Rules* 2012 (Qld), which prohibits a solicitor from engaging in conduct which will bring the profession into disrepute.

[32] The Commissioner asserts that the conduct amounts to professional misconduct.

[33] The Tribunal does not believe that the conduct described involved a substantial or consistent failure or as described by Thomas J, was conduct which violates or falls short to a substantial degree of the standard of professional conduct observed or approved by members of the profession of good repute and competency.

[34] The Tribunal notes that the respondent accepts that, in the absence of the arguments concerning his mental illness (to be addressed later in these reasons) the conduct amounted to unsatisfactory professional conduct.

Charge 2

[35] The conduct which was said to give rise to charge 2 concerned a portion of the email mentioned above which begins “these children are only 8 years old”. [27]

[36] The Commissioner submits that in the circumstances the contents of the email were inappropriate, especially as the respondent admitted on 23 May 2013 that the statements were not his opinions but were on his instructions.

[37] The Commissioner submits that the respondent’s actions failed to exercise forensic judgment and were in breach rule 17.1 of the *Australian Solicitors Conduct Rules* 2012. This lack of judgment of the respondent in being a “mouthpiece” is alleged by the Commissioner as amounting to professional misconduct.[28]

[38] Again, it is the opinion of the Tribunal that the conduct of question did not amount to a substantial or consistent failure and does not satisfy the test as described in *Adamson*.

[39] Again, the Tribunal notes that in the absence of the arguments concerning mental illness, the respondent accepts that the conduct which gave rise to Charge 2 amounted to unsatisfactory professional conduct.

Charge 3

[40] The conduct which was said to give rise to charge 3 related to the filing of an affidavit in the Federal Magistrates Court in which the respondent stated “upon further consultation with my client, I noted that the parties had not completed a mediation dispute resolution session and that there was no certificate as required under s 601(7) of the *Family Law Act* 1975 (Cth).[29]

[41] The Commissioner asserts that the statement was misleading as the respondent knew or ought to have known facts which were at odds with the respondent’s affidavit. The Commissioner submits that the statement deceived or knowingly or recklessly misled the Court and was in breach of rule 19.1 of the Australian Solicitors Conduct Rules which provides that a solicitor must not deceive or knowingly or recklessly mislead the Court.

[42] The respondent has admitted these facts.

[43] Accuracy and honesty in dealings with a Court are fundamental to the duties which are owed by a solicitor. Conduct which misleads a Court falls short, to a substantial degree, of the standard of professional conduct observed or approved by members of the profession of good repute and competency.

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27 Submission on behalf of the Applicant, filed 29 March 2016, paragraph 17.
28 Ibid, paragraph 18.
29 Submission on behalf of the Applicant, filed 29 March 2016, paragraph 19.

[44] The Tribunal finds that the conduct in relation to charge 3 was professional misconduct.

Charges 4 and 5 – disreputable conduct

[45] The conduct which gave rise to these charges involved communications with the Legal Services Commission and elsewhere (including the Attorney-General and the Queensland Ombudsman) which were erratic, offensive and unprofessional. The communications were voluminous (300 pages and 80 pages) and included links to a male homosexual website and allegations that the Commissioner had breached British legislation.

[46] It is alleged by the Commissioner that the conduct was in breach of rule 5.1.2 of the *Australian Solicitors Conduct Rules* 2012 and is likely to bring the profession in to disrepute.

[47] The conduct is admitted.

[48] In the context of ensuring the orderly and appropriate regulation of the legal profession, it is essential that practitioners deal in a professional way with a regulator such as the Legal Services Commissioner and with professional bodies such as the Queensland Law Society and the Queensland Bar Association.

[49] In this case, the conduct was substantial and fell below the standard of conduct which would be expected of an Australian Legal Practitioner. Reference is made to two occasions, namely on 21 August 2013 and 22 August 2013.

[50] Whilst it occurred in just two communications, the conduct did fall short, to a substantial degree (because of the nature and volume of the material) of the standard of conduct which would be approved by members of the profession. The Tribunal finds that the conduct amounts to professional misconduct.

Charge 6 – breach of fundamental ethical duties and disreputable conduct

[51] The conduct which led to charge 6 occurred between 21 August 2013 and 22 January 2014, and was very significant in volume, being contained in 7 A4 lever arch folders.[30]

[52] The emails contained:

a) various email messages to various parties making false and baseless allegations;

b) continued harassment and threats against third parties;

c) Direct communications with another legal practitioner's client;

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30 Submissions on behalf of the Applicant, filed 29 March 2016, paragraph 26.

d) Breaches of confidentiality and privacy by distributing materials that ought to have been apparent were confidential in nature; and

e) Vexatious complaints to the Legal Services Commissioner and unfounded allegations of unsatisfactory professional conduct or professional misconduct against another legal practitioner.

[53] It is clear that the material contains statements that were scandalous, vexatious, defamatory showed a lack of reasoning.[31]

[54] The emails were of a significant volume and over a long period of time. The conduct was conduct which violated and fell short to a substantial degree of the standard of professional conduct observed or approved by members of the profession of good repute and competency and so amounted to professional misconduct.

Charge 7 – breach of s443(3) of the LPA

[55] It is admitted that the respondent failed to comply a requirement issued under s 443 of the LPA.

[56] Pursuant to s 443(3) of the LPA, upon the practitioner failing to comply with a notice, the practitioner might be dealt with for professional misconduct. Failure to comply with a notice under s 443(3) means that the practitioner is taken to have committed professional misconduct unless the practitioner had reasonable excuse for not complying with the requirement within the period.[32]

[57] As has been mentioned earlier in the context of the proper regulation and maintenance of confidence in the legal profession, it is essential that practitioners respond in a prompt way to requests by a regulator such as the Commissioner and failure to so comply and respond is conduct which falls substantially below the standard which would be expected by members of the profession of good repute and competency. The fact that the conduct of the practitioner is deemed to be professional misconduct is consistent with the importance of this obligation.

Cumulative effect of conduct

[58] The Tribunal has found that the conduct which led to some of the charges amounts to unsatisfactory professional conduct,[33] and the conduct which led to some of the charges amounted to professional misconduct.[34]

[59] The cumulative effect of the conduct in relation to charges 1–7 demonstrates that the conduct amounts to professional misconduct as the conduct of the respondent involved a substantial and consistent failure to reach and maintain a reasonable standard of competence and diligence.

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31 Ibid.
32 *Legal Profession Act* 2007 (Qld) s 443(4)(a).
33 Charges 1 and 2.
34 Charges 4 – 7.

Mental Illness

[60] The respondent submits that he was not responsible for his conduct by reason of mental illness and so the respondent should be excused from a finding of professional misconduct or unsatisfactory professional conduct based upon his mental illness.[35]

[61] On 27 March 2014, the respondent was admitted to the Royal Brisbane and Women's Hospital and diagnosed with delusional disorder and initially managed under an involuntary treatment order.[36]

[62] Dr Zdral says "I have read the 'particulars of charge' outlining the current prosecution of the respondent by the Legal Services Commissioner. The alleged behaviours it refers to are likely the result of acute psychosis from which the respondent was suffering at the relevant times"

[63] Dr Reddan, consultant psychiatrist was appointed by the QLS to examine the respondent. In his report,[37] Dr Reddan observed "the much more significant evidence of a development of an abnormal mental state appears to have begun mainly during 2013 (but it probably started earlier) and this arose out of the respondent's conduct of a family law matter".

[64] Later, the respondent came under the care of Dr Calder-Potts who provided a report.[38] Dr Calder-Potts says "Dr Zdral informed me that at the time of his admission to the RBWH Mental Health Unit, on about 26 March 2014, the respondent's psychiatric condition was Bipolar Affective Disorder – Manic phase. He displayed the symptoms of mania including persecutory delusions which results in his inappropriate and threating (sic) emails. His mood was labile and he displayed neurovegetative symptoms of mania. Also his thinking was overly inclusive and disorganised."

[65] No challenge was made to the medical reports.

[66] The respondent has undertaken successful treatment since.

[67] As Dr Zdral says:

> "Over the last 10 months his symptoms have resolved.
>
> He has accepted a diagnosis of delusional disorder, developing a good insight and expressed willingness to continue with the treatment for as long as required, likely for the rest of his life.
>
> Recently the respondent has contacted the Office of Professional Standards (Queensland) Catholic Church regarding assistance in dealing with child sexual abuse. He was allocated a support person… also the relevant Church authority, has agreed to appoint a person pursuant to the towards healing protocol. As a result he

35 Respondent's submissions dated 13 April 2016, paragraphs 4 and 7.
36 Report of Dr Zdral, dated 5 February 2015.
37 Report of Dr Reddan dated 9 April 2015.
38 Report of Dr Calder-Potts dated 15 February 2016.

> has engaged with a psychologist for trauma counselling with a view to address symptoms relating to the childhood sexual abuse.
>
> The respondent has participated in the identification of his recovery goals and a development of a relapse prevention plan. He has agreed to contact his treating team if he noticed any early warning signs or has concerns about his mental state.
>
> Currently the respondent has no mood or psychotic symptoms. He has embraced and responded well to his treatment.
>
> I would anticipate his level of function would return back to the level prior to the development of his symptoms.
>
> In my opinion the respondent should continue with current treatment and follow up in the community. Provided he does, I consider the respondent would be able to resume work as a legal practitioner at the same level he was able to achieve prior to the onset of his condition."

[68] Dr Reddan concluded:

> "It is rare to observe an individual develop the degree of insight that the respondent has developed as time went on in a delusional disorder.
>
> In any event, whether one considers that the respondent's condition was that of a delusional disorder or that of mania, his condition is now in remission and he has developed insight. His alcohol use disorder is also in remission."

Practising Certificate

[69] The respondent ceased to practise as a legal practitioner on 11 August 2013 and has not resumed as a practitioner.

[70] Following receipt of the Reddan Report, and after response to a show cause notice issued by the Queensland Law Society, the Queensland Law Society resolved to impose certain conditions on the respondent's practising certificate. The respondent accepted these conditions.

[71] The respondent submits the conditions provide ample protection for the public

The impact of mental illness

[72] The respondent asserts that a person should not be held responsible for acts or omissions which were the result of mental illness or infirmity.[39]

[73] The respondent submits it is open to the Tribunal to find that, in certain circumstances, mental illness can excuse an act or omission amounting to professional misconduct or unsatisfactory professional conduct.

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39 Respondent's submissions dated 13 April 2016, paragraph 33.

[74] The respondent refers to a number of cases decided in New South Wales[40] in which, it is asserted, that the authorities left open the possibility that mental illness could excuse misconduct.[41] The respondent refers to passages from the decision in *Council of the Law Society of New South Wales v Kay*[42] where it is said "if the relevant mental intent is lacking because there was a degree of impaired judgment… then there must be a finding of no unsatisfactory professional conduct or professional misconduct".

[75] The Respondent refers to the case of *Prothonotary of Supreme Court of New South Wales v Christopher Ronald Fitzsimons*.[43]

[76] As has previously been found by this Tribunal, the existence of a medical condition will not generally excuse a practitioner's conduct.[44]

[77] The matter was considered in *Legal Practitioners Conduct Board v Ardalich*.[45] Acting Chief Justice Perry concluded that the practitioner's mental state, serious though it was, could not deflect the tribunal from a finding that the charges of unprofessional conduct were made out once the objective facts were proved or admitted. That is the correct approach. What would otherwise amount to unprofessional conduct does not cease to be such, by reason of the existence of a mental illness on the part of the practitioner.

[78] Acting Chief Justice Perry concluded that the mental illness of a practitioner cannot excuse the conduct but may be a mitigating circumstance in considering what disciplinary orders should be made.

[79] In *BRJ v Council of New South Wales Bar Association*[46] Adamson J summarised the relevant principals and concluded:

> "[100] The language of the definition of "unsatisfactory professional conduct is apt to connote that the test is an objective one. In these circumstances the objective conduct, rather than the professional culpability of the practitioner, is of prime, if not sole, relevance. Therefore generally speaking any mental affliction which the practitioner may suffer is irrelevant to the characterisation of conduct as unsatisfactory professional conduct.
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> [101] Where the question is whether certain conduct amounts to 'professional misconduct' the relevance of a mental condition will

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40 *Prothonotary of Supreme Court of New South Wales v Christopher Ronald Fitzsimons* [2012] NSWSC 260; *Robinson v Law Society of New South Wales* (Supreme Court of New South Wales, Court of Appeal, Unreported 17 June 1997); *Law Society of New South Wales v Kay* [2009] NSWADT 139; *Council of the New South Wales Bar Association v Fitzgibbon* [2012] NSWADT 56.

41 Respondent's submissions dated 13 April 2016, paragraph 38.

42 [2009] NSWADT 139.

43 [2012] NSWSC 260.

44 *Legal Services Commissioner v Mellick* [2016] QCAT 155 at paragraph 43; *Legal Services Commissioner v Yarwood* [2015] QCAT 208.

45 [2005] SASC 478.

46 [2016] NSWSC 146.

> depend upon the species of professional misconduct. For example, where the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence the practitioner's mental condition may not be relevant.
>
> [102] The mental condition of a practitioner, if it is relevant to the conduct, will generally be relevant to the question what orders ought to be made as a consequence of a finding of professional misconduct or unsatisfactory professional conduct"

[80] The Tribunal agrees with the approach taken in those cases.

[81] The existence of the mental condition, may explain, but does not excuse the conduct. The test is an objective test, based on the nature of this conduct.

[82] Where the practitioner's mental condition may be relevant is in the context of the "mitigating circumstances", when considering sanction.

[83] Relevant to the question of sanction is whether the practitioner is a fit and proper person.

[84] It is well established that in deciding on the sanction or the disciplinary order:

a) The primary function of the sanction is not to punish the practitioner but to protect the public.[47]

b) The time at which the appropriate sanction must be assessed (the question of fitness) is the date of the order not the date of the conduct.

[85] This means that whilst the mental illness does not excuse the conduct, it may assist in explaining the conduct and, if the reasons for the conduct (which are identified from the explanation) are removed, then the Tribunal might be satisfied, as at the date of the hearing, that the need to protect the public does not require the practitioner to be removed from practice (that the name of the practitioner be removed from the roll of practitioners).

[86] In the circumstances of this case, the Tribunal concludes that the respondent's mental condition does not excuse the conduct which, as to the various charges, has been found to be either unsatisfactory professional conduct or professional misconduct. Whilst the Tribunal has concluded that the respondent's mental condition did not excuse the conduct, it is relevant to the question of fitness.

Sanction

[87] As has been said earlier in these reasons, the primary function of disciplinary orders is not to punish the practitioner but to protect the public

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47 *Legal Services Commissioner v Madden (No 2)* [2008] QCA 301 at 122.

and the time at which to consider this position is the date of the hearing not the date of the conduct.

[88] The doctors who have treated the respondent have concluded that he has successfully undertaken treatment for his condition and that he is able to return to work as a legal practitioner.[48]

[89] Given the opinions which have been expressed by the treating psychologists it follows that there is no need to protect the public by preventing the respondent from returning to practice.

[90] The Commissioner has submitted that the appropriate orders to be made should include:

a) That the practitioner be publicly reprimanded.

b) That conditions be imposed upon the respondent's practicing certificate. Counsel for the practitioner has confirmed that the conditions which are suggested are those which were imposed by the Queensland Law Society.

[91] The Commissioner submits that the making of such orders is consistent with the need to protect the public and with principles of general and personal deterrence.

[92] The respondent submits that:

a) As to the question of "personal deterrence" how conduct resulting from illness can be deterred is unclear.[49]

b) Conditions on the practicing certificate, tailored to the illness and protection of the public from the relapse, is appropriate. However, this has already been done by the Queensland Law Society and accepted by the respondent.

c) As the conditions have already been imposed by the Queensland Law Society, no greater public protection is achieved through the sanction which the Commissioner seeks.

[93] At the hearing, the Commissioner submitted that the imposition of conditions on the practicing certificate by the Tribunal would be more effective than the imposition of such conditions by the Queensland Law Society.

[94] As to this issue, the Tribunal notes that the Queensland Law Society obtained expert medical opinion and following receipt of that opinion, and having required the practitioner to show cause, the Queensland Law Society imposed conditions upon the practicing certificate, and the

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48 Reports of Dr Zdriel & Reddan.

49 Respondent's submission dated 13 April 2016, paragraph 59.

Commissioner has accepted that these conditions are adequate to protect the public.

[95] The appropriate protection is currently in place and, as time passes, the best body to determine the conditions which should be imposed on the practicing certificate, based upon the relevant circumstances at the particular time, is the Queensland Law Society.

[96] On that basis it is not necessary for the protection of the public that the Tribunal make any order concerning conditions on the practicing certificate.

[97] As to the questions of general and personal deterrence, the Tribunal agrees with the submissions made by the practitioner that personal deterrence cannot be relevant in relation to conduct resulting from mental illness.

[98] General deterrence can be relevant where the imposition of a sanction, such as a public reprimand, might have the effect of deterring practitioners from being involved in similar conduct. What is to be discouraged is the type of conduct which is found to be unsatisfactory professional conduct or professional misconduct. On that basis, the imposition of a public reprimand is warranted as a deterrent to other practitioners.

General comment

[99] The respondent has submitted that a sick person requires and should be afforded treatment and compassion – not condemnation and punishment. It is argued that the public's right to protection is not absolute. It must be tempered by contemporary expectations that a fair balance must be struck between the objective of ensuring general public protection and ensuring that members of the public who are sick can be healed and freed to move on with their lives.

[100] The orders which have been made allow that outcome to follow.

[101] The respondent's case is a tragic one. He was the victim of abuse during his childhood. This sowed the seeds of the mental illness he suffered later in life.[50] The conduct results from the mental illness and the respondent worked hard to overcome his mental illness and his efforts have been recognised by doctors who have treated him including Dr Zdral and Dr Reddan.[51]

[102] The orders which have been made are consistent with the submissions made by the respondent in that as the law stands, the respondent's successful recovery has been taken into account and, if he wishes, it will be possible for him to take his place in the legal profession on conditions which he has agreed with the Queensland Law Society, which will protect

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50 Respondent's submission dated 13 April 2016, paragraph 65(a).

51 Ibid, paragraph 65(b) and (c).

members of the public. Essentially, he will be free to get on with his life in circumstances which will allow for the protection of the public.

Costs

[103] The Tribunal has very little discretion with respect to the question of costs.

[104] Upon a finding of unsatisfactory professional conduct or professional misconduct, the tribunal must make an order requiring the practitioner to pay costs unless the tribunal is satisfied that exceptional circumstances exist.

[105] The respondent submits that there are exceptional circumstances in that:

a) He has been the victim of a tragic childhood in which he was abused, leading to the mental illness he suffered in later life;

b) The conduct results from the mental illness;

c) He has worked hard to overcome the mental illness;

d) He has been successfully treated;

e) He lives hand to mouth earning below the national minimum wage;

f) He has negligible assets;

g) Any adverse costs order would be oppressive in the extreme and amount to a punishment from which it could take him years to recover – and in fact from which he may never recover – given his age, employment prospects and limited earning capacity; and

h) An order for costs against the respondent would be exceptionally unfair.

[106] Counsel for the Commissioner submitted at the hearing that although a costs order might be made, the Commissioner may decide not to take steps to enforce the order. Of course, this is of little comfort to the respondent.

[107] The Commissioner submitted that no exceptional circumstances exist which would mean that an order for costs should not be made as is contemplated by s 462(1) LPA.

[108] Exceptional circumstances, as contemplated by s 462(1) LPA are those which relate to the conduct of the proceedings. In this case, whilst the underlying facts were admitted, the characterisation of the conduct was not and so, in discharging his duty, it was necessary for the Commissioner to conduct these proceedings. In the result, the Commissioner has been successful and the findings as to the conduct which have been urged by the Commissioner have been made.

[109] In those circumstances, pursuant to s 462(1) LPA the Tribunal orders that the respondent is to pay the applicant's costs assessed on a standard basis, on the Supreme Court Scale under the *Uniform Civil Procedure Rules* 1999 (Qld) in the manner that the costs would be assessed were the matter in the Supreme Court of Queensland. The Tribunal further orders that the costs so assessed will be paid by equal monthly instalments over a period of 24 Months.