

CITATION: *Legal Services Commissioner v XBT* [2018] QCAT 64

PARTIES: **LEGAL SERVICES COMMISSIONER**
(Applicant/Appellant)
v
XBT
(Respondent)

APPLICATION NUMBER: OCR032-14, OCR083-15

MATTER TYPE: Occupational Regulation Matters

HEARING DATE: On the papers

HEARD AT: Brisbane

DECISION OF: **Justice Carmody**
Assisted by:
Ms Megan Mahon, Legal Panel Member
Dr Margaret Steinberg AM, Lay Panel Member

DELIVERED ON: 7 March 2018

DELIVERED AT: Brisbane

ORDERS MADE: **THE TRIBUNAL ORDERS THAT:**

1. The practitioner is publicly reprimanded.
2. The practitioner is ordered to pay a fine of \$750.00.
3. The practitioner is ordered to pay the commissioner's assessed costs under the Queensland Civil and Administrative Tribunal rules by equal monthly instalments over a period of 3 years.
4. The application for non-publication is refused.

CATCHWORDS:

PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – DISCIPLINARY PROCEEDINGS – PROFESSIONAL MISCONDUCT AND UNSATISFACTORY PROFESSIONAL CONDUCT – FALSIFICATION OF DOCUMENTS AND TRANSACTIONS – where the practitioner admits to falsely witnessing a transfer document – whether mitigating circumstances exist – where the conduct is professional misconduct and the appropriate sanction is pecuniary – where the practitioner is ordered to pay the commissioner’s costs

PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – DISCIPLINARY PROCEEDINGS – PROFESSIONAL MISCONDUCT AND UNSATISFACTORY PROFESSIONAL CONDUCT – THREATENING LETTERS – where the practitioner admits sending an email making remarks about a third party unbecoming of a solicitor and likely to bring the profession into disrepute – whether mitigating circumstances exist – where the conduct is unsatisfactory professional conduct and the appropriate sanction in all of the circumstances is a public reprimand

PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – DISCIPLINARY PROCEEDINGS – PROFESSIONAL MISCONDUCT AND UNSATISFACTORY PROFESSIONAL CONDUCT – OTHER MATTERS – where the practitioner failed to comply with statutory notices requiring a response to disciplinary investigations – where the conduct is deemed professional misconduct – where the practitioner admits the conduct in question – whether mitigating circumstances exist

PROFESSIONS AND TRADES – LAWYERS – OTHER MATTERS – where a non-publication order is unilaterally requested late – where the practitioner’s health and safety is a relevant concern – whether ordering a non-publication order defeats the purpose of a public reprimand and other statutory objects – where the

commissioner is to be given the opportunity to be heard on the point

Legal Profession Act 2007 (Qld) ss 418, 419, 443(3), 462(1), 472(1), 472(4), 476(1), 477, 656D

Queensland Civil and Administrative Tribunal Act 2009 (Qld) ss 7(2), 90(1), 90(2)(b)(e), 125(1), 66(1)

Attorney-General v Clough [2002] 1 Qd R 116

Bolton v Law Society [1994] 1 WLR 512

Council of Queensland Law Society Inc v

Whitman [2003] QCA 438

Kyle v Legal Practitioners' Complaints

Committee [1999] WASCA 115

Legal Profession Complaints Committee v in de Braektt [2012] WASAT 58

Legal Services Commissioner v Atkins

[2009] LPT 010

Legal Services Commissioner v Baker (No 2)

[2006] QCA 145

Legal Services Commissioner v Bone

[2014] QCA 179

Legal Services Commissioner v Browne

[2004] NSWADT 63

Legal Services Commissioner v CBD

[2011] QCAT 401

Legal Services Commissioner v Cooper

[2011] QCAT 209

Legal Services Commissioner v Jackson

[2017] QCAT 207

Legal Services Commissioner v Madden

[2008] QCA 301

Legal Services Commissioner v Ramsden

[2006] LPT 010

Legal Services Commissioner v Reeve (No 2)

[2016] QCAT 486

Legal Services Commissioner v Scott (No 2)

[2009] LPT 009

Legal Services Commissioner v Sing

[2007] LPT 004

Legal Services Commissioner v Winning

[2017] QCAT 150

Legal Services Commissioner v XBN

[2016] QCAT 471

Queensland College of Teachers v Klemm

[2011] QCAT 207

Quinn v Law Institute of Victoria Ltd

[2007] VSCA 122
R v Kelly [2000] QB 198
Scroope v Legal Services Commissioner
 [2013] NSWCA 178

APPEARANCES and REPRESENTATION (if any):

This matter was heard and determined on the papers without the attendance of either party in accordance with s 32 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ("QCAT Act").

REASONS FOR DECISION

- [1] The tribunal is called on to hear and decide four charges (false witnessing, disreputable conduct, and 2 x non-compliance with regulatory information notices) in consolidated discipline applications.
- [2] The practitioner admits the allegations in relation to each charge and that they are capable of constituting a category of prescribed conduct but takes issue with the commissioner's suggested sanction and liability for costs.

Substantiation

- [3] On 15 July 2009 the practitioner prepared and then witnessed a signature on a title transfer declaration asserting that the complainant had been provided with a copy of the document by registered mail when, in truth, he had not been.¹ The declaration was lodged and acted on without being corrected.
- [4] On 27 November 2009 the practitioner concedes making emailed remarks about a third party unbecoming of a solicitor and likely to bring the profession into disrepute.²
- [5] The practitioner failed to comply with two statutory notices issued by the Queensland Law Society in June³ and October⁴ 2013 requiring her to provide information and an explanation of complaints under investigation.⁵ Her omission in the circumstances is deemed professional misconduct if there was no reasonable excuse for it.
- [6] From mid-2009 to 2016 the practitioner was severely depressed. According to her treating psychiatrist she was "...cognitively impaired with no energy

¹ Charge 1 of OCR032-14.

² Charge 2 of OCR032-14.

³ Charge 3 of OCR032-14.

⁴ Charge 2 of OCR083-15.

⁵ Contrary to *Legal Profession Act 2007* (Qld) s 443(3). All section references in these reasons are to this Act unless otherwise stated.

or volition and medically unable to comply with even the most basic instructions/orders.”

- [7] Mental illness does not alter the objective character of the conduct or the protective purpose of disciplinary proceedings and there is as a “...natural reticence to allow mental illness to excuse (as opposed to explain) dishonest conduct (where unfitness is not suggested) as it is unlikely to deprive a person of the ability to appreciate the wrongfulness of her or his behaviour.”⁶
- [8] However, as it is at least arguable that the practitioner’s impaired functioning affected her disciplinary liability for alleged conduct with a mental element as in charges 1 and 3 of OCR032-14 and charge 2 of OCR008-15 (relating to the false witnessing and the deemed professional misconduct for not assisting the law society’s investigation into her conduct without a reasonable excuse) and to be sure the question had not been overlooked by the parties inadvertently, the tribunal called for further submissions addressing the relevance and significance of her treating psychiatrist’s observations to the issue of the practitioner’s liability for the fault based charges.
- [9] The commission responded as follows:
- the psychiatric report supports the position that the practitioner had severe depression in mid-2009;
 - during this period she held a practicing certificate implying fitness to practice;
 - the practitioner’s mental state does not excuse or alter the character of her conduct but may mitigate and partially explain it;
 - a finding of professional misconduct is open as “... there is no mental element in the current charges”⁷ and her “mental condition does not excuse her conduct”.⁸
- [10] The practitioner substantially agrees with the commissioner’s submissions and emphasises that while she raises it as a mitigating circumstance she has never relied on her mental health as a defence.
- [11] While acknowledging that a full psychiatric report could have supported a psychiatric defence she is consciously not seeking to do so to avoid “... the possibility⁹ of me being declared unfit to practice as a solicitor” and expressly adopts the commissioner’s position the material is relevant only to

⁶ GE Dal Pont, *Lawyers’ Professional Responsibility* (Thomson Reuters, 5th ed, 2013) 762 [23.145].

⁷ Further submissions on behalf of the Legal Services Commissioner, 20 December 2017, [15].

⁸ *Ibid* [17].

⁹ This concern is probably misplaced because on the governing legal principles and decided cases the possibility of an unfitness finding is remote.

penalty. She reaffirms her guilt including that she was outside the time limitation for responses to the charges.

- [12] In light of the parties' submissions the tribunal has decided that there is insufficient evidence or justification for it to enquire into the practitioner's liability by reference to her capacity to act dishonestly or without a reasonable excuse.
- [13] Accordingly, the panel is satisfied on the agreed facts that the practitioner has engaged in prescribed conduct and of its jurisdiction to take disciplinary action under s 456; but before doing so has to find whether the conduct has the character of unprofessional conduct or professional misconduct by reference to the statutory definitions in ss 418 and 419 of the Act.

Characterisation

- [14] There are two categories of prescribed professional conduct. Unsatisfactory professional conduct includes conduct of an Australian legal practitioner happening in connection with the practice of law 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.¹⁰
- [15] Professional misconduct,¹¹ by contrast, relevantly includes unsatisfactory professional conduct of an Australian legal practitioner (a) involving a substantial or consistent failure to reach or keep a reasonable standard of competence and diligence or (b) spells current unfitness for legal practice.
- [16] The commissioner contends that the admitted conduct is equally capable of being characterised either as misconduct or merely as unprofessional but does not submit that it demonstrates unfitness.

Honesty and integrity

- [17] Lawyers are entrusted with special privileges in connection with their client's business. The integrity of the legal profession and its reputation in the public eye depends on the enforcement of exacting professional standards so that its members discharge their duties with "integrity, probity and complete trustworthiness".¹² They also have a duty not to damage the trust and confidence the public is presumed to have in the legal profession.
- [18] Lodging a post-dated document (to avoid stamp duty penalties) was found to be deceptive and dishonest amounting to professional misconduct warranting a \$5000 fine and reprimand in *Legal Services Commissioner v Ramsden*.¹³

Courtesy and civility

¹⁰ LPA s 418.
¹¹ LPA s 419.
¹² *Bolton v Law Society* [1994] 1 WLR 512, 519.
¹³ [2006] LPT 010.

- [19] There is no question that sending rude, demeaning, derogatory, disparaging, personally abusive or offensive, undisciplined and discourteous correspondence to or about a third party with an opposing interest in a matter where the practitioner acts for a client breaches r 28(5) *Solicitors Rule 2007* (since repealed)¹⁴ and meets the statutory description of unprofessional conduct.
- [20] The conduct diminishes the dignity and high standing of the profession and tends to reduce community respect for it. It is unbecoming and suggests a loss of the objectivity, independence and judgment needed for the proper discharge of professional responsibilities on which the administration of justice depends and the court relies.
- [21] The defendant appears to have allowed herself to overinvest in her client's case to a degree that unbalanced her professional judgment. Identifying too closely with a client's cause is a constant danger for a committed lawyer to guard against. The conduct in question amounted to a serious professional indiscretion and ordinarily calls for the censure of a public reprimand to express disapproval and deter similar conduct by others.
- [22] In *Legal Services Commissioner v Cooper*¹⁵ the use of bad language in professional correspondence was found to be unsatisfactory conduct but not serious enough to call for the imposition of a sanction.

Candour and cooperation

- [23] There is a professional obligation on practitioners to properly respond to any enquiry of their regulatory body. Failing to reply within prescribed time limits can have more severe disciplinary consequences than the suspected misconduct under investigation¹⁶ because it demonstrates that the practitioner had a disregard for the investigative process and her professional obligations¹⁷ and is deemed professional misconduct unless she had a reasonable excuse.

Findings

- [24] We are satisfied on the material that charge 2 of OCR032-14 amounts to unsatisfactory professional conduct and charges 1 and 3 of OCR032-14 and charge 2 of OCR083-15 are of professional misconduct.

The costs issue

- [25] The commissioner applies for a costs order in an unstated amount without any suggested basis of calculation.

¹⁴ *Legal Profession Complaints Committee v in de Braektt* [2012] WASAT 58; *Legal Services Commissioner v Cooper* [2011] QCAT 209.

¹⁵ [2011] QCAT 209.

¹⁶ *Council of Queensland Law Society Inc v Whitman* [2003] QCA 438 [36].

¹⁷ *Legal Services Commissioner v Browne* [2004] NSWADT 63.

- [26] Losses already suffered by a practitioner, while technically irrelevant, commonly influence a disciplinary response and tend to incline the tribunal against a monetary penalty such as a fine especially where there is no escaping a costs order and no need for special deterrence.¹⁸ Sometimes, the costs liability is therefore considered ahead of sanction issues. That approach is taken here.
- [27] An order requiring a person found guilty of a disciplinary offence to pay the stated or assessed costs of proceedings is the norm in tribunal proceedings.¹⁹ The tribunal's discretion not to do so²⁰ is limited to exceptional circumstances and matters arising in the conduct of the proceedings²¹ but is not confined to only those implying fault on the part of regulatory authorities.²²
- [28] Withdrawal or dismissal of some charges is not exceptional per se.²³
- [29] In *R v Kelly*²⁴ Lord Bingham of Cornhill CJ in a different context said:
- We must construe 'exceptional' as an ordinary, familiar English adjective, and not as a term of art. It describes a circumstance which is such as to form an exception, which is out of the ordinary course, or unusual, or special, or uncommon. To be exceptional a circumstance need not be unique, or unprecedented, or very rare; but it cannot be one that is regularly, or routinely, or normally encountered.
- [30] The same test is applied here.
- [31] In *Legal Services Commissioner v Atkins*²⁵ of 6 charges (3 of deceit) one was withdrawn and the others failed. The practitioner's central argument in support of an indemnity costs application was that the commissioner's case was hopeless on the known facts and was, therefore, proceeded with in bad faith or incompetency. Excessive delay in abandoning the unprovable case and between the filing and hearing dates was also relied on. These circumstances were 'sufficiently exceptional' to entitle the practitioner to an order for costs against the commissioner.
- [32] The Queensland Court of Appeal in *Legal Services Commissioner v Bone*²⁶ (where an indemnity costs order had been made in favour of a successful practitioner in disciplinary proceedings) confirmed the following propositions:

¹⁸ *Attorney-General v Clough* [2002] 1 Qd R 116 [94].

¹⁹ LPA s 462(1).

²⁰ *Legal Services Commissioner v Reeve (No 2)* [2016] QCAT 486.

²¹ *Legal Services Commissioner v Scott (No 2)* [2009] LPT 009.

²² *Legal Services Commissioner v Jackson* [2017] QCAT 207.

²³ *Legal Services Commissioner v Baker (No 2)* [2006] QCA 145 [56]-[57] where though succeeding on a few charges the practitioner was convicted on seven and removed from the roll.

²⁴ [2000] QB 198, 208.

²⁵ [2009] LPT 010 [84].

²⁶ [2014] QCA 179 [66].

- the mere fact that a charge fails, or a particular factual allegation is not sustained, cannot establish “special circumstances”, because of the general rule that a practitioner found not guilty is not entitled to costs;
- if a charge has no substantial prospect of success, and that ought reasonably to have been known by the LSC, that may amount to special circumstances;
- if the LSC knew or ought to have realised, if properly advised, that a particular allegation of fact had no real prospect of being established, that may amount to special circumstances; and
- where charges have a sufficiently substantial prospect of success to justify their prosecution, that will not amount to special circumstances.

[33] In *Legal Services Commissioner v XBN*²⁷ a practitioner unsuccessfully disputed the commissioner’s characterisation of the admittedly substantial offending and relied on the following circumstances to unsuccessfully resist a costs order:

- he had been the victim of a tragic childhood in which he was abused leading to the mental illness he suffered in later life;
- the conduct resulted from mental illness;
- he has worked hard to overcome the mental illness;
- he has been successfully treated;
- he lives hand to mouth earning below the national minimum wage;
- he has negligible assets;
- any adverse costs order would be so extremely oppressive and exceptionally unfair that it would practically 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.

[34] In *Legal Services Commissioner v Jackson*²⁸ a finding of unsatisfactory conduct was made against the practitioner for overcharging about \$35,000 or 51% of the billed sum.

[35] The conduct was isolated at the lower end of seriousness for cases of its kind and was, to a degree, provoked by difficult clients but stemmed mainly

²⁷ [2016] QCAT 471 [105].

²⁸ [2017] QCAT 207.

from incompetence and poor practice not characterised as fee gouging. No dishonesty was involved. Three other charges failed.

[36] The tribunal considered the unexplained delay by the commissioner in bringing the proceedings and its effect as relevant to both the calculation of sanction and the question of costs. It deferred consideration of penalty until after deciding whether the practitioner should be “burdened by an astronomical costs order that would exponentially exceed the fine” of \$2,000 sought by the commissioner. We think similar approach is advisable here.

[37] Overall the circumstances in Jackson were treated as exceptional and the tribunal made no order for costs because, in addition to the commissioner’s failure to prove three out of four charges after a long unexplained delay²⁹ and the deleterious effect of the protracted tribunal proceedings on the practitioner’s mental health³⁰ there was found to be:

- extraordinary laxity in conducting the litigation including failure of the commissioner to fully address the practitioner’s submissions despite two and a half years in which to do so;
- the commissioner changed his position after the hearing and started to fill in evidentiary gaps exposed by the practitioner’s extensive submissions;
- only a small fraction of the costs were incurred by the commissioner after his complete case was presented;
- the practitioner overwhelmingly succeeded on the substantiation and sanction issues.

[38] Following the approach taken on arguably slightly worse facts in the New South Wales case of *Scroope v Legal Services Commissioner*³¹ the tribunal imposed a \$2,000 fine but no public reprimand on the basis that the substantiation and public recording of unsatisfactory professional conduct plus the fine imported a “sufficient level of disgrace”.

[39] According to the practitioner the following are exceptional circumstances justifying a no costs order:

- early pleas;
- mental health issues making her considerably ineffectual at meeting requirements;

²⁹ The disciplinary proceedings were not started until 2013 then dragged on for another four years due to unsuccessful case management.

³⁰ The practitioner fell victim to “significant depression” but apart from periods in 2014 when her ability to function was compromised by her mental state the commissioner’s demands for investigation information and responses were generally met.

³¹ [2013] NSWCA 178.

- the impact traumatic events have had on her life since 2008;
- medical evidence of ongoing mental health issues;³²
- charge 1 of OCR083-17 (the most serious) was not withdrawn until 2017;
- while admitting indirectly abusing the other side of the family law matter at the centre of charges 1, 2 and 3 of OCR032-14 the practitioner claims "(the circumstances) very much resembled (her own experience) and was pressured and stressed ... and although it is something I did, I truly believe that without (the offender) in my life I would have managed the situation in a very different way";
- the commissioner missed dates for complying with directions causing further needless anxiety and stress;
- three separate investigators handled the matter without progressing it to finalisation.

[40] The practitioner also points to financial loss and debts (incurred in closing down her practice due to stress) meaning that she lacks the financial resources to pay costs as she and her husband earn just enough money to cover their mortgage and have four dependent children.

[41] Discipline proceedings are publicly funded. The commissioner is accountable for related expenditure. The practitioner's financial circumstances, by contrast, are not strictly relevant.³³

[42] The commissioner has substantially succeeded in the proceedings and there is insufficient material supporting a finding that he unreasonably preferred or pursued the withdrawn charge at all or for too long.

[43] The practitioner's personal circumstances are extremely unfortunate, if not downright tragic, but there is no sign of any disqualifying litigation conduct by the commissioner such as procedural oppression or unacceptable laxity. The investigative delay since 2009 is not specifically explained but there is no evidence of any fault or undue laxity on the commissioner's part. Nor is there any other sufficiently unique or unusual circumstance justifying departure from the general statutory rule as to costs.

[44] Jackson is clearly distinguishable by the commissioner's failure, in that case, to sustain most charges after inordinate delay with resulting mental detriment to the practitioner.

Sanction

³² Ibid Annexure JG6.

³³ cf. *Legal Services Commissioner v Winning* [2017] QCAT 150 [47].

- [45] Disciplinary penalties are not imposed as punishment but rather in the interests of the protection of the community and profession from unsuitable practitioners³⁴ or behaviours.
- [46] As a general rule external pressures, even dramatic life events beyond the practitioner's control, mitigate, sometimes substantially,³⁵ but never completely relieve a lawyer from the disciplinary consequences of unprofessional conduct.
- [47] Professional misconduct involving dishonesty ordinarily attracts both a reprimand and a pecuniary penalty mainly for its specific deterrent effect.³⁶ Public censure has the advantage of shaming the practitioner, highlighting the standards to be met and deterring others from similar breaches. However, the adequacy of disciplinary action is highly context sensitive and each case has to be decided on its own facts.
- [48] The commissioner submits that the disciplinary objects cannot be adequately met by any penalty lower than a public reprimand and a pecuniary penalty of \$2,000 - \$5,000.
- [49] The practitioner does not resist a pecuniary penalty for witnessing a false declaration and sending offensive correspondence but says it should be limited to \$500 because:
- at the time of commission of the first offence she had been admitted as a solicitor for 15 months and had not practiced in the area of conveyancing;
 - the family law client had been diagnosed with terminal brain cancer and had months to live;
 - she had been provided instructions to transfer the property from joint tenants to tenants in common;
 - a conveyancing clerk prepared the transfer documents;
 - the declaration as to service was false when the practitioner witnessed her client's signature but she did not know this at the time. She was dilatory rather than dishonest;
 - the email was directed to the client's brother after she had died concerning her former husband;
 - it came to light when her file was subpoenaed for the estate proceedings and he naturally found them offensive;
 - the email was provoked by the former husband's refusal to allow the client to spend time with their 7 year old son on the stated basis

³⁴ *Legal Services Commissioner v Madden* [2008] QCA 301.

³⁵ *Quinn v Law Institute of Victoria Ltd* [2007] VSCA 122 [35].

³⁶ *Legal Services Commissioner v Sorban* [2009] LPT 005, 1-7.

“that she was going to die anyway so he (the son) would just have to get used to it”;

- the client’s brother had told the practitioner that the former husband was making claims for the entire estate of his deceased wife and that this would then leave nothing for her oldest son from a previous relationship;
- she admits that the email remarks were unprofessional but never intended or considered the risk of it being published;
- at the time of this offence, her professional judgment was adversely affected by undiagnosed diabetes and the impact of the symptoms led to extreme mood swings. She was diagnosed in 2011 and has since been insulin dependent.³⁷

[50] The practitioner acknowledges that a public reprimand is warranted for the two charges of statutory misconduct for failing to comply with investigative requirements without excuse but not a monetary penalty. She points to the following facts in mitigation:

- the plea of guilty on the two charges;
- at the time of the commission of both offences, she was suffering from major depression;³⁸
- both charges have been on foot for some considerable time and while accepting partial responsibility, says the commissioner contributed to the delay by unreasonable non-compliance with tribunal directions and withdrawing a serious charge at a late stage that she was never guilty of, causing stress and anxiety to the detriment of her family, friends and professional career.

[51] Although the risk of repetition by the practitioner is assessed as low a pecuniary order is called for to denounce the practice of creating documents that tell a lie about themselves, in the sense that they are not really what they pretend to be, with an intention that they will be taken at face value by the system and other legal practitioners unaware of the deceit will act on them to their detriment.

[52] The lower end of the commissioner’s suggested range is \$1000 while \$500 is the full extent of the practitioner’s.

[53] Advised by the panel, the tribunal considers an amount midway between those amounts will adequately meet the disciplinary purposes in the circumstances without imposing any economic hardship or undue financial burden on the practitioner.

³⁷ Respondent’s submissions, filed 7 August 2017, Annexure JG3.

³⁸ Ibid Annexure JG1.

- [54] On that basis the practitioner is publicly reprimanded, fined \$750 and ordered to pay the commissioner's assessed costs under the QCAT rules by equal monthly instalments over a period of 3 years.

Publication

- [55] A tribunal hearing of a proceeding must ordinarily be held in public unless an enabling Act provides otherwise³⁹ or it is directed to be conducted privately under s 90(2) QCAT Act but the tribunal can publish its final decision including its reasons in anyway it considers appropriate.⁴⁰
- [56] However, the practitioner has requested non-publication based on concerns that information relating to these proceedings will be used against her. In her submission the risk to her safety would for various reasons be exacerbated by the publication of the disciplinary findings.
- [57] A QCAT tribunal order the publication of a written decision and reasons be limited⁴¹ or prohibit disclosure of identifying information about a party to avoid endangering a person's physical or mental health or for any other reason in the interest of justice.⁴²
- [58] In *Queensland College of Teachers v Klemm*⁴³ where the suggestion was that a teacher's risk of harm in prison increased by publication the tribunal expressed the following views on non-publication orders:

Deciding an application of this nature requires a balancing of public and private interests. There are clear public interest considerations in the publication of a teacher's name who has abused his position and power by committing sexual offences against a child. ... Given the fact that the relevant information before QCAT contains nothing beyond the facts that had already been ventilated we do not think that there is any reason to think that permitting the ... application to be held in public would endanger the teacher's safety. It is a clear case where the desirability of proceeding in public outweighs all other considerations.

- [59] In *Legal Services Commissioner v CBD*⁴⁴ the practitioner's mental wellbeing and increased risk of suicide predominated over the public interest in openness to the limited extent of justifying details of a criminal offence he was convicted of in 2010 were not published.
- [60] Plainly, the practitioner's health and safety interests are genuine and important considerations but how the non-publication discretion can be exercised consistently with the principles of transparency and publicity⁴⁵

³⁹ QCAT Act s 90(1).

⁴⁰ QCAT Act s 125(1).

⁴¹ QCAT Act s 66(1).

⁴² QCAT Act ss 7(2), 90(2)(b)(e). The wider suppression powers in s 656D *Legal Profession Act 2007* (Qld) prevail over s 66 QCAT Act to the extent of any inconsistency.

⁴³ [2011] QCAT 207 [14].

⁴⁴ [2011] QCAT 401.

⁴⁵ *Kyle v Legal Practitioners' Complaints Committee* [1999] WASCA 115.

and it's compatibly with meeting the intended purpose of the public reprimand for professional misconduct charges is not readily apparent to us.

- [61] Also a significant countervailing interest⁴⁶ is the commissioner's statutory obligations to keep a detailed discipline register for public inspection⁴⁷ subject to stated exceptions⁴⁸ including the name and other identifying particulars.
- [62] As the commissioner had neither consented to nor opposed the non-publication order he was given the chance to be heard on the point before the tribunal made an order one way or the other.
- [63] The commissioner responded:
- in addition to the public register disciplinary action may be publicised in any way he considers appropriate⁴⁹ subject to any tribunal order regulating the disclosure of information;⁵⁰
 - the intent of the Legal Profession Act is to promote openness and transparency;
 - there is a general discretion to suppress information relating to a disciplinary application or tribunal order under s 656D Legal Profession Act and s 66 QCAT Act to the limited extent necessary to avoid endangering the physical or mental health or safety of the person or for another reason within the interests of justice;
 - the more specific provision of s 472(2) Legal Profession Act overrides the general discretion of the tribunal in s 66(1)(c) QCAT Act to prohibit the inclusion of the practitioner's identifying particulars in the discipline register;⁵¹
 - making a suppression order would be seen to elevate the practitioner's private interest over the public interest which should rightly predominate;⁵²
 - openness in the administration of disciplinary justice is of fundamental importance;⁵³
 - details of the proceeding have been in the public arena and available for reporting since 23 February 2014;

⁴⁶ *Legal Services Commissioner v Sing* [2007] LPT 004.

⁴⁷ LPA s 472(1), (4); *Legal Profession Regulation 2017* (Qld) rr 90-91.

⁴⁸ LPA ss 476(1), 477.

⁴⁹ LPA s 473(1).

⁵⁰ LPA s 477.

⁵¹ QCAT Act s 7(2) QCAT Act; LPA s 472(2).

⁵² *Legal Services Commissioner v Sing* [2007] LPT 004 (de Jersey CJ).

⁵³ *Kyle v Legal Practitioners' Complaints Committee* [1999] WASCA 115 [76]-[78].

- the practitioner's ongoing risk of exposure has pre-existed the proceedings and no application to restrict information has previously been made;
- publication has not been demonstrated to increase the risk of relevant harm to the practitioner to the point of warranting secrecy.

[64] Overall the tribunal accepts the strength of the submissions by the commissioner and refuses a blanket non-publication order on the basis that it is not reasonably satisfied that making one is necessary in the overall interests of justice to minimise the risk of endangering her health and safety and the commissioner's statutory duty to record the details mentions in s 472(2) of the Legal Profession Act in the discipline register⁵⁴ or other approved means of disclosure.

[65] This, however, does not affect the de-identification of these reasons in line with the directions of 13 December 2017. There is no contradiction or lack of transparency involved in regulating the disclosure of information by anonymising the name and deleting other identifying particulars of the practitioner from the decision.

⁵⁴ cf. QCAT Act s 66(1)(c); LPA ss 472(2), 472(5), 477(2), 656D.