QCAT

Queensland Civil and Administrative Tribunal

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| **CITATION:** | *Legal Services Commissioner v Shand* [2017] QCAT |
| **PARTIES:** | Legal Services Commissioner<br>(Applicant)<br>v<br>Harold Warner Shand<br>(Respondent) |
| **APPLICATION NUMBER:** | OCR163-13 |
| **MATTER TYPE:** | Occupational regulation matters |
| **HEARING DATE:** | 28 February 2017 |
| **HEARD AT:** | Brisbane |
| **DECISION OF:** | **Hon J B Thomas, Judicial Member**<br>Assisted by:<br>**Ms Megan Mahon (Legal panel member)**<br>**Mr Keith Revell (Lay panel member)** |
| **DELIVERED ON:** | 12 May 2017 |
| **DELIVERED AT:** | Brisbane |
| **ORDERS MADE:** | **1. A finding is recorded that under s 456(1) of the *Legal Profession Act 2007* the Tribunal is satisfied that the respondent Harold Warner Shand engaged in professional misconduct.**<br><br>**2. It is ordered that a local practising certificate not be granted to the respondent before the expiry of five years from the date of this order.**<br><br>**3. The Respondent must pay the Applicant's costs fixed in the sum of $2500.00 on or before 30 June 2017.**<br><br>**4. The Respondent's application for a non-publication order is refused.** |
| **CATCHWORDS:** | PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – DISCIPLINARY PROCEEDINGS – PROFESSIONAL MISCONDUCT – where |

respondent charged and convicted with criminal offence of corruptly giving valuable consideration to influence an agent – where sentence for criminal offence duly served – where respondent gave an undertaking to the Legal Services Commissioner not to practise law again – where respondent made full admissions and did not dispute finding of professional misconduct – whether respondent guilty of professional misconduct – whether respondent a fit and proper person to continue to practise – whether respondent's name should be removed from the local roll of practitioners – whether respondent should be prohibited from applying for a practicing certificate

PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – DISCIPLINARY PROCEEDINGS – APPLICATION FOR NON-PUBLICATION ORDER – where respondent foreshadowed application for non-publication of his identifying information – where grounds for non-publication concern embarrassment – whether it is appropriate to grant the order

COSTS - application by Commissioner for order for costs to be assessed – circumstances where payment of a limited sum fixed by the Tribunal considered more appropriate

*Legal Profession Act* 2007 (Qld) ss 419, 420, 452, 456, 462, 656D
*Queensland Civil and Administrative Tribunal Act* 2009 (Qld) ss 32, 66, 90

*A Solicitor v Council of the Law Society of New South Wales* (2004) 216 CLR 253
*Adamson v Queensland Law Society Incorporated* [1990] 1 Qd R 498
*Allinson v General Council of Medical Education and Registration* [1894] 1 QB 750
*Attorney-General v Bax* [1999] 2 Qd R 9
*Attorney-General v Priddle* [2002] QCA 297
*Barristers' Board v Darveniza* [2000] QCA 253
*Clyne v New South Wales Bar Association* (1960) 104 CLR 186
*Hilton v Legal Profession Admission Board*

[2016] NSWSC 1617
*In Re Davis* (1947) 75 CLR 409
*Legal Practitioners Admissions Board v Doolan* [2016] QCA 331
*Legal Services Commissioner v Michael David Sing (No 2)* [2007] LPT 005
*Myers v Elman* 1940 AC 282
*New South Wales Bar Association v Evatt* (1968) 117 CLR 177
*Prothonotary of the Supreme Court v P* [2003] NSWCA 320
*Queensland College of Teachers v Klemm* [2011] QCAT 207
*Queensland Law Society Incorporated v Smith* [2001] 1 Qd R 649
*Re A Barrister & Solicitor; Ex parte Attorney-General (Cth)* (1972) 20 FLR 234
*Re Solicitor; ex parte Law Society* [1912] 1 KB 302
*Re Wheeler* [1992] 2 Qd R 690
*Watts v Legal Services Commissioner* [2016] QCA 224.
*Ziems v Prothonotary of the Supreme Court of New South Wales* (1957) 97 CLR 279

**APPEARANCES:**

This matter was heard and determined on the papers pursuant to s 32 of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) (QCAT Act).

**REPRESENTATIVES:**

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| **APPLICANT:** | Mr M Nicolson for the Legal Services Commissioner |
| **RESPONDENT:** | Mr H Shand appearing on his own behalf |

**REASONS FOR DECISION**

**Jurisdiction**

[1] This is an application by the Legal Services Commissioner under section 452 of the *Legal Profession Act* 2007 ("the Act") for disciplinary orders against a legal practitioner.

[2] The respondent is alleged to have been guilty of misconduct in that he engaged in conduct for which he was convicted of a serious offence on 1 April 2011 and sentenced to a term of imprisonment.

[3] There are no jurisdictional issues or contested facts. The case involves the drawing of inferences from known facts, a determination of the sanction that should be imposed, and a decision whether a non-publication order should be made.

[4] The orders that can be made by the Tribunal on this disciplinary application are those contained in section 456(2) of the Act.

[5] The main point at issue is whether or not the order should include a recommendation for removal of the respondent's name from the local roll.

**Facts**

[6] The respondent was born in 1951, educated in Queensland, and was admitted as a solicitor of the Supreme Court of Queensland in 1975, and subsequently in other states and territories.

[7] He served as associate to a Supreme Court Judge, and by 1977 had become a partner in a law firm. Between 1977 and 1997 he was successively a partner in three major lawyer firms, and acted for a wide range of clients. His practice focused initially on banking and finance, and grew into wide-ranging work for large corporate and government bodies in large scale commercial transactions and over many other areas including property, rural matters, hotels and mining. He also performed a good deal of honorary legal work.

[8] He describes his legal career as spanning 22 years, presumably the period 1977-1999. He was a part-time consultant to another firm for the last two years of that period, and had already moved from mainstream practice towards mining and commerce. As early as 1988 he had become a director of a start-up mining enterprise called Jellinbah Resources Pty Ltd, of which he subsequently became the Chairman, and, from 1997 to 2003, the Chief Executive Officer.

[9] In April 2002, while CEO of Jellinbah, he committed the criminal offence that is the origin of the present proceedings.

[10] These circumstances will be detailed below, but the central fact is that under direction from the company's owner he signed a company cheque and effected a corrupt payment of $60,000 to the then Minister for Mines, Mr Gordon Nuttall.

[11] Some years passed before the offence was detected. In due course, the respondent was charged and eventually convicted in 2011. The charge, made under section 442BA(b) of the *Criminal Code,* was that he corruptly gave valuable consideration to influence an agent.

[12] Two trials took place, the first taking 10 days and ending in a jury disagreement, and the second taking 9 days and ending in conviction.

[13] On 1 April 2011 he was sentenced to 15 months imprisonment, suspended after 4 months, for an operational period of 15 months.

[14] The sentence was duly served.

[15] The sentencing judge, Griffin DCJ presided at both trials, and there are strong reasons for giving considerable weight to His Honour's view of the circumstances, and of the role that the respondent played in the event.

[16] His Honour's observations included:

- You did not derive any actual benefit;
- I find that you acted on the instructions of Gorman[1]... in the sense that you were called upon to effect the payment in your role as CEO of Jellinbah;
- The politician, Nuttall, was not corrupted by the payment…Nuttall was already deeply corrupted;
- Nutall's behaviour suggested that, should his requests not be accommodated, he had the ministerial wherewithal to show palpable disfavour to those commercial interests.
- The primary intention of making the payment, I find, was to protect Gorman's commercial interests against Nutall's possible displeasure at refusal…therefore I find that the offence was committed by you knowing and appreciating these things and effected in collaboration with Gordon at his request.

[17] No suggestion to the contrary is made on behalf of the applicant Legal Services Commissioner.

[18] His Honour emphasised the seriousness of participation in corruption within government, and imposed the sentence indicated above.

[19] Following his being charged with the offence, the respondent suffered depression and was treated with counselling and sedation by a psychiatrist who was also a friend of 20 years standing, Dr F Ian Curtis.

[20] A report was tendered, written by Dr Curtis, on the issue whether the respondent "is currently a fit and proper person to be recognised as a practising solicitor in Queensland". Leaving aside the obvious question whether Dr Curtis was qualified to express an opinion on such a question, and also leaving aside Dr Curtis's views on that point, the report contains relevant material, particularly that which confirms that the respondent underwent a period of relatively significant depression, particularly around the period when he was charged and tried. Dr Curtis attempts, somewhat

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[1] Gorman was the respondent's "mine manager" and "effectively the owner-director" of Jellinbah.

unconvincingly in my view, to relate a milder form of this depression back to the period when the offence was committed. He describes this as having been caused by the respondent's loss of position and recognition as CEO of Jellinbah. However, on the material before me, his loss of that position occurred subsequently to the offending conduct. I therefore do not propose to take into account any psychiatric mitigation for the conduct in question, and note that the respondent did not rely on it or suggest to the Tribunal that it should be taken into account on that basis.

[21] Subject to the above-mentioned reservations, the report confirms that the respondent's behaviour was an isolated event in the life of a person of otherwise outstanding good character and that it was aberrant and uncharacteristic. It also confirms that he has made a "complete recovery from his depression" and that the recovery "really commenced with the sense of closure structured by His Honour in sentencing". His impression of the respondent at the time of this report was of "a normal but highly sensitive and community minded professional person".

[22] The applicant Legal Services Commissioner did not actively commence a misconduct investigation until seven months after the respondent's conviction, when it invited him to make submissions on the matter.

[23] The respondent promptly made submissions[2] and gave an undertaking not to practise law again. He asked for time to obtain a psychiatric report.

[24] Twelve months elapsed before the applicant Commissioner inquired about its non-production. In due course, Dr Curtis' report was received on 11 June 2013.

[25] The matter was then fairly quickly referred to this Tribunal.

[26] The respondent's response included an admission that the relevant conduct amounted to professional misconduct, and he took issue only on the question whether his name should be removed from the roll of legal practitioners.

[27] The evidence does not show when the respondent last held a practising certificate, and the applicant Commissioner did not provide any evidence concerning the history of practising certificates or details concerning his registration or professional history.

[28] What is known however is that the respondent ceased conventional legal practice in favour of a business career at least by 1999 when his consultancy role with Corrs Chambers Westgarth ceased, and that he had become CEO of Jellinbah in or around 1997. The extent of any engagement in legal practice by him (if any) after that time was not examined.

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[2] Submissions filed in QCAT, 10 February 2012.

[29] He undertook in early 2012 not to practise again and it may be inferred that there has been no renewal or attempt at renewal of any practising certificate since then or possibly since much earlier. Moreover, he has indicated that he does not desire to practise and has offered to give an undertaking to that effect in relation to future practice.

[30] During his lengthy period of actual legal practice spanning 22 years, the respondent was never the subject of any complaint of misconduct. With the exception of the serious aberration in 2002, his conduct has been unimpeachable.

[31] He has endured the inevitable disgrace that follows such a conviction, and has not returned to active legal or commercial activity.

[32] Throughout the respondent's adult life he has been seriously involved in rugby union and its organisation, and has to some extent maintained this to the present day, with a particular interest in the disciplinary administration of that code.

[33] There is uncontradicted evidence that he has contributed in substantial ways to the benefit of the community, and this is confirmed by an impressive list of personal references.

**Finding of professional misconduct**

[34] The first task of the Tribunal is to determine whether or not the respondent was guilty of "professional misconduct". That issue is not contested, but it is necessary that the Tribunal be independently satisfied that such a finding is justified.

[35] The statutory definition of that term includes:

> *"Conduct of an Australian legal practitioner, whether happening in connection with the practice of law or happening otherwise than in connection with the practice of law that would, if established, justify a finding that the practitioner is not a fit and proper person to engage in legal practice."*[3]

[36] The practitioner's conduct in this case happened "*otherwise than in connection with the practice of law*". A finding of professional misconduct therefore cannot be made unless there is a finding that the respondent "is not a fit and proper person to engage in legal practice".

[37] Section 419(2) provides:

> *"For finding that an Australian legal practitioner is not a fit and proper person to engage in legal practice as mentioned in subsection (1), regard may be had to the suitability matters that would be considered if the practitioner were an applicant for admission to the legal*

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3 *Legal Profession Act* 2007 (Qld), s 419(1)(b).

> *profession under this Act or for the grant or renewal of a local practising certificate."*[4]

[38] The "suitability factors" to which regard may be had are listed in section 9. Many of these are inapplicable to present circumstances, but the section includes some issues of present relevance including whether he is currently of good fame and character, the nature of the offence that was committed, and how long ago.

[39] Section 420 non-exclusively mentions some categories of conduct that are capable of constituting unsatisfactory professional conduct or professional misconduct. Relevantly it includes "conduct for which there is a conviction for a serious offence".[5]

[40] "Serious offence" is defined to include indictable offences within the state.

[41] There is no doubt that the evidence here is capable of establishing professional misconduct. Whether it in fact does so depends on evaluation of the evidence by the Tribunal.

[42] In order to make such a finding it is necessary that the conduct would "justify a finding that the practitioner is not a fit and proper person to engage in legal practice."[6]

[43] For the reasons stated hereunder, I have concluded that at the present time the respondent is not a fit and proper person to engage in legal practice. The question whether his name should be removed from the roll is of course a separate one.

[44] Accordingly, and with the advice of members of the panel, I find that the respondent was guilty of professional misconduct as alleged in the application.

**Sanction**

[45] Section 456(1) provides that following a finding of professional misconduct or unsatisfactory professional conduct, the Tribunal "may make any order as it thinks fit".

[46] The orders listed in section 456(2) are mere examples of orders that may be made, although it may well be that other options will not often need to be chosen.

[47] No attempt has been made to specify the circumstances that might be appropriate for the making of orders that section 456(2) exemplifies. The Tribunal's discretion is untrammelled.

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4 Ibid, s 419(2).
5 Ibid, s 420(1)(c).
6 *Legal Profession Act* 2007 (Qld), s 419(1)(b).

[48] In this situation, the necessary principles and criteria are to be found in the common law, and in precedents that show how the courts have traditionally regulated the profession.

[49] It is recognised that the power of the courts, and now of this Tribunal, is protective, not punitive.[7]

[50] We are dealing with misconduct occurring otherwise than in the course of legal practice. Conduct of this kind was termed “personal misconduct” in *Ziems* case.[8] The utility of the discussion in *Ziems,* and in many other cases referred to in legal argument,[9] is that they illustrate the level and nature of the factors that have been considered necessary to justify the striking-off of a practitioner's name from the roll for conduct of this kind. The system that operated before statutory intrusions, and indeed, the various statutory intrusions themselves, differs in many respects from the present day system, and proper interpretation of the statements in earlier cases is enlightened by historical examination.

[51] Until at least the middle of the 20th century, the term “professional misconduct” was widely thought to apply only to acts and omissions in the course of professional practice or "in the pursuit of the profession".[10] This derived from the test first formulated in *Allinson's Case*[11] in 1894, which was adopted as an appropriate definition for the term "professional misconduct" in a case concerning a solicitor in 1912.[12] That test required that the conduct be done "in the pursuit of his profession". That seems to have been the prevailing view in 1957 at the time of *Ziems case*[13] in which Fullagar J observed:

> "*But the whole approach of a court to a case of personal misconduct must surely be very different from its approach to a case of professional misconduct. Generally speaking, the latter must have a much more direct bearing on the question of a man's fitness to practise than the former."*[14]

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7 *New South Wales Bar Association v Evatt* (1968) 117 CLR 177; *Clyne v New South Wales Bar Association* (1960) 104 CLR 186.

8 *Ziems v Prothonotary of the Supreme Court of New South Wales 1957* 97 CLR 279, 290.

9 Leading cases include *Ziems* (above); *Attorney-General v Bax* [1999] 2 Qd R 9; *Adamson v Queensland Law Society Incorporated* [1990] 1 Qd R 498; *Prothonotary of the Supreme Court v P* [2003] NSWCA 320; *Barristers' Board v Darveniza* [2000] QCA 253; *Watts v Legal Services Commissioner* [2016] QCA 224.

10 Lord Atkin in *Myers v Elman* 1940 AC 282,303; *Re Wheeler* [1992] 2 Qd R 690,697; *Queensland Law Society Incorporated v Smith* [2001] 1 Qd R 649, 652; contrast *New South Wales Bar Association v Cummins* [2001] 52 NSWLR 279, 286-9 where the NSW Court of Appeal did not regard this view of the term as settled.

11 *Allinson v General Council of Medical Education and Registration* [1894] 1 QB 750, 761 per Lord Esher MR.

12 *Re Solicitor; ex parte Law Society* [1912] 1 KB 302.

13 *Ziems v Prothonotary of the Supreme Court of New South Wales* (1957) 97 CLR 279; [1957] HCA 46.

14 Ibid, p 290.

[52] It was however well recognised that misconduct of that kind might still be serious enough to render a legal practitioner unfit to practise or to remain on the roll.

[53] By 1972, various terms had come to be used to describe different categories of misconduct, including professional misconduct, malpractice and unprofessional conduct. The leading case of *Re A Barrister & Solicitor; Ex parte Attorney-General (Cth)*[15] drew the authorities together and expressed an "ultimate" test applicable to all three categories, which was capable of being applied to conduct both in and out of professional practice. Paraphrases and variations of that test then started to appear in legislation as governments progressively introduced controls over the activities of practitioners and professional boards. Many variations appeared in the legislation across the various states.

[54] In 2000, National Model Laws were introduced for the legal profession, adopting a variety of terms and definitions, which inter alia adopted some extended concepts of unacceptable conduct by practitioners, including terms such as "unsatisfactory professional conduct" which widened the range of conduct for which disciplinary measures could be taken.

[55] Queensland amended that law into the Legal Profession Act 2007, which, as has already been noticed, specifically addresses the category which Fullagar J described as "personal misconduct". Its definition of "professional misconduct"[16] makes special provision for such cases. For example, s 419(2) helpfully points to factors to which regard *may* be had in making a finding under s 419(1)(b). But nothing in the Act undermines what may be described as the traditional approach of the courts in such matters in the assessment of overall fitness to be or remain on the roll of practitioners.

[56] One significant change of which one needs to be aware in the application of past cases is that there is now a clear distinction between admission to the roll and admission to practice.

[57] Until the latter part of the 20th-century, entry on the roll conferred the right to practise, and that right was only lost by removal or suspension of the practitioner's name from the roll.[17] But now admission to the roll no longer confers a right to practise. Practising certificates are necessary in order to engage in legal practice.

[58] This means that separate consideration is now necessary in disciplinary proceedings as to whether a practitioner is unfit to engage in practice and whether he or she is unfit to remain on the roll. The former question now needs to be answered in making the initial determination of professional

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15 (1972) 20 FLR 234, 242-3, 245-6.

16 *Legal Profession Act* 2007 (Qld), ss 419(1)(b) and 419(2).

17 *In re the Justices of the Court of Common Pleas at Antigua* (1830)1 Knapp 267; 12 ER 321; *In Re Davis* (1947) 75 CLR 409, 419.

misconduct,[18] while the second question arises on the issue of sanction when the Tribunal considers whether an order recommending removal of the practitioner's name from the roll should be made[19] as distinct from suspension or postponement of the right to practise,[20] or no suspension or postponement at all.

[59] A determination of professional misconduct under the Act requires a present tense determination that the practitioner is not a fit and proper person to engage in legal practice.

[60] A finding that a person at a particular time is not fit and proper to engage in legal practice does not necessarily mean that he or she is not fit to remain on the roll. It is necessary to recognise that different purposes and considerations apply to the maintenance of the roll than to the granting, withdrawing, suspending and imposing of conditions concerning practising certificates. This was emphatically noted in the recent Court of Appeal decision of *Legal Practitioners Admissions Board v Doolan.*[21]

[61] In finding the respondent guilty of professional misconduct above, it was necessary to find that he is not currently fit to practise, and the practitioner himself did not suggest that he was. The relevant criteria for deciding whether his name should now be struck from the roll can only be distilled from decided cases with an awareness of the different purposes for which admission rolls and practising certificates now exist.

[62] Traditionally, the Supreme Court has controlled the admission of members of the legal profession, and in performing that function it has been concerned with two major factors - sufficient qualification and good character. The overlay of statutory requirements does nothing to contradict its principal focus on those issues. The function of issuing practising certificates has been entrusted to the Queensland Law Society, subject to a different and more heavily controlled statutory regime, which is of course subject to supervision by the Tribunal and ultimately the Court.

[63] It is true that most of the decided cases do not advert to the distinction between rights to enrolment and rights to practice, but they still provide benchmarks for the type of conduct that will justify a striking from the roll, and that which will justify a suspension from practice.

[64] Many cases were referred to by counsel for the Commissioner which are helpful in discerning the level of seriousness at which a "striking off" becomes necessary as distinct from a suspension from practice. The cases illustrate the central importance of the court's perception of the character of the relevant practitioner. As Kitto J observed in *Ziems*:

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18 *Legal Profession Act* 2007 (Qld), s 419(1)(b).
19 Ibid, s 456(2)(a).
20 Ibid, ss 456(2)(b) and 456(2)(c).
21 [2016] QCA 331 [44]-[50]; cf *Watts v Legal Services Commissioner* [2016] QCA 224, [46],[47],[52].

> *"Conduct may show a defect of character incompatible with membership of a self-respecting profession; or, short of that, it may show unfitness to be joined with the Bench and the Bar in the daily co-operation which the satisfactory working of the courts demands. A conviction may of its own force carry such a stigma that judges and members of the profession may be expected to find it too much for their self-respect to share with the person convicted the kind and degree of association which membership of the Bar entails. But it will be generally agreed that there are many kinds of conduct deserving of disapproval, and many kinds of convictions of breaches of the law, which do not spell unfitness for the Bar; and to draw the dividing line is by no means always an easy task."*[22]

[65] A helpful compendious summary of the approach of the courts to the striking off from the roll of the name of a legal practitioner for personal misconduct through commission of a crime is contained in the NSW Court of Appeal decision of *Prothonotary v P.*[23] This has been extensively followed in other Australian jurisdictions.

[66] One criterion that is clearly established in this case and others which follow it is "*an order striking off the roll should only be made when the probability is that the solicitor is permanently unfit to practise*".[24] The need for a perception of permanent unfitness to practise has recently been emphasised by the Queensland Court of Appeal in *Watts,*[25] where the court concluded that the conduct of the solicitor in question, when it was committed, "*would have rendered him unfit to practise at that point. However that is not determinative on whether he is now permanently unfit to practise*."[26]

[67] A similar observation might be made as to the respondent's conduct in the present case.

[68] It also seems clear that suspension from the roll has been regarded as a more appropriate course than striking off whenever the Court or Tribunal perceives that after a stated period of suspension the practitioner is likely to be of appropriate character to resume practice.[27] This is sometimes achieved by the imposition of conditions or undertakings limiting the nature of the practice in which the practitioner may re-engage.[28]

[69] I turn to the main factors in the present case.

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22 *Ziems v Prothonotary of the Supreme Court of New South Wales* (1957) 97 CLR 279, 298.

23 *Prothonotary of the Supreme Court v P* [2003] NSWCA 320, [17].

24 Ibid, [17](2).

25 *Watts v Legal Services Commissioner* [2016] QCA 224, [46].

26 Ibid, [47].

27 *Attorney-General v Priddle* [2002] QCA 297, [9]-[14]; *Attorney General v Kehoe* [2001] 2 Qd R 350, 357-8; *Re a Practitioner* (1984) 36 SASR 590, 593 per King CJ; *Barristers Board v Darveniza* [2000] QCA 253, [38].

28 *Attorney-General v Priddle* [2002] QCA 297, [14].

[70] There is no doubt that the crime was a serious one, which involved playing a part in an act of public corruption.

[71] There are cases where the nature of the offence and its circumstances are themselves enough to permanently stigmatise the offender as unfit to be a member of an honourable profession. Such a case might show an ingrained, unacceptable character which raises such public concern that the practitioner ought never to be allowed to practise again.

[72] A good example of this is *Hilton*,[29] a solicitor who bribed a Minister and was struck off in 1988. Despite substantial rehabilitation and a blameless life over many years subsequent to the offence, he was still not regarded as a "fit and proper person" to practise, and was refused readmission. He, as criminal lawyer, had repeatedly over a sustained period, corrupted a Minister and thereby obtained early release for his clients. Understandably, the court took the view that the original conduct was so bad that he could never again be an acceptable member of the legal community. It is also to be noted that this involved repeated misconduct over a significant period and perversion of actual legal practice.

[73] Counsel for the applicant Commissioner submitted that any participation in the making of a corrupt payment to a Minister of the Crown is so serious that it is incompatible with any right to practise the law, and that it should be a permanent bar. In short, the seriousness of the crime, it was submitted, is enough in itself to require his removal from the roll.

[74] However, as stated by Fullagar J in *Ziems*, *"it is on what the man did that the case must be ultimately decided. We are bound to ascertain, so far as we can on the material, the real facts of the case*."[30] This remains appropriate, and is reinforced by a more recent High Court decision reaffirming the need to examine 'the whole position'.[31]

[75] Here the findings of the learned sentencing judge, as to which there has been no contrary submission, show that:

1. The respondent did not initiate or participate in the transaction with Nuttall other than to act as directed by his employer for the employer's perceived benefit. It is noted that the employer was not prosecuted; he was given indemnity in exchange for his testimony to secure the conviction of Nuttall.

2. The offending act was not for personal gain;

3. The offence was the result of a single aberrant act of poor judgment;

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29 *Hilton v Legal Profession Admission Board* [2016] NSWSC 1617, [6].

30 *Ziems v Prothonotary of the Supreme Court of New South Wales* (1957) 97 CLR 279, [288].

31 *A Solicitor v Council of the Law Society of New South Wales* (2004) 216 CLR 253, 266 per Gleeson CJ, McHugh, Gummow, Kirby and Callinan JJ.

4. The respondent's act did not corrupt Nuttall who was the moving force in the transaction.

[76] The respondent has served the sentence that was imposed. He has completely recovered from whatever depression formerly affected him. The overall picture is that of a person with a blameless, indeed meritorious legal career for 22 years, followed by a period of business activity during which he made a serious transgression, followed by a period of 14 years of blameless conduct during which he took his punishment, endured disgrace, saw his family suffer, and got on with his life to the best of his ability.

[77] The respondent's misconduct was very serious and ultimately inimical to the maintenance of law and order, and it is open to think that had an application been considered immediately after the offending conduct, or even around the time of his conviction and imprisonment, it could have been appropriately determined that he was then unfit to practise. But, as the court observed in *Watts*,[32] "*this is not determinative of whether he is now permanently unfit to practise*". That is a test which I am bound to apply in determining whether his name should be removed from the roll. As the High Court observed in *A Solicitor v Council of the Law Society of New South Wales (*above):

> *"Thus not all cases of professional misconduct justify or require a conclusion that the name of a practitioner should be removed from the Roll. Where an order for removal from the Roll is contemplated, the ultimate issue is whether the practitioner is shown not to be a fit and proper person to be a legal practitioner of the Supreme Court, upon whose Roll the practitioner's name presently appears."*[33]

[78] Counsel for the Commissioner submitted, that it is necessary that not only clients, but also fellow lawyers, the judiciary, and the public be able to repose confidence in a practising lawyer. That submission addresses fitness for current practice, and is a valuable observation. But the question here is whether he is now not a fit and proper person to remain on the roll, and, more specifically, whether he should now be seen as permanently unfit to practise.

[79] Notwithstanding the seriousness of the transgression, on the facts of this case I cannot say that this man is permanently unfit to practise, or that the circumstances of this case give rise to any apprehension that the community, the profession or the judiciary needs to be protected from him. There is no necessary incongruity about a person's name remaining on the roll notwithstanding that he or she is currently unable or temporarily disqualified from obtaining a practising certificate.

[80] Short of striking from the roll, options are available by which a sufficient general deterrent effect may be achieved, and by which public disapproval

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32 *Watts v Legal Services Commissioner* [2016] QCA 224, [47].

33 [2004] 216 CLR 253, 265-6.

of his misconduct will be sufficiently recognised. This is achievable by precluding him from practice for a further substantial period on top of the period for which he has already voluntarily desisted from practice.

[81] A similar approach was taken by the members of the High Court in the above-mentioned case of *A Solicitor v Council of the Law Society of New South Wales*, where the erring solicitor was convicted of four counts of indecent assault upon a minor under 16 years of age, and whose conduct was seriously aggravated by lack of candour in his dealings with the Law Society. He had not renewed his practising certificate since his conviction. The court stated -

> *"In effect, he has been unable to practise for more than five years. It would have been appropriate for the Court of Appeal to make an order for his suspension, but an appropriate order would not have extended beyond the present time. The Court of Appeal made an order for costs against the appellant, and that should stand. In those circumstances, no further sanction is required."*[34]

[82] It can be deduced that the maximum limit of an appropriate order of suspension in that case was the period between the respective determinations of the Court of Appeal and the High Court, that is to say, of the order of two years, which would follow a period of five years of voluntary non-practice.

[83] In the present case, the respondent indicated that he has no desire ever to practise again, and offered an undertaking to the Tribunal never to reapply for a practising certificate.

[84] The question arises whether an undertaking to that effect should be accepted as a condition of the order, and taken into account in fixing the appropriate sanction. After much consideration, I conclude that such a course might wear the appearance of a respondent "buying out" a part of the sanction, and that it is preferable in this case that the Tribunal take responsibility for the imposition of the entire sanction that it thinks appropriate at this point. I do not for a moment think that the respondent's offer was made other than in good faith, but can see potential future difficulties and complications if such an undertaking were received and taken into account in determination of the level of sanction.

[85] Bearing in mind that he has already observed a self-imposed ban from practice for the past five years, I consider that the appropriate response in this case will be to ensure that further five years should elapse before any consideration be given to the issue of any further practising certificate to the respondent. The appropriate order will be made under s 456(2)(c) of the Act.

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34 *A Solicitor v Council of the Law Society of New South Wales* [2004] 216 CLR 253, 275-6.

[86] The overall loss of practice from his voluntary cessation and the order that the Tribunal will now make will total a period of 10 years. His age (now 65) is a relevant factor in regard to fixation of the appropriate period, along with the need to signify public disapproval for the conduct in question.

**Non-Publication Order**

[87] By email dated 6 February 2017, the respondent foreshadowed a request that publication of information identifying him be prohibited.

[88] He pointed out that he and his family had already been subjected to damaging and embarrassing publicity, that he had suffered consequential depression confirmed in Dr Curtis' report, and submitted that "additional detriment" would be incurred if material concerning these proceedings were to be published.

[89] The Tribunal has jurisdiction to make such an order in appropriate cases, notably that conferred by s 656D of the Act, and also by ss 66 and 90 of the *Queensland Civil and Administrative Tribunal Act* 2009 ("the QCAT Act").

[90] The *Legal Profession Act* 2007 is the enabling act, and in the event of any inconsistencies, its provisions would prevail over those of the QCAT Act. However, other than provisions making it necessary for the keeping and making of entries in a discipline register,[35] which must always be available for public inspection, there is no tension between the provisions of the QCAT Act relating to non-publication orders, and those in the *Legal Profession Act*.

[91] Many decisions have been made in QCAT on applications under ss 66 or 90 of the QCAT Act, and in other courts and Tribunals concerning similar legislation.[36] My view of these sections was stated in *Klemm's case*, which concerned a school teacher,[37] part of which may be here restated:

> [6] The regime that is to be followed by this tribunal is statutory, and is contained in two companion sections, sections 66 and 90 of the QCAT Act. Section 90(2) sets out the exceptions from the general principle that all hearings prima facie be held in public, and section 66 permits the tribunal to give effect to these exceptional cases through the making of non-publication orders with respect to evidence given before the tribunal and the contents of any documents produced. The tests in ss 66(2) and 90(2) are identical.
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> …

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35 Part 4.11 of Chapter 4 (sections 471-477) of the Act.

36 Particular reference was made to *Legal Services Commissioner v Michael David Sing (No 2)* [2007] LPT 005; *Kyle v Legal Practitioners' Complaints Committee* [1999] WASCA 115; *Legal Services Commissioner v CBD* [2011] QCAT 401; *Legal Services Commissioner v XBY* [2016] QCAT 102; *Legal Services Commissioner v XBN* [2016] QCAT 471.

37 *Queensland College of Teachers v Klemm* [2011] QCAT 207, [3]-[14].

> [14] 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. The only competing interest suggested is the suggestion that the teacher's level of risk of harm in prison is increased by the publication of such information. 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 QCT's 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.

[92] I am not prepared to make an order of this kind in the present case.

[93] In the first place, the proceedings have already been in the public arena for a considerable time. In the second place, the orders that the Tribunal makes must necessarily be published in the discipline register by statute. In the third place, the medical evidence shows that the respondent has fully recovered from whatever psychiatric difficulty he formerly experienced, and there is no evidence to suggest that his mental health or safety would be endangered by such publication.

[94] In the fourth place, and importantly, the disciplinary process concerning the legal profession needs to be seen to be accountable and transparent[38] and the visibility of proceedings of this kind contributes to public confidence in the profession, and in the end, to law and order itself. For this reason, orders of this kind in this jurisdiction are relatively few, though of course they may be made when considered necessary under one or more of the criteria stated in s 66(2) of the QCAT Act.

[95] For the above reasons the Tribunal declines to make any non-publication order in this case.

## Costs

[96] In the Commissioner's written submissions dated 19 February 2014, the following submissions appeared:

> [18] The applicant seeks an order for costs fixed in the amount of $2,500 pursuant to s 462(5) of the Act.
>
> …
>
> [21] The applicant submits that there are no exceptional circumstances in this case justifying an order departing from s 462(1) and thus seeks an order that the respondent pay the applicant's costs as sought.

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38 *Legal Services Commissioner v Sing (No 2)* [2007] LPT 005 at pg 4 per De Jersey CJ*; Kyle v Legal Practitioners' Complaints Committee* [1999] WASCA 115 at [70]-[78].

[97] That appeared to be a responsible request, and the respondent made no opposition to it.

[98] However, during and after the hearing, the applicant sought an order that the respondent pay "costs…assessed on the standard basis pursuant to ss 462(1) and 462(5)(d) on the *Legal Profession Act 2007*".

[99] Experience suggests that an order of that kind would have a very significant effect upon the quantum of the demand, and it would also entail the further expense of the assessment itself.

[100] Fresh submissions have now been filed by the Commissioner on costs. They recite the history of the proceedings in QCAT, where the original directions contemplated a hearing "on the papers" that would take place on 17 June 2015. Despite the provision of written submissions by both parties, that "hearing" did not occur. I do not know why, but the reason would seem to involve an equal lack of activity by both parties, and a failure by QCAT to regiment them. In the event, the matter was eventually listed for "oral hearing" on 28 February 2017, during which both parties supplemented their written submissions with oral argument.

[101] The only additional matters raised since 2015 were a complaint in an email by the respondent about the delay, upon which the Commissioner, shortly before the oral hearing, filed an affidavit designed to show that the Commissioner's office was not responsible for it; and a request by the respondent for the Tribunal to consider making a non-publication order, which the Commissioner opposed, and which was duly refused at the commencement of the oral proceedings.

[102] I fail to see that these events cast any different character upon the principal disciplinary application, or that they materially affect the disposition of the question of costs, or justify a change of step on the Commissioner's part from what was originally a proper request.

[103] The respondent conceded the issue of professional misconduct at the outset, and there has been no contest on the facts. His response was consistently confined to the one question concerning striking from the roll, on which point it might be noticed he has succeeded. His conduct has enabled the Commissioner to deal with this matter upon the basis of what would seem to have been light preparation, with minimal investigation and without undue complication.

[104] The applicant Commissioner is of course entitled under the Act to an order for costs, and his original request for $2,500 was entirely consistent with that entitlement.[39]

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[39] Section 462(5)(a).

[105] I see no sufficient basis why the manner of assessment should now be changed in order to allow a higher amount to be assessed. The recent submission asserts –

> "As the Tribunal would be aware, public funds are expended in a course of disciplinary proceedings by the applicant. It follows that it is upon the applicant to account for those public funds and seek recovery on those funds where possible".

[106] It is true that statutory corporations, government agencies, or other bureaucracies have proliferated and now play a major role in the administration of professional discipline, which formerly was the sole province of professional boards funded by members of the relevant profession. However, the economic aspirations and policies of such bodies are not particularly persuasive on the issue of costs, indeed no more so than those of the respondent.

[107] I see no sufficient basis why the method of assessment should now be changed in order to allow a higher amount to be assessed. Indeed, having regard to the litigation as a whole, I would have been inclined in any event to make an order under s 462(5)(a) for the payment of a limited amount.

[108] The order that will be made on this issue will therefore be that the respondent pay the applicant's costs fixed at $2,500.

**Orders**

[109] The following orders will be made:

1. A finding is recorded that under s 456(1) of the *Legal Profession Act 2007* that the Tribunal is satisfied that the respondent Harold Warner Shand engaged in professional misconduct.

2. It is ordered that a local practising certificate not be granted to the respondent before the expiry of five years from the date of this order.

3. The respondent must pay the applicant Commissioner's costs, fixed at $2,500 on or before 30 June 2017.

4. The respondent's application for a non-publication order is refused.