[2012] WASAT 221

JURISDICTION	**:**	STATE ADMINISTRATIVE TRIBUNAL
STREAM	**:**	VOCATIONAL REGULATION
ACT	**:**	LEGAL PROFESSION ACT 2008 (WA)
CITATION	**:**	LEGAL PROFESSION COMPLAINTS COMMITTEE and SKERRITT [2012] WASAT 221
MEMBER	**:**	JUDGE D R PARRY (DEPUTY PRESIDENT) MR S ELLIS (SENIOR SESSIONAL MEMBER) DR A MCCUTCHEON (SENIOR SESSIONAL MEMBER)
HEARD	**:**	29 OCTOBER 2012
DELIVERED	**:**	9 NOVEMBER 2012
FILE NO/S	**:**	VR 126 of 2011
BETWEEN	**:**	LEGAL PROFESSION COMPLAINTS COMMITTEE Applicant AND ANDREW PAUL SKERRITT Respondent

Catchwords:

Vocational regulation - Legal practitioners - Professional misconduct - Penalty - Practitioner sent letter which he knew was misleading to State Administrative Tribunal in relation to conflict between criminal trial and SAT hearing in which he was to appear as counsel - Practitioner's mental illness was a contributory factor in his failure to address conflict between criminal trial and SAT hearing in a timely manner - Mental illness not cause of professional misconduct but relevant to context and circumstances - Whether Tribunal should make and

transmit report to Supreme Court (full bench) with recommendation that name of practitioner be removed from the roll - Suspension - Requirement for practitioner to undergo medical treatment and psychological counselling - Condition on practising certificate requiring practitioner to submit report from psychiatrist to Legal Practice Board - Costs

Legislation:

Legal Profession Act 2008 (WA), s 438(2)(a), s 438(4)(b), s 439(a), s 439(c), s 441(j)
State Administrative Tribunal Act 2005 (WA), s 87(2)

Result:

Suspension of practitioner's practising certificate for six months from 1 December 2012 to 31 May 2013 inclusive
Requirement that practitioner undergo medical treatment and psychological counselling prescribed by psychiatrist from date of decision until 31 May 2013
Condition on practitioner's practising certificate requiring submission of a report by psychiatrist to the Legal Practice Board by 7 June 2013

Summary of Tribunal's decision:

Mr Andrew Skerritt, a legal practitioner, admitted that he engaged in professional misconduct by sending a letter, which he knew was misleading, to the State Administrative Tribunal in relation to a matter in which he was briefed to appear as counsel. The Tribunal considered the appropriate disciplinary consequence of the practitioner's conduct. The Legal Profession Complaints Committee contended that the appropriate disciplinary consequence of the practitioner's conduct is for the Tribunal to make and transmit a report on its finding to the Supreme Court (full bench) with a recommendation that the name of the practitioner be removed from the Roll of Practitioners. The Tribunal disagreed, principally because the practitioner suffered from mental illness which, while not the cause of his professional misconduct, formed part of the context and circumstances in which the conduct occurred, and also having regard to character references and the practitioner's admission of the allegation and acceptance that his conduct constituted professional misconduct. The Tribunal determined that in order to protect the public in their dealings with lawyers, maintain proper standards in the legal profession, and protect the reputation of the legal profession, the appropriate disciplinary consequence of

the practitioner's professional misconduct in the circumstances of this case involves three elements, namely:

suspension of the practitioner from legal practice for a period of six months;

requiring the practitioner to undergo medical treatment and psychological counselling prescribed by a psychiatrist and to act in accordance with the psychiatrist's medical advice until the conclusion of the suspension; and

requiring the practitioner to submit a report by the psychiatrist to the Legal Practice Board within a week of the practitioner's return to practice indicating the treatment and counselling that he has undergone, his current state of mental health, any further treatment or counselling the psychiatrist considers the practitioner should undergo, and any restrictions on the type of matter, hours of work or nature or mode of practice that the psychiatrist recommends the practitioner should be subject to in his legal practice in the interests of his mental health

Category: B

Representation:

Counsel:

Applicant	:	Ms PE Cahill SC with Mr RI Fletcher
Respondent	:	Mr GR Donaldson SC with Mr RW Bower

Solicitors:

Applicant	:	Law Complaints Officer
Respondent	:	Corser & Corser

Case(s) referred to in decision(s):

A Solicitor v Law Society (NSW) [2004] HCA 1; (2004) 216 CLR 253
Barristers' Board v Darveniza [2000] QCA 253; (2000) 12 A Crim R 438
Kyle v Legal Practitioners' Complaints Committee [1999] WASCA 115; (1999) 21 WAR 56
Legal Practitioners Complaints Committee v Lashansky [2007] WASC 2011
Legal Practitioners Complaints Committee v McKerlie [2007] WASC 119

Legal Practitioners Complaints Committee v Pepe [2009] WASC 39
Legal Profession Complaints Committee and Gandini [2011] WASAT 86 (S)
Re Maraj (a legal practitioner) (1995) 15 WAR 12
The Council of the New South Wales Bar Association v Sahade [2007] NSWCA 145
The Council of the Queensland Law Society Inc v Wright [2001] QCA 58
Vogt v Legal Practitioners Complaints Committee [2009] WASCA 202

REASONS FOR DECISION OF THE TRIBUNAL:

Introduction

1 Mr Andrew Skerritt, legal practitioner, admitted that he engaged in professional misconduct by sending a letter, which he knew was misleading, to the State Administrative Tribunal in relation to a matter in which he was briefed to appear as counsel. Being satisfied by reason of the practitioner's admission that proper cause exists for disciplinary action against him, and having regard to the facts agreed between the Legal Profession Complaints Committee and the practitioner which are set out below, the Tribunal made consent orders finding that the practitioner is guilty of professional misconduct. As the Committee and the practitioner were unable to agree on the appropriate disciplinary consequence of the finding of professional misconduct and costs of the proceeding, the Tribunal conducted a hearing in relation to penalty and costs.

Agreed facts

2 The Committee and the practitioner agreed the following relevant facts:

1) By letter dated 4 November 2008, the Western Australian Police advised Mr B (client) that his application for a firearms licence had been refused (refusal).

2) On 17 December 2008, the practitioner on instructions from the client filed and served an Application, seeking a review of the refusal by the Tribunal, together with a notice advising that he acted for the client.

3) On 8 January 2009, the practitioner attended a directions hearing in the Tribunal, at which the Tribunal made the following programming orders:

   (a) By 29 January 2009 the Commissioner of Police (Commissioner) file and serve a Statement of Issues, Facts and Contentions (SIFC) and a s 24 bundle of documents;

   (b) By 19 February 2009 the client file and serve his SIFC;

(c) The matter be listed for final hearing on 13 March 2009, later changed administratively to 4 May 2009 (hearing); and

(d) Each party file and serve the signed statement of any witness to give evidence at the hearing, including any expert, at least 14 days prior to the hearing (together, the orders).

4) On 9 January 2009, the practitioner advised the client by email:

(a) of the orders (referring to the original hearing date of 13 March 2009); and

(b) that he would need to meet the client and his partner 'in the next few weeks to obtain statements'.

5) By letter dated 15 January 2009, the practitioner confirmed the varied date of the hearing.

6) The Commissioner's SIFC was filed with the Tribunal on 9 February 2009 and was served on the client.

7) The client provided a copy of the Commissioner's SIFC to the practitioner by no later than a few days before 26 February 2009.

8) By letter dated 26 February 2009, the practitioner advised the Tribunal that he had received the Commissioner's SIFC 'in the past few days' and that he would endeavour to file the client's SIFC as soon as possible.

9) From 14 April 2009 until 18 May 2009, the practitioner appeared as counsel in a jury trial in the District Court before His Honour Judge Goetze DCJ (trial).

10) At all material times, the trial was listed to commence on 14 April 2009 and run for three weeks. Thus, the trial was listed to conclude not before 4 May 2009, giving rise to a potential scheduling conflict with the hearing.

11) On 14 April 2009, Goetze DCJ advised those present at the trial, including the practitioner, that:

a) the trial had been listed for hearing for three weeks; and

b) the trial could run longer; but

c) the best estimate then available was that the trial would likely take less than three weeks to conclude.

12) As at 22 April 2009, the client's SIFC had not been filed with the Tribunal.

13) On 24 April 2009, Goetze DCJ advised those present at the trial, including the practitioner, that he was prepared to excuse a juror who was going to Queensland on 8 May 2009. His Honour noted that 'ordinarily that would have been a week after the trial was meant to be concluded', to which the prosecutor replied 'I think it's safe to say, your Honour, that we'll still be going'.

14) On 28 April 2009, Goetze DCJ advised those present at the trial, including the practitioner, that the court would not be sitting on Thursday 30 April 2009 and the prosecutor advised that he would revise his trial estimates overnight.

15) By letter dated Friday 1 May 2009, the practitioner wrote to the Tribunal in the following terms:

> I refer to the above matter which is scheduled for hearing on Monday 04 May 2009.
>
> Counsel is currently engaged in a District Court trial before his Honour Goetze DCJ and a jury. The said trial was scheduled to be completed earlier this week after 2 and a half weeks hearing time.
>
> For reasons outside the control of counsel, including absenteeism by prosecution witnesses, the trial has run significantly overtime. As such, counsel will not be able to appear for the client and due to the unexpected delay; counsel has not been able to pass the brief to another practitioner.
>
> Additionally counsel notes that the Police Statement of Facts Issues and Contentions was not served on the

> solicitor for the Applicant and only recently received by the Applicant's legal counsel.
>
> Counsel for the Applicant would suggest that the matter be brought on for hearing at 9.30am on the morning of 4 May 2009 to enable counsel to appear to discuss the maters noted above before the commencement of the District Court trial.

16) The practitioner's letter dated 1 May 2009 was misleading in that it misrepresented the external factors affecting the practitioner's capacity to represent the client. In particular:

a) the listed trial dates overlapped with the date of the hearing, such that a scheduling conflict between the practitioner's commitments was a relevant possibility at all material times and this was not stated in the letter;

b) the practitioner was aware, by no later than 24 April 2009, that the trial was likely to run over the date of the hearing which would affect his ability to appear for the client at the hearing, and therefore he did have time after 24 April 2009 to 'pass the brief to another practitioner'; and

c) the Commissioner's SIFC was delivered to the practitioner by the client by no later than 26 February 2009, and so had not been 'only recently received' by the practitioner.

Appropriate disciplinary consequence of the practitioner's professional misconduct

3 It is well recognised that the function and purpose of professional disciplinary proceedings against legal practitioners is the protection of the public, the maintenance of proper standards in the legal profession, and the protection of the reputation of the legal profession, rather than punishment of the practitioner: ***Re Maraj (a legal practitioner)*** (1995) 15 WAR 12 at 24 and 25 (***Maraj***) (Malcolm CJ with whom Kennedy and Franklyn JJ agreed).

Consideration of Committee's contention that the practitioner should be struck off

4 The Committee contended that the appropriate disciplinary consequence of the practitioner's professional misconduct is for the Tribunal to make and transmit a report on its finding to the Supreme Court (full bench) with a recommendation that the name of the practitioner be removed from the Roll of Practitioners. The Tribunal has power to make and transmit a report to the Supreme Court (full bench) with this recommendation under s 438(2)(a) and s 438(4)(b) of the *Legal Profession Act 2008* (WA) (LP Act).

5 The question for determination in relation to whether a practitioner should be struck off the Roll is 'whether the practitioner is a fit and proper person to remain a member of the legal profession' (***Maraj*** at 25 (Malcolm CJ with whom Kennedy and Franklyn JJ agreed); see also ***A Solicitor v Law Society (NSW)*** [2004] HCA 1; (2004) 216 CLR 253 at 265 [15]) or, similarly expressed, whether 'the seriousness of the conduct demands such a disposition because it demonstrates unfitness to practise' (***Legal Practitioners Complaints Committee v Pepe*** [2009] WASC 39 (***Pepe***) at [10] (Murray and Beech JJ)). In ***Pepe***, the Court of Appeal endorsed the following statement by Thomas JA, with whom McMurdo P and White J agreed, in the decision of Queensland Court of Appeal in ***Barristers' Board v Darveniza*** [2000] QCA 253; (2000) 12 A Crim R 438 (***Darveniza***) at 446 - 447 [38]:

> Striking off is of course reserved for the very serious cases where the character and conduct of the practitioner is seen to be inconsistent with the privileges of further practice.

6 The practitioner acted dishonestly when he sent the letter which he knew was misleading to the Tribunal. As Ipp J held in ***Kyle v Legal Practitioners' Complaints Committee*** [1999] WASCA 115; (1999) 21 WAR 56 (***Kyle***) at [6]:

> A practitioner who knowingly misleads a court will do so dishonestly. Therein lies the unprofessional conduct.

7 As Martin CJ, with whom Simmonds and Blaxell JJ agreed, said in ***Legal Practitioners Complaints Committee v McKerlie*** [2007] WASC 119 at [8]:

> … honesty and integrity are essential prerequisites to the right to practice [sic] law and the conduct most likely to result in striking-off of the Roll is that which undermines the trustworthiness of the practitioner or which suggests a lack of

> integrity, so that the practitioner cannot be trusted to deal fairly within the system within which he or she practises.

8 Similarly, Basten JA, with whom Mason P and Santow JA agreed, said in the New South Wales Court of Appeal in ***The Council of the New South Wales Bar Association v Sahade*** [2007] NSWCA 145 at [58]:

> … willingness to engage in deceptive or dishonest behaviour will generally be a matter of central relevance. Such a characteristic may be revealed by conduct in the practice of law or in conduct unrelated to the practice of law. Whatever the context of the conduct, the element of character thus revealed is likely to be relevant although if based on conduct in the practice of law, that context will usually give rise to heightened concern.

9 Furthermore, the practitioner's conduct involved a breach of 'the confidence that every court rightly and necessarily puts in all counsel who appear before it' (to quote Parker J, with whom Ipp and Steytler JJ agreed, in ***Kyle*** at [66]). As the Court of Appeal observed in ***Vogt v Legal Practitioners Complaints Committee*** [2009] WASCA 202 (***Vogt***) at [61], a finding that a legal practitioner knowingly misled a court 'goes to the very heart of a practitioner's duty as an officer of the court and therefore to the proper administration of justice'. In ***Kyle*** at [61], the Court adopted the following statement from the decision of the Queensland Court of Appeal (McMurdo P, with whom Davies JA and Helman J agreed) in ***The Council of the Queensland Law Society Inc v Wright*** [2001] QCA 58 at [67], made in the case of a solicitor who had intentionally misled a court in an affidavit resisting a summary judgment application:

> A practitioner's duty to the court arises out of the practitioner's special relationship with the court; it overrides the duties owed by a practitioner to clients or others [citation omitted]. The lawyer's duty to the court includes candour, honesty and fairness. The appellant abused her role as an officer of the court in relying on material she knew to be false and in deliberately and recklessly misleading the court in an attempt to further the interests of her clients and family. Her conduct was made more serious by its repetition. The effective administration of the justice system and public confidence in it substantially depends on the honesty and reliability of practitioners' submissions to the court. This duty of candour and fairness is quintessential to the lawyer's role as officer of the court; the court and the public expect and rely upon it, no matter how new or inexperienced the practitioner. Breaches such as this are hard to detect and once established to the requisite standard are deserving of condign punishment, not only as a deterrent but also to reassure the public that such conduct on the part of lawyers will not be tolerated.

10 Although the practitioner made misleading statements to the Tribunal in correspondence, rather than in a SIFC, affidavit, witness statement or

written or oral submission, a lawyer's duty of 'candour, honesty and fairness' to a court or tribunal extends to all aspects of his or her dealings with the court or tribunal. The proper administration of justice requires no less.

11 The Committee submitted that, when the totality of the circumstances and the evidence are considered, the 'inevitable conclusion is that the practitioner is presently not a fit and proper person to remain a legal practitioner'. The Committee submitted that, while all instances of a practitioner deliberately misleading a court or tribunal should be viewed as a matter of utmost seriousness, there are features of the practitioner's conduct in this case which are of 'particular concern'. Ms PE Cahill SC, who appeared with Mr RI Fletcher on behalf of the Committee, emphasised four aspects of the practitioner's conduct.

12 First, although the Committee acknowledged that the practitioner engaged in a single event of misleading conduct, Ms Cahill noted that 'the letter was misleading in multiple respects'. Second, Ms Cahill referred to the 'gratuitous' nature of the practitioner's professional misconduct, given that the letter related to a scheduling conflict which is a common occurrence in legal practice and that an adjournment is likely to have been granted in any case. Third, Ms Cahill submitted that the practitioner did not seek to correct his deception to the Tribunal. Finally, Ms Cahill submitted that, apart from his admission in the proceeding that he engaged in professional misconduct, the practitioner's 'conduct in the course of this matter demonstrates a present and continued lack of insight, contrition and remorse in respect of his professional misconduct'. Ms Cahill referred to the statement by the Supreme Court (full bench) in ***Legal Practitioners Complaints Committee v Lashansky*** [2007] WASC 211 at [35] that:

> … a practitioner's failure to understand the impropriety of his [or her] conduct, may be a factor of very great importance in determining whether he or she is permitted to remain on the Roll.

13 However, as the Tribunal recognised in ***Legal Profession Complaints Committee and Gandini*** [2011] WASAT 86 (S) (***Gandini***) at [12], referring to ***Vogt***:

> … while a departure from the duty of honesty to the Court must attract a substantial penalty, such misconduct does not compel a removal from the Roll.

14 As the Tribunal also observed in ***Gandini*** at [22], in reference to other cases in which practitioners have been or have not been struck off for having intentionally misled a court:

> … the circumstances of each case differ and reference to this case law may be unhelpful. What one does derive from these cases is an uncompromising and justifiably severe approach to any conduct involving intentionally misleading a court, to be mitigated only by extenuating circumstances of varying degrees.

15 Notwithstanding that the practitioner's conduct involved dishonesty and a breach of the confidence that courts and tribunals necessarily place in practitioners involved in proceedings before them, and that Ms Cahill's submissions in relation to the four aspects of the practitioner's conduct emphasised by her are substantially correct, for the following three reasons we do not consider that the practitioner's conduct demonstrates that he is not a fit and proper person to remain a member of the legal profession or that his character and conduct are inconsistent with the privileges of further practice.

16 First, and most significantly, at the relevant time the practitioner suffered from (and continues to suffer from) mental illness which, while not the cause of his professional misconduct, forms part of the context and circumstances in which his conduct occurred. Dr Russell Hoyle, a psychiatrist, gave evidence that in February 2011 he diagnosed the practitioner as suffering from three overlapping psychiatric conditions, namely Post Traumatic Stress Disorder (PTSD), Recurrent Episodic Depression and Anxiety. Although Dr Hoyle had not seen the practitioner prior to February 2011, he indicated that the practitioner had been treated by other psychiatrists previously. Based on the history given by the practitioner, which Dr Hoyle accepted, Dr Hoyle expressed the opinion that the practitioner is likely to have been suffering from PTSD and Depression since and consequent upon a particular incident.

17 Dr Hoyle explained that there is a high degree of overlap in the symptom profiles of the three psychiatric illnesses which he diagnosed. He said that these illnesses 'can have quite far reaching effects on an individual's function' and that 'with specific reference to [the practitioner], this has included periods of subjective cognitive impairments (difficulties with attention, concentration, memory and recall, difficulties processing information, and difficulties in organisation and planning), impediments to energy, interpersonal transactions and communication' (report 28.06.12). Dr Hoyle also explained that a common symptom of the practitioner's illnesses, and one from which the practitioner has suffered, is procrastination or what Dr Hoyle described as 'avoidance' (T:44.3; 29.10.12). Dr Hoyle explained that, for a person, such as the practitioner, suffering from PTSD and Depression and experiencing a symptom of procrastination or avoidance, the individual keeps avoiding

until he or she cannot avoid any longer and the consequence is 'initially calamity and subsequently hopefully a process of sorting things out and addressing the problems that have accumulated as a product of that avoidance' (T:44.5; 29.10.12). However, Dr Hoyle said that 'not all of my patients do that, some of my patients continue to avoid even though it seems unavoidable' (T:44.6; 29.10.12).

18 Dr Hoyle explained that the practitioner's 'deficits in function are directly related to the severity of illness' and that the practitioner 'has experienced significant fluctuations of symptoms of both his depressive disorder and the PTSD' over the period since 1989 (report 28.06.12). In June 2012, Dr Hoyle characterised the severity of the practitioner's PTSD and Depression as 'of moderate to severe intensity' at that time. Dr Hoyle said that there has been a 'progressive' and 'robust' improvement in the practitioner's mental health since that time, with two exceptions, both apparently related to anxiety over this proceeding. In October 2012, Dr Hoyle admitted the practitioner to hospital for three days as he was unable to sleep and on the day of the hearing the practitioner was unable to come into the hearing room because of what Dr Hoyle described as 'an acute episode of panic' (T:38.4; 29.10.12).

19 Of significance in relation to the context and circumstances in which the conduct the subject of this proceeding took place, Dr Hoyle explained that a person suffering from PTSD may experience 'triggering events' which cause severe symptoms of the illness to occur. Triggering events are phenomena that are reminiscent of the index traumatic event from which the PTSD stemmed. Dr Hoyle gave as examples of potential triggering events in the case of the practitioner anything pertaining to certain circumstances of the incident, or being in an environment reminiscent of the index event, or threats to the practitioner's personal or professional standing or relationships.

20 Significantly, Dr Hoyle gave evidence that, according to the history which he took from the practitioner and which he did not doubt, in 2009 the practitioner experienced two triggering events which caused severe symptoms of his illnesses to occur. The first triggering event was being contacted by members of the media. The second triggering event related to concerns regarding the practitioner's wife's and newborn child's health. Dr Hoyle gave evidence that:

> These additional pressures would likely have contributed to a decline in [the practitioner's] mental state at that time … meaning that it is entirely within the bounds of possibility that his post traumatic stress disorder symptoms and his depressive and anxiety symptoms could have worsened

> in response to these stressors and along with that the … cognitive symptoms. (T:47.5; 29.10.12)

21 Dr Hoyle also said that psychiatric illnesses, including PTSD, Depression and Anxiety, can be exacerbated by the level of general stress associated with a person's personal or work life.

22 Dr Hoyle gave evidence that untruthfulness is not a symptom of any of the psychiatric illnesses from which the practitioner suffers, although it may be a reaction to an illness. However, as noted earlier, the symptoms of the practitioner's illnesses include periods of subjective cognitive impairment, involving difficulties with attention, concentration, memory and recall, difficulties in processing information, and difficulties in organising and planning, as well as procrastination or avoidance. As also noted earlier, in 2009 there were two triggering events for the practitioner's PTSD with the consequence that he was suffering from what Dr Hoyle called 'a higher level of symptomology' at that time. Dr Hoyle gave evidence that:

> It is reasonable to assume that if he was suffering a higher burden of symptoms and illness at the time that this may have affected his judgment in attending to [the conflict between the District Court trial and the SAT hearing] in a timely manner. (T:49.7; 29.10.12)

23 On the evidence of Dr Hoyle, we find that it is likely that the practitioner's PTSD, Depression and Anxiety was a contributory factor in his failure to address the obvious conflict between the District Court trial and the SAT hearing in a timely manner by seeking an adjournment of the SAT hearing by, or at least on, 24 April 2009. It is also likely that the practitioner's failure to address the conflict in a timely manner exacerbated the stress he was under in consequence of conducting a lengthy jury trial as counsel with only four years' legal experience, when the trial was increasing in length, and while the SAT hearing was fast approaching. In the circumstances of his inexperience, the increasing length of the trial, the impending SAT hearing and his failure to address the conflict in a timely manner due, in part at least, to his psychiatric illness, it is likely that the practitioner was under significant stress when he wrote the letter to SAT. While this does not excuse deliberately misleading the Tribunal, it is relevant, in our view, in terms of the context and circumstances in which the letter was written and therefore as to whether the practitioner's character and conduct is seen to be inconsistent with the privileges of further practice, and more broadly in relation to the appropriate disciplinary consequence of his conduct.

24 The Committee contended, in essence, that the practitioner's professional misconduct was a function of his character, not of his mental illness. In contrast, the practitioner, by his senior counsel, contended in essence that his professional misconduct was a function of his mental illness, not of his character. The reality, in our view, is more complex than either of these propositions. The practitioner's untruthfulness in his letter was not caused by his mental illness. However, his mental illness is likely to have contributed to his failure to address the obvious conflict between the District Court trial and the SAT hearing in a timely manner and is likely to have exacerbated the stress that he was under when he finally wrote to the Tribunal in relation to the conflict on 1 May 2009, the last business day before the SAT hearing. Although the mental illness did not cause the practitioner to be untruthful, it is nevertheless relevant in relation to whether his character and conduct are such that he is not a fit and proper person to remain a legal practitioner, and, more broadly, in relation to the appropriate disciplinary consequence of his conduct.

25 The second reason, although less significant than the first, as to why we do not consider that the practitioner's character and conduct is inconsistent with the privileges of further practice, is that his character was supported in strong terms by nine character references from practitioners and a non-practitioner advocate who were made aware of the Tribunal's finding of professional misconduct and the agreed facts, and who were not required by the Committee for cross-examination. Sergeant Symon Bagley, a police officer who has appeared in many cases in which the practitioner represented applicants in firearms proceedings in SAT over a period of approximately five years, said that the practitioner 'has performed his duty as counsel ethically and with utmost professionalism'. Mr Gavan MacLean, a practitioner who has worked with the practitioner on a number of matters over five years, described him as 'a conscientious practitioner who operates with a high degree of integrity' and 'a skilled and principled practitioner'. Mr David Manera, a practitioner with 25 years' experience, said that he instructed the practitioner to act as trial counsel for several of his clients during lengthy trials involving serious charges and requiring consideration of complex evidential issues, and that he has 'never had cause to question [the practitioner's] integrity or commitment to his client's interests'. Mr Jeremy Morris, a practitioner in Perth since 2008 and elsewhere since 1997, described the practitioner as 'a role model in his approach to courts and tribunals, clients, fellow practitioners and other parties' and considers him to be 'a person of high morals and good standing'. Mr Brian Nugawela, a barrister who has been briefed by the practitioner

said that he 'had no reason whatsoever to question his integrity, professionalism or dedication to his clients' interests' and that he regarded the practitioner's conduct the subject of this proceeding as 'out of character, based on my knowledge of him'. Ms Helen Price, a barrister who has been briefed by the practitioner and has had professional dealings with the practitioner as a barrister said that 'in my experience he is mindful of his ethical obligations and he has sought advice from senior practitioners when an issue arises' and that 'he is well regarded as a trial advocate'. Mr Chau Savas, a practitioner for seven years and a friend of the practitioner for 12 years, described him as 'a competent and professional barrister' and said that he has 'great respect for his tenacity and family morals'. Finally, Mr Sukhwant Singh, a practitioner for over 30 years and a partner in the firm where the practitioner was previously employed, described the practitioner as 'careful and professional in the discharge of his duties' and recalled that the practitioner was 'careful to satisfy himself that in, for example, pleadings, he did not mislead a court'. Mr Singh has also briefed the practitioner as a barrister. Mr Singh concluded his reference as follows:

> I must say that when he informed me of the present proceedings against him, I was, frankly, stunned as I did not expect such a complaint against him. Having noted the seriousness of the conduct referred to in the [Tribunal's finding of professional misconduct], I nevertheless remain of the view that [the practitioner] is a good and fit practitioner and in the absence of conduct suggesting that the allegations against him are of a repetitive nature, I would be surprised, and very disappointed, if in the future professional concerns are levelled against him.
>
> While I understand the circumstances of the present proceedings against [the practitioner], and conceding the seriousness of the allegations, I proffer my humble view that [the practitioner] remains a fit and proper person to continue to practise as a barrister of the Supreme Court of Western Australia.

26 Finally, although it appears that the practitioner still lacks a complete understanding of the impropriety of his conduct, and has not demonstrated any real contrition or remorse, he has shown some insight by admitting the allegation and accepting that his conduct constituted professional misconduct.

Tribunal's determination as to appropriate disciplinary consequence

27 In our view, in order to protect the public in their dealings with lawyers, maintain proper standards in the legal profession, and protect the reputation of the legal profession, the appropriate disciplinary

consequence of the practitioner's professional misconduct in the circumstances of this case involves three elements, namely:

- suspension of the practitioner from legal practice for a period of six months;
- requiring the practitioner to undergo medical treatment and psychological counselling prescribed by Dr Hoyle and to act in accordance with Dr Hoyle's medical advice until the conclusion of the suspension; and
- requiring the practitioner to submit a report by Dr Hoyle to the Legal Practice Board within a week of the practitioner's return to practice indicating the treatment and counselling that he has undergone, his current state of mental health, any further treatment or counselling Dr Hoyle considers the practitioner should undergo, and any restrictions on the type of matter, hours of work or nature or mode of practice that Dr Hoyle recommends the practitioner should be subject to in his legal practice in the interests of his mental health.

28 As the Queensland Court of Appeal said in ***Darveniza*** at 447 [38]:

> The proper use of suspension is … for those cases in which a legal practitioner has fallen below the high standards to be expected of such a practitioner, but not in such a way as to indicate that he lacks the qualities of character and trustworthiness which are the necessary attributes of a person entrusted with the responsibilities of a legal practitioner.

29 Mr GR Donaldson SC, who appeared with Mr RW Bower for the practitioner, submitted that a suspension would be 'harsh' having regard to the practitioner's mental illness. We disagree. Although we have found that the practitioner's mental illness is relevant in relation to the context and circumstances in which the professional misconduct took place, it was not the cause of the professional misconduct. Although the mental illness is likely to have contributed to the practitioner's failure to address the conflict between hearings in a timely manner, and exacerbated his level of stress, when he finally came to address the conflict on 1 May 2009 he could and should have done so with candour and honesty. By failing to do so, the practitioner abused the necessary trust and confidence that courts and tribunals place in legal practitioners involved in proceedings before them in the effective administration of justice. His conduct

undermined the effective administration of justice and public confidence in it.

30 We, therefore, consider that a suspension of six months from legal practice is warranted and that an order to that effect should be made pursuant to s 439(a) of the LP Act. The period of suspension should commence on 1 December 2012 in order to enable the practitioner's clients to obtain alternative representation.

31 Section 441(j) of the LP Act enables the Tribunal to make:

> [A]n order that the practitioner undergo counselling or medical treatment or act in accordance with medical advice given to the practitioner[.]

32 Dr Hoyle explained that there are 'three pillars of treatment' (T:36.5; 29.10.12) for the practitioner's illness, namely therapy, medication and lifestyle, and that each of these will have an influence on the practitioner's ability to manage stress. Dr Hoyle gave evidence in relation to the treatment that he has prescribed for the practitioner in relation to each of these three matters which it is unnecessary in these reasons to recount, other than to note that the practitioner has been referred to a clinical psychologist with particular expertise in PTSD and has obtained an appointment to see that person.

33 In our view, given the cognitive impairments associated with the practitioner's mental illness, the protection of the public requires that he undergo medical treatment and psychological counselling prescribed by Dr Hoyle and act in accordance with Dr Hoyle's advice at least until the end of the period of the practitioner's suspension from legal practice. In this regard, in June 2012, Dr Hoyle expressed the opinion that, 'all other things being equal, I would hope [the practitioner] would achieve a substantial improvement of his symptoms within a 6 to 12 month timeframe', although he noted that 'further resolution of his symptoms may be more protracted' (report 28.06.12).

34 Section 439(c) of the LP Act enables the Tribunal to make:

> [A]n order that -
>
> (i) specified conditions be imposed on the practitioner's practising certificate granted or to be granted under this Act; and
>
> (ii) the conditions be imposed for a specified period; and
>
> (iii) specifies the time (if any) after which the practitioner may apply to the Tribunal for the conditions to be amended or removed[.]

35 The Tribunal discussed with Dr Hoyle whether conditions should be imposed on the practitioner's practising certificate in the interests of his mental health and therefore for the protection of the public. Dr Hoyle was asked by the Tribunal for his view as to whether practising as a solicitor rather than as a barrister would be more beneficial for the practitioner's mental health. Dr Hoyle said that:

> In general terms, I would have thought, and my assumption would have been, that, yes, [practising as a barrister] could be associated with a high level of stress, there's confrontation with the other side, and so my assumption was, yes, that could be worse for someone struggling with these conditions. I'm not sure that I have evidence based on my interactions with [the practitioner] that that is the case for him, in particular. (T:53.1; 29.10.12)

36 Given that we have decided that a six month suspension is warranted together with a requirement that the practitioner should undergo medical treatment and psychological counselling prescribed by Dr Hoyle, it is unnecessary at this stage to seek to fashion conditions restricting the practitioner's practice in the interests of his mental health. Furthermore, the determination of whether any restrictions should be imposed and, if so, on what terms, needs to be made having regard to the state of the practitioner's mental health when he returns to practice.

37 However, we consider that it is appropriate, in the interests of the practitioner's mental health and therefore the protection of the public, to impose a condition on his practising certificate requiring him to submit a report by Dr Hoyle to the Legal Practice Board within a week of his return to practice. The report will inform the Legal Practice Board in considering whether any further conditions are warranted and, if so, their terms and period of imposition.

Costs

38 The Committee sought an order for the payment by the practitioner of counsel's fees and other disbursements incurred in the proceeding in the amount of $4,784.50. The application for costs was not opposed. The Tribunal's approach to the exercise of discretion as to costs in professional disciplinary proceedings and as to the assessment of the amount or quantum of costs was described in ***Legal Profession Complaints Committee and in de Braekt*** [2012] WASAT 58 (S) at [51] and [53].

39 There is no reason why, in the circumstances of this case, the Tribunal should depart from its usual practice in relation to costs. The amount of costs sought by the Committee is reasonable and generally in

accordance with the Tribunal's approach to the assessment of costs. An order for the payment by the practitioner of the Committee's costs in the amount of $4,784.50 should, therefore, be made pursuant to s 87(2) of the *State Administrative Tribunal Act 2004* (WA).

Orders

40 For these reasons, the Tribunal makes the following orders:

1. Pursuant to s 439(a) of the *Legal Profession Act 2008* (WA), the respondent's local practising certificate be suspended for a period of six months from 1 December 2012 to 31 May 2013 inclusive.

2. Pursuant to s 441(j) of the *Legal Profession Act 2008* (WA), the respondent must undergo medical treatment and psychological counselling prescribed by Dr Russell Hoyle and act in accordance with Dr Hoyle's medical advice from the date of this order until 31 May 2013.

3. Pursuant to s 439(c) of the *Legal Profession Act 2008* (WA), the following condition be imposed on the respondent's practising certificate:

> By 7 June 2013, the practitioner must submit to the Legal Practice Board a report by Dr Russell Hoyle indicating:
>
> (a) the medical treatment and psychological counselling that the practitioner has undergone up to 31 May 2013;
>
> (b) the respondent's current state of mental health;
>
> (c) any further medical treatment or psychological counselling that Dr Hoyle considers the respondent should undergo;
>
> (d) any restrictions on the type of matter, hours of work or nature or mode of practice that Dr Hoyle recommends the respondent should be subject to in his

legal practice in the interests of his mental health; and

(e) in relation to any restrictions recommended in accordance with paragraph (d), the period during which Dr Hoyle considers the restrictions should be imposed before review of the restrictions by the Legal Practice Board having regard to further psychological assessment of the respondent's mental health.

4. Pursuant to s 87(2) of the *State Administrative Tribunal Act 2004* (WA), the respondent must pay to the applicant its costs of the proceeding in terms of disbursements in the amount of $4,784.50 by 7 December 2012.

I certify that this and the preceding [40] paragraphs comprise the reasons for decision of the State Administrative Tribunal.

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JUDGE D R PARRY, DEPUTY PRESIDENT