

**JURISDICTION** : STATE ADMINISTRATIVE TRIBUNAL

**STREAM** : VOCATIONAL REGULATION

**ACT** : LEGAL PRACTICE ACT 2003 (WA)

**CITATION** : LEGAL PRACTITIONERS COMPLAINTS  
COMMITTEE and MCKERLIE [2007] WASAT 67

**MEMBER** : JUSTICE M L BARKER (PRESIDENT)  
MR D R PARRY (SENIOR MEMBER)  
MS M CONNOR (MEMBER)

**HEARD** : DETERMINED ON THE DOCUMENTS

**DELIVERED** : 22 MARCH 2007

**FILE NO/S** : VR 24 of 2004

**BETWEEN** : LEGAL PRACTITIONERS COMPLAINTS  
COMMITTEE  
Applicant

AND

COLIN MCKERLIE  
Respondent

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*Catchwords:*

Professions - Legal practice - Illegal conduct - Unsatisfactory conduct - Practitioner convicted of unlawful and indecent assault and of sexual penetration without consent - Finding of illegal conduct and of unsatisfactory conduct - Reference to Supreme Court (full bench) with recommendation that the practitioner's name be struck off the Roll of Practitioners

*Legislation:*

*Legal Practice Act 2003 (WA), s 180(1), s 185(1)(a)*

*Legal Practitioners Act 1893 (WA), s 29A(1)(a)*

*Legal Practitioners Disciplinary Tribunal Rules 1993 (WA), r 7*

*State Administrative Tribunal (Conferral of Jurisdiction) Amendment and Repeal Act 2004 (WA)*

*State Administrative Tribunal Act 2004 (WA), s 167(4)(b)*

*Result:*

Transmittal of report to Supreme Court (full bench) with recommendation that the name of the practitioner be struck off the Roll of Practitioners

*Category:* B

**Representation:**

*Counsel:*

Applicant : Ms C Coombs and Ms P Le Miere  
Respondent : Self-represented

*Solicitors:*

Applicant : Legal Practitioners Complaints Committee  
Respondent : Self-represented

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

McKerlie v Western Australia (No 2) [2006] WASCA 274

**REASONS FOR DECISION OF THE TRIBUNAL:**

***Summary of Tribunal's decision***

1 This matter was delayed pending resolution of the practitioner's  
appeal to the Court of Criminal Appeal. After the appeal was dismissed,  
the State Administrative Tribunal determined the matter on the  
documents.

2 The Tribunal found that the practitioner was convicted of unlawful  
and indecent assault, and of sexual penetration without consent, which  
conduct constituted illegal conduct under the *Legal Practitioners Act 1893*  
(WA) and unsatisfactory conduct under the *Legal Practice Act 2003*  
(WA). The Tribunal referred the matter to the Supreme Court (full  
bench).

3 The Tribunal recommended that the practitioner be struck off the  
Roll of Practitioners.

4 The Tribunal also suspended the practitioner from practice pending  
the resolution of the matter by the full bench of the Supreme Court and  
ordered that he pay the applicant's costs.

***Proceedings before the Legal Practitioners Disciplinary Tribunal***

5 This matter was initially heard before the Legal Practitioners  
Disciplinary Tribunal (the former Tribunal) on 26 November 2004.  
Before the former Tribunal made its report to the Supreme Court of  
Western Australia as it proposed to do, the *State Administrative Tribunal*  
(*Conferral of Jurisdiction*) *Amendment and Repeal Act 2004* (WA) came  
into force. The operation of s 167(4)(b) of the *State Administrative*  
*Tribunal Act 2004* (WA) then transferred jurisdiction in this matter to the  
State Administrative Tribunal (the Tribunal).

6 The record of proceedings before the former Tribunal, including the  
transcript of proceedings on 26 November 2004, sets out the findings of  
the former Tribunal.

7 On 6 August 2004 and pursuant to s 180(1) of the *Legal Practice Act*  
*2003* proceedings were instituted before the former Tribunal by the Legal  
Practitioners Complaints Committee against Colin Robert McKerlie (the  
practitioner).

8 The reference alleged that the practitioner was guilty of illegal  
conduct. The particulars of the illegal conduct alleged were that on or  
about 7 February 2002 at Fremantle, he unlawfully and indecently

assaulted a woman by placing his mouth on her breast; further that on the same date and at the same place, he sexually penetrated her without her consent by inserting his thumb or finger in her anus; and further that he on the same date and at the same place, sexually penetrated her without her consent by inserting his penis in her vagina.

9           The practitioner failed to provide an answer to the reference.

10           The reference came on for hearing on 26 November 2004 before the former Tribunal constituted by the Hon HA Wallwork QC, Mr MW Odes QC, Mr GTW Tanning SC and Dr K Spillman (community representative).

11           Ms Mary-Anne Paton, the Registrar of the former Tribunal, gave evidence that on 17 August 2004 she had written to the practitioner at Hakea Prison enclosing a copy of the reference and advising that an answer should be filed in duplicate within 14 days of receipt of the reference. She also enclosed a copy of r 7 of the *Legal Practitioners Disciplinary Tribunal Rules 1993* (WA) relating to the answer to the reference. A copy of her letter to Mr McKerlie became Exhibit 2 in those proceedings.

12           Ms Paton tendered in evidence an affidavit sworn by Terrence Joseph Daly sworn on 16 September 2004 deposing to the fact that on Thursday 9 September 2004 at approximately 11 am at Casuarina Prison, he served the practitioner with a sealed envelope marked "Private and Confidential" containing:

- (a) R23 of 2004 - reference to the former Tribunal dated 6 August 2004, filed 6 August 2004.
- (b) a copy of r 7 of the *Legal Practitioners Disciplinary Tribunal Rules 1993*.
- (c) a covering letter dated 17 August 2004 from Registrar Mary-Anne Paton.

13           A copy of the affidavit and the annexures became Exhibit 3.

14           Ms Paton said in evidence that she wrote again to the practitioner on 29 September 2004 requesting that as the time in which the practitioner had to file his answer had lapsed, would he please advise either in writing or by telephone within the next seven days whether he intended filing an answer to the reference. A copy of that letter became Exhibit 4.

15           Ms Paton said that on 11 November 2004 she sent by Registered Post to the practitioner a letter confirming that the reference had been set down

for hearing in the former Tribunal on Friday 26 November 2004 commencing at 9.30 am. Ms Paton tendered the Registered Post receipt dated 11 November 2004, number RP22286253, and a delivery confirmation advice receipt of that registered letter dated 15 November 2004.

16 Ms KA Williams, who appeared as counsel for the complainant before the former Tribunal, tendered an affidavit sworn by her on 25 November 2004, deposing that on 24 November 2004 she had telephoned Casuarina Prison and had spoken to the practitioner. Ms Williams deposed that she had asked the practitioner whether he was aware of the reference in the former Tribunal which was listed to be heard "on Friday". The practitioner said words to the effect that he was aware of the reference and did not intend to file an answer or be heard at the hearing of the reference. Ms Williams deposed that she had said words to the effect that "the hearing would then proceed in his absence on Friday". The practitioner indicated that "he did not have any objection to that occurring". Ms Williams' affidavit became Exhibit 1.

17 A copy of the indictment against the practitioner dated 7 April 2003 was tendered in evidence. The indictment (516 of 2003) alleged offences identical to the particulars of the reference R23 of 2004. A copy of the indictment became Exhibit 6.

18 Also tendered in evidence was a certified true copy of the "Certificate of Final Outcome of Trial or Proceeding" dated 1 June 2004, signed by His Honour Judge Nisbet and the Clerk of Arraignment certifying that after a trial by jury between 12 and 14 May 2004, the practitioner was found guilty of the charges in Indictment 516 of 2003 and was convicted of those charges. The second page of the certificate is a form recording the sentences of imprisonment which were imposed with respect to the charges in the indictment, being one year's imprisonment for the unlawful indecent assault, three years six months' imprisonment for sexual penetration without consent and four years eight months' for the second sexual penetration without consent, being count three in the indictment, all of the sentences to be served concurrently. The total term of imprisonment was four years eight months from 14 May 2004. The practitioner was ordered to be eligible for parole. The Certificate of Final Outcome of Trial became Exhibit 7 at the hearing.

19 A copy of the transcript of the sentencing remarks of His Honour Judge Nisbet on 27 May 2004 was tendered in evidence and became Exhibit 8.

20 At the completion of the hearing, the former Tribunal found the reference proved and resolved to submit a report to the Full Court of the Supreme Court of this State with a recommendation that the practitioner be struck off the Roll of Practitioners. The former Tribunal also ordered that the practitioner be suspended from practice pending the resolution of the matter by the Full Court and that he pay the Committee's costs fixed in the sum of \$500.00. See transcript of the hearing.

### ***Proceedings before State Administrative Tribunal***

21 The matter was then referred to the Tribunal after 1 January 2005. At this point the former Tribunal had not caused the actual transmittal of its proposed report to the Supreme Court. In the meantime the practitioner had taken steps to appeal his conviction and sentence. As a result, the finalisation of the proceedings in the Tribunal were delayed pending the resolution of the practitioner's appeals to the Court of Criminal Appeal. The appeals were dismissed on 15 December 2006: *McKerlie v Western Australia (No 2)* [2006] WASCA 274.

22 On 6 February 2007, the Tribunal ordered that the matter be determined on the documents. At a disciplinary hearing that day the practitioner indicated to the President of the Tribunal that in light of his conviction, he understood that the matter should be determined on the documents and would be referred to the full bench of the Supreme Court with a recommendation that his name be struck off the Roll of Practitioners.

### ***Findings of the Tribunal***

23 By reference to the matters set out in the Court of Criminal Appeal decision referred to above and the annexures to this decision, the Tribunal finds that on 14 May 2004, the practitioner was convicted of:

- unlawful and indecent assault; and
- two counts of sexual penetration without consent.

24 The Tribunal finds that the conduct for which the practitioner was convicted constitutes illegal conduct under the *Legal Practitioners Act 1893*, s 29A(1)(a), and unsatisfactory conduct under the *Legal Practice Act 2003*, s 185(1)(a).

### ***Annexures to this Report***

25 In so finding, the Tribunal also relies on the following evidence before the Tribunal, namely:

	<i>Document</i>	<i>Date</i>
A	Reference to the Legal Practitioners Disciplinary Tribunal	6 Aug 2004
B	Transcript – Legal Practitioners Disciplinary Tribunal	26 Nov 2004
C	Letter – LPCC to practitioner	17 Aug 2004
D	Affidavit – Terence Joseph Daly	16 Sep 2004
E	Letter – LPCC to practitioner	29 Sep 2004
F	Letter – LPCC to practitioner	11 Nov 2004
G	Affidavit – Katrina Ann Williams	25 Nov 2004
H	Indictment – No 516 of 2003	7 Apr 2003
J	Certificate of Final Outcome of Trial or Proceeding	4 Dec 2004
K	Transcript – District Court, 27 May 2004	27 May 2004

***Recommendations of the Tribunal***

26 In these circumstances and having regard to the nature and circumstances of the conviction described in the decision of the Court of Criminal Appeal, the Tribunal refers the matter to the Supreme Court (full bench) with a recommendation that:

1. The practitioner's name be struck off the Roll of Practitioners.

***Interim Order***

27 Pending the final order of the Supreme Court (full bench) the Tribunal further orders that:

1. The practitioner is suspended from practice pending resolution of this matter by the Supreme Court (full bench).
2. The practitioner pay the applicant's costs, to be fixed at \$500.

I certify that this and the preceding [27] paragraphs comprise the reasons for decision of the State Administrative Tribunal.

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**JUSTICE M L BARKER, PRESIDENT**