JURISDICTION	**:**	STATE ADMINISTRATIVE TRIBUNAL
ACT	**:**	LEGAL PROFESSION ACT 2008 (WA)
CITATION	**:**	LEGAL PROFESSION COMPLAINTS COMMITTEE and CHANG [2019] WASAT 67 (S)
MEMBER	**:**	JUDGE D PARRY, DEPUTY PRESIDENT MR D AITKEN, SENIOR MEMBER MS S GILLETT, SENIOR SESSIONAL MEMBER
HEARD	**:**	DETERMINED ON THE DOCUMENTS
DELIVERED	**:**	15 MAY 2020
FILE NO/S	**:**	VR 51 of 2018
BETWEEN	**:**	LEGAL PROFESSION COMPLAINTS COMMITTEE Applicant AND CHRISTINA MARIE CHANG Respondent

Catchwords:

Vocational regulation - Legal practitioners - Professional misconduct - Penalty - Practitioner also registered migration agent - Client of practitioner in her capacity as registered migration agent issued notice of demand claiming refund of fees paid in relation to unsuccessful visa application and subsequently commenced minor case proceedings in Magistrates Court against practitioner seeking refund of fees - Ethical duties of candour and fairness when responding to letter of demand - Professional misconduct by knowingly seeking to mislead client by email statements referring to notification of, and correspondence with,

practitioner's insurer regarding claim, in circumstances where practitioner did not notify or correspond with any insurer regarding claim, in order to defer or delay client from commencing proceedings against practitioner seeking refund of fees - Ethical duties of candour and fairness in court proceedings - Professional misconduct by knowingly seeking to mislead Magistrates Court and client by statements to the effect that 'the matter is in the insurer's hands' and 'there is an insurer involved', in circumstances where practitioner did not notify or correspond with any insurer regarding claim, in order to defer or delay proceedings - Legal and ethical duties to respond to notification letters and summonses for production of documents from regulatory authority - Professional misconduct by, without reasonable excuse, failing to respond to three notification letters of complaint and conduct investigations requesting practitioner's submissions, a Summons to Produce Documents and a Summons to Produce Documents and Provide Written Information Verified by Statutory Declaration within the periods specified in the letters and summonses or at all - Mental health - Practitioner diagnosed with Post-Traumatic Stress Disorder and Depression/Anxiety - Whether medical and psychological evidence provides explanation for professional misconduct - Report on findings of professional misconduct to Supreme Court (full bench) with recommendation that name of practitioner be removed from roll of persons admitted to legal profession - Costs

Legislation:

Legal Practitioners Act 1893 (WA)
Legal Profession Act 2008 (WA), s 3, s 28(1), s 56, s 275, s 428(1), s 438, s 438(1), s 438(2), s 438(2)(a), s 438(2)(b), s 438(3), s 438(4)(a), s 438(4)(b), s 439, s 439(a), s 439(b), s 439(c), s 439(d), s 440, s 441, s 441(a), s 441(m)
State Administrative Tribunal Act 2004 (WA), s 9, s 46(1), s 56(1), s 60(2), s 87(1), s 87(2), s 89
State Administrative Tribunal Rules 2004 (WA), r 43

Result:

Report on Tribunal's findings of professional misconduct made and transmitted to Supreme Court (full bench) with a recommendation that the name of the Practitioner be removed from the roll of persons admitted to the legal profession under the *Legal Profession Act 2008* (WA)
The practitioner is to pay the Legal Profession Complaints Committee's costs in terms of disbursements fixed in the amount of $20,761.35, such costs to be paid to the Legal Practice Board within 30 days of the Tribunal's order or as otherwise agreed between the practitioner and the Legal Practice Board

Summary of Tribunal's decision:

The Tribunal previously made findings that Ms Christina Marie Chang, a legal practitioner, engaged in professional misconduct:

1. Between 23 June 2016 and 7 July 2016, in the course of corresponding with a client who had instructed the practitioner as a registered migration agent to prepare and lodge a permanent residency visa application, and who subsequently terminated the practitioner's instructions, withdrew the visa application and sent a letter of demand to the practitioner seeking 'compensation' of $10,000 'to refund us your fee, one [visa] application fee and all the documents that we obtained due to your incorrect advice' and stating that, if the practitioner was 'not willing [to] pay us any compensation', then 'you will leave me no other choice than [to] take legal action', by knowingly seeking to mislead the client by email statements referring to notification of, and correspondence with, the practitioner's insurer in relation to the claim for compensation, when, in truth, the practitioner did not notify, or correspond with, any insurer during that period regarding the claim for compensation, so as to defer or delay the client from commencing proceedings against the practitioner in respect of the claim;

2. Between 23 August 2016 and 27 September 2016, in the course of defending Magistrates Court minor case proceedings brought by the client against the practitioner seeking the payment of $10,000 'as (part of) reimbursement for one [visa] application and her honorarium' plus court fees, by knowingly seeking to mislead the Magistrates Court and the client by making statements at pre-trial conferences to the effect that:

   'I cannot disclose any details because the matter is in the insurer's hands. I will discuss it as soon as I have more information on what they are going to do', and

   'I cannot speak about the matter because there is an insurer involved',

   when, in truth, at no time prior to 23 August 2016, and between 23 August 2016 and 27 September 2016, did the practitioner notify, or correspond with, any insurer regarding the claim for compensation or the Magistrates Court proceedings, so as to defer or delay the Magistrates Court proceedings; and

3. On and after 6 October 2017, following a complaint to the Legal Profession Complaints Committee by the client against the practitioner, by, without reasonable excuse, failing to respond to three notification letters, a Summons to Produce Documents and a Summons to Produce Documents and Provide Written Information Verified by Statutory Declaration.

The Tribunal required the parties to file submissions in relation to penalty and costs and listed these issues for determination. Ultimately, the Tribunal determined the issues of penalty and costs entirely on the documents comprising written submissions and a schedule of the amount of costs and disbursements sought and supporting accounts filed by the Committee and character references, medical and psychological reports and written submissions filed by the practitioner.

The practitioner has been diagnosed with Post-Traumatic Stress Disorder and Depression/Anxiety. The medical evidence indicates that avoidance, which is a coping mechanism that the practitioner appears to have adopted to deal with anxiety and consequent long-term stress, provides some explanation for her failing to respond to the notification letters and summonses. However, the medical and psychological evidence does not indicate that the practitioner's Post-Traumatic Stress Disorder or Depression/Anxiety caused, contributed to, or is in any way related to, the practitioner knowingly seeking to mislead the client by making the email statements or knowingly seeking to mislead the Magistrates Court and the client by making the statements at the pre-trial conferences.

The Tribunal determined that the appropriate professional disciplinary consequence of the practitioner's professional misconduct by knowingly seeking to mislead the client by making the email statements and by knowingly seeking to mislead the Magistrates Court and the client by making the statements at the pre-trial conferences, in the circumstances of this case, is to make and transmit a report on the Tribunal's findings that the practitioner is guilty of professional misconduct to the Supreme Court (full bench) with a recommendation that the practitioner's name be removed from the roll of persons admitted to the legal profession under the *Legal Profession Act 2008* (WA).

The Tribunal also determined that the practitioner should pay costs in terms of the disbursements incurred by the Committee in the proceeding fixed in the amount of $20,761.35, such costs to be paid to the Legal Practice Board within 30 days of the Tribunal's order or within such further period as agreed between the practitioner and the Board.

Category: B

Representation:

Counsel:

Applicant : Mr P Yovich SC
Respondent : Mr M Bennett

Solicitors:

Applicant : Law Complaints Officer
Respondent : Bennett + Co

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

Barristers' Board v Young [2001] QCA 556
Khosa v Legal Profession Complaints Committee [2017] WASCA 192
Legal Practitioners Complaints Committee and Chang [2007] WASAT 86
Legal Profession Complaints Committee and A Legal Practitioner [2013] WASAT 37 (S)
Legal Profession Complaints Committee and A Legal Practitioner [2013] WASAT 37; (2013) 84 SR (WA) 158
Legal Profession Complaints Committee and Bower [2017] WASAT 47 (S)
Legal Profession Complaints Committee and Chang [2018] WASAT 121
Legal Profession Complaints Committee and Chang [2019] WASAT 67
Legal Profession Complaints Committee and in de Braekt [2012] WASAT 58 (S); (2012) 80 SR (WA) 194
Legal Profession Complaints Committee and Park [2017] WASAT 89; (2017) 92 SR (WA) 33
Legal Profession Complaints Committee and Skerritt [2012] WASAT 221
Legal Profession Complaints Committee and Skerritt [2013] WASAT 7
Legal Profession Complaints Committee v Love [2014] WASC 389
Medical Board of Western Australia and Roberman [2005] WASAT 81 (S); (2005) 39 SR (WA) 47
Paridis v Settlement Agents Supervisory Board [2007] WASCA 97; (2007) 33 WAR 361
Western Australian Planning Commission and Scutti [2019] WASAT 99
Western Australian Planning Commission v Questdale Holdings Pty Ltd [2016] WASCA 32; (2016) 213 LGERA 81

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REASONS FOR DECISION OF THE TRIBUNAL:

Background

1 On 9 September 2019, we published reasons for decision in ***Legal Profession Complaints Committee and Chang*** [2019] WASAT 67 (conduct reasons) in which, on the referral of a matter by the Legal Profession Complaints Committee (Committee) to the Tribunal under s 428(1) of the *Legal Profession Act 2008* (WA) (LP Act), we made the following findings of professional misconduct under s 438(1) of the LP Act against Ms Christina Marie Chang (practitioner):[1]

> (1) Between 23 June 2016 and 7 July 2016, in the course of corresponding with a former client, the complainant, in response to a letter of demand from the complainant dated 2 June 2016 for a refund of $10,000 for fees paid by the complainant in relation to an unsuccessful visa application the practitioner had prepared and lodged on behalf of the complainant and her family on 16 October 2015 (claim), the practitioner engaged in professional misconduct, within the meaning of s 403 and s 438 of the [LP Act], in that her conduct would be reasonably regarded as disgraceful or dishonourable by practitioners of good repute and competence, by preparing and sending:
>
> 1. an email to the complainant dated 23 June 2016 in which she stated 'I will notify my Insurers and will await their response. Once I have that I can then respond to you in detail';
>
> 2. an email to the complainant dated 29 June 2016 in which she stated 'Hi the way insurance works is that all claims must be reported to the insurers and I am required by my insurers not to discuss the claim with you directly'; and
>
> 3. an email to the complainant dated 7 July 2016 in which she stated 'Hi I am waiting for [a] reply from my insurer[.] I should hear by next week. They know its [sic] urgent';
>
> (together, the email statements),
>
> in circumstances where:

[1] Conduct reasons [207]. In these reasons, the expressions 'the email statements' and 'the PTC statements' have the meanings given in findings (1) and (2), respectively.

(a) the email statements were false and misleading, as, in truth, at no time between 23 June 2016 and 7 July 2016 did the practitioner notify, or correspond with, any insurer or insurers regarding the claim; and

(b) the practitioner knew the email statements were false and misleading and intended that the complainant be misled by the email statements, so as to defer or delay the complainant from commencing proceedings against the practitioner in respect of the claim.

(2) Between 23 August 2016 and 27 September 2016, in the course of defending Magistrates Court proceedings lodged by the complainant against the practitioner on 25 July 2016 in respect of the claim, by which the complainant sought the sum of $10,118.20 (including allowable Court fees) (proceedings), the practitioner engaged in professional misconduct, within the meaning of s 403 and s 438 of [LP Act], in that her conduct would be reasonably regarded as disgraceful or dishonourable by practitioners of good repute and competence by:

1. at a pre-trial conference before a registrar of the Court (Registrar) on 23 August 2016, saying words to the effect 'I cannot disclose any details because the matter is in the insurer's hands. I will discuss it as soon as I have more information on what they are going to do'; and

2. at a further pre-trial conference before the Registrar on 27 September 2016, saying words to the effect 'I cannot speak about the matter because there is an insurer involved';

(together, the PTC statements),

in circumstances where:

(a) the PTC statements were false and misleading as, in truth, at no time prior to 23 August 2016, and between 23 August 2016 and 27 September 2016, did the practitioner notify, or correspond with, any insurer or insurers regarding the claim or the proceedings; and

(b) the practitioner knew the PTC statements were false and misleading and intended that the Court and the complainant be misled by the PTC statements, so as to defer or delay the proceedings.

(3) On and after 6 October 2017, following a complaint to the [Committee] by the complainant against the practitioner arising

from the practitioner's response to the claim, her conduct in the proceedings and her failure to pay the judgment sum (complaint), the practitioner engaged in professional misconduct, within the meaning of s 403, s 404(a) and s 438 of the [LP Act], in that her conduct would be reasonably regarded as disgraceful or dishonourable by practitioners of good repute and competence and fell short, consistently and to a substantial degree, of the standard of professional conduct observed or approved by members of the profession of good repute and competence, by, without reasonable excuse, failing to respond to:

1. by 5 October 2017 or at all, a letter from the Committee to the practitioner dated 15 September 2017 which formally notified her of, and requested her submissions in relation to, the complaint (first notification letter), in breach of r 50(3) of the *Legal Profession Conduct Rules 2010* (WA);

2. by 5 October 2017 or at all, a Summons to Produce Documents dated 14 September 2017 issued to the practitioner by the Committee under s 520(1)(a) of the [LP Act] (first summons), in breach of s 520(5) and s 532(3) of the [LP Act];

3. by 7 November 2017 or at all, a letter from the Committee to the practitioner dated 17 October 2017 which formally notified her of, and requested her submissions in relation to, a conduct investigation commenced on the Committee's own initiative, under s 421 of the [LP Act], in relation to the practitioner's failure to respond to the first notification letter and the first summons (second notification letter), in breach of r 50(3) of the *Legal Profession Conduct Rules 2010* (WA);

4. by 6 December 2017 or at all, a letter from the Committee to the practitioner dated 15 November 2017 which formally notified her of, and requested her submissions in relation to, a conduct investigation commenced on the Committee's own initiative, under s 421 of the [LP Act], in relation to the practitioner's failure to respond to the second notification letter, in breach of r 50(3) of the *Legal Profession Conduct Rules 2010* (WA); and

5. by 6 December 2017 or at all, a Summons to Produce Documents and Provide Written Information Verified by Statutory Declaration dated 15 November 2017 issued to the practitioner by the Committee under

> s 520(1)(a), (c) and (d) and s 520(3) of the [LP Act], in breach of s 520(5) and s 532(3) of the [LP Act].

2 Consequent upon our findings of professional misconduct against the practitioner, on 9 September 2019, we made the following orders:[2]

> 1. By 1 October 2019 the [Committee] is to file and serve its submissions in relation to penalty and costs together with a schedule of the amount of costs and disbursements it seeks and supporting accounts.
>
> 2. By 22 October 2019 the [practitioner] is to file and serve her submissions in relation to penalty and costs and any evidence, including character references, on which she relies.
>
> 3. By 29 October 2019 the [Committee] is to file and serve a statement of the names of the authors of any character references filed in accordance with the preceding order who are required for cross-examination at the hearing in relation to penalty and costs.
>
> 4. The issues of penalty and costs are listed for hearing to commence at 10.00 am on 4 November 2019 for half a day.

3 On 1 October 2019, the Committee filed its submissions in relation to penalty and costs together with a schedule of the amount of costs and disbursements it seeks and supporting accounts, in accordance with Order 1 made on 9 September 2019. However, the practitioner did not comply with Order 2 made on 9 September 2019 requiring her to file and serve her submissions in relation to penalty and costs and any evidence, including character references, on which she relies, by 22 October 2019. On 30 October 2019, Mr Stephen Walker, who appeared for the practitioner at the conduct hearing on 13 June 2019 (conduct hearing), filed a notice stating that he no longer represents the practitioner.

4 At 7.40 pm on Sunday, 3 November 2019, which was the evening prior to the hearing in relation to the issues of penalty and costs listed to commence at 10.00 am on 4 November 2019, Ms Nguyet Doan sent the following email to Mr Stephen Merrick, the Senior Legal Officer of the Committee:

> From: Nguyet Doan
> Sent: Sunday, 3 November 2019 7:40 PM
> To: [email address]

[2] Conduct reasons [208].

> Subject: [Practitioner] VR 51 of 2018 URGENT
> Importance: High
>
> Dear Mr Merrick and Ms Faller
>
> I want to send you the attached medical report relating to [the practitioner].
>
> [The practitioner] fainted last week and is under medical treatment[.]
>
> Please postpone the hearing for a few weeks as she is too unwell at present.
>
> Yours faithfully
>
> Nguyet Doan

5 In an earlier email to Mr Merrick sent at 10.48 am on Friday, 1 November 2019, which Mr Merrick forwarded to the Tribunal at 1.44 pm on 1 November 2019, Ms Doan said 'I am a friend of [the practitioner] and also her employer'.

6 Although the email sent by Ms Doan to Mr Merrick at 7.40 pm on 3 November 2019 was addressed to both Mr Merrick and Ms Faller, Judge Parry's Associate, Ms Doan did not in fact send the email at that time to Ms Faller. At 7.49 pm on Sunday, 3 November 2019, Ms Doan sent the following email to Ms Faller forwarding her email to Mr Merrick:

> From: Nguyet Doan [email address]
> Sent: Sunday, 3 November 2019 7:49 PM
> To: Faller, Megan [email address]
> Subject: FW: [Practitioner] VR 51 of 2018 URGENT
> Attachments: Letter Dr Ray Cibulskis.pdf
>
> Importance: High
>
> To Ms Faller
>
> Please see below my letter which I sent to Mr Merrick regarding [the practitioner].
>
> Thank you.
>
> Nguyet Doan

7 Ms Doan attached the following medical certificate/report from Dr Ray Cibulskis to her emails sent to Mr Merrick and to Ms Faller at 7.40 pm and 7.49 pm, respectively, on 3 November 2019:

> 31st October 2019
>
> To whom it may concern.
>
> Re: [Practitioner]
> [home address]
> 02/04/1962
>
> I have been [the practitioner's] GP for the past 12 years. [The practitioner] has suffered from depression, anxiety and panic attacks. [The practitioner] has also been the principal carer for her elderly sick parents. Currently [the practitioner] is suffering from an acute stress reaction relating to her pending legal proceedings and financial problems. I have referred [the practitioner] to see a clinical psychologist and Psychiatrist. I would hope that you would would [sic] defer the proceedings against her for four weeks to allow her to seek appropriate treatment and not exacerbate her current Acute Stress Reaction.

8 On 4 November 2019, we made orders including the following:

> 1. On the basis of the medical report of Dr Ray Cibulskis dated 31 October 2019, the hearing in relation to costs and penalty listed for 4 November 2019 is vacated.
>
> 2. The issues of penalty and costs are listed for hearing to commence at 10.00 am on 12 December 2019 for a duration of half a day.

9 Later on 4 November 2019, the Committee emailed the Tribunal indicating that Mr Paul Yovich SC, who appeared for the Committee at the conduct hearing and settled the Committee's written submissions in relation to penalty and costs, would be unavailable on 12 December 2019 (and generally for at least six months, other than on six nominated days, owing to a lengthy criminal trial) and stating that 'it would significantly disadvantage the Committee if it was required to engage alternative counsel to appear at the hearing on 12 December 2019'.

10 On 5 November 2019, we made orders including the following:[3]

> 1. On the application of the applicant dated 4 November 2019 the hearing in relation to the issues of penalty and costs listed for 12 December 2019 is vacated.

[3] 23 December 2019 was one of the six days on which the Committee advised that Mr Yovich would be available.

> 2. The issues of penalty and costs are listed for hearing to commence at 9 am on 23 December 2019 for a duration of three hours.

11 At 11.50 am on 18 December 2019, which was the third-last working day prior to the hearing in relation to the issues of penalty and costs listed to commence at 9.00 am on 23 December 2019, the practitioner, in an email to the Committee copied to the Tribunal, requested the Committee's agreement for a further adjournment of the hearing in relation to the issues of penalty and costs 'to say 4 weeks AFTER my scheduled appointment with Dr [Murray] Chapman, Psychiatrist on 23 January 2020',[4] in order to enable her to attend that appointment, obtain a medical report from Dr Chapman and 'seek legal representation in relation to this matter as trying to deal with [this] myself is enormously stressful'. In support of her request for a further adjournment, the practitioner attached the following letter from Dr Cibulskis:

> 4th December 2019
>
> To Whom It May Concern,
>
> I provide this letter to strongly support [the practitioner's] application for further adjournment.
>
> I confirm that I have referred [the practitioner] to Dr Murray Chapman (Psychiatrist) but there are no available appointments until 23rd January 2020.
>
> There was an aggravation of her symptoms recently when [the practitioner] was required to attend to some personal legal matters.
>
> I am managing her psychological symptoms with anti[-]depressants and sleeping tablets. She is also undertaking weekly psychological counselling under a Mental Health Care Plan and has had 4 sessions so far which I understand is going well.

12 At 2.22 pm on 18 December 2019, the Tribunal emailed the parties as follows:

> In light of [the practitioner's] correspondence and the attached letter from Dr Cibulskis, and in light of the Committee's earlier indication that Mr Yovich SC is engaged in a lengthy criminal trial which is expected to occupy the first half of 2020, the Tribunal seeks the parties' positions as to the issues of penalty and costs being (subject to any further order) determined entirely on the documents under s 60(2) of the

[4] Original emphasis.

> *State Administrative Tribunal Act 2004* (WA), with [the practitioner] having until 7 February 2020 to file and serve any evidence on which she relies and her written submissions, and the Committee having until 14 February 2020 to file any submissions in reply.

13 Following emails received from the parties on 19 December 2019, on 20 December 2019, the Tribunal made the following orders:

> 1. The hearing listed at 9am on 23 December 2019 is vacated.
>
> 2. By 4pm on 21 February 2020 the [practitioner] is to file and serve any submissions in relation to penalty and costs and any evidence, including character references, in relation to penalty and costs, on which she proposes to rely.
>
> 3. By 4pm [on] 6 March 2020, the [Committee] is to file and serve any submissions in reply.
>
> 4. Subject to any further order, the issues of penalty and costs are to be determined entirely on the documents pursuant to s 60(2) of the *State Administrative Tribunal Act 2004* (WA).

14 At 11.29 am on Thursday 20 February 2020, which was the day immediately before the date by which the practitioner was required, by Order 2 made on 20 December 2019, to file and serve any submissions in relation to penalty and costs and any evidence, including character references, in relation to penalty and costs, on which she proposes to rely, the practitioner sent the following email to the Tribunal:

> Dear Ms Faller,
>
> I refer to the Tribunal's order dated 20 December 2019 which inter alia obliges me to file and serve any submissions in relation to penalty and costs and any evidence, including character references, in relation to penalty and costs, on which I propose to rely.
>
> Regrettably I must again seek further indulgence from the Tribunal for a short extension by reason of the fact that I am unable to finalise my submissions because I am waiting to receive some forensic medical evidence from my GP, Psychiatrist and Psychologist.
>
> Attached is a request for an extension by my Psychologist Professor Miguel Fernandez dated 19 February 2020. I am due to have a further session with Professor Fernandez on the 28 February 2020. I have had several sessions with him already pursuant to a Mental Health Care [P]lan.
>
> I have also seen my Psychiatrist Dr Murray Chapman on 3 occasions. Dr Chapman also requires further time to prepare a detailed report and

wishes to receive a formal letter of instruction to do so from my legal representative. My first appointment with Dr Murray [Chapman] was only on 23 January 2020. I also attach Dr Chapman's letter to the Tribunal dated 19 February 2020.

Finally I am also waiting for my GP to prepare a report.

I fully appreciate that the contravention decision was first delivered on 9 September 2019 and this matter has been put back several times already. I am grateful for the Tribunal's indulgence in this regard.

Having spoken with my medical practitioners, I would seek a further period of 14 days. Understandably I would also agree for the time for the Committee to file submissions in reply to be extended by a further 14 days calculated from 6 March 2020.

I will write a letter to the [Committee] with a view to the Committee agreeing to the above. I have written to the Tribunal in the first instance due to time constraints as I do not wish the Tribunal to be of the view that I am being intentionally dilatory. I have copied the Committee into this email.

Yours faithfully,

[Practitioner]

15 The following letter from Professor Fernandez dated 19 February 2020 was attached to the practitioner's email to the Tribunal on 20 February 2020:

…

19/2/2020

To Whom It May Concern

RE: [Practitioner]

Dear Sir/Madam.

Given my practice and teaching load, I am requesting an extension of 14 days (2 weeks) to provide a more thorough report on my work with [the practitioner].

Thanking you kindly for your attention.

Yours sincerely

_____

Prof Miguel FERNANDEZ, PhD

16 The following letter from Dr Chapman dated 19 February 2020 was also attached to the practitioner's email to the Tribunal on 20 February 2020:

> 19/02/2020
>
> State Administrative Tribunal
> 565 Hay Street
> Perth
> WA 6000
>
> sat@justice.wa.gov.au
> Fax 93255099
>
> Re: [Practitioner]
> [home address]
> 02/04/1962
>
> [The practitioner] has attended three appointments with me now, and she has invited me to write a report for the SAT. I am unable to provide a report for this coming Friday however, as I have not as yet received instruct [sic]. I understand that lawyers have declined to represent her due to time constraints and security for their fees, and she is currently seeking a new lawyer.
>
> Yours faithfully
>
> Dr Murray Chapman
> MBBS FRANZCP

17 At 5.11 pm on 20 February 2020, the Tribunal emailed the parties requesting the Committee to advise its position in response to the practitioner's application for a two-week extension for the filing and service of her submissions and any evidence on which she proposes to rely in relation to penalty and costs.

18 At 10.59 am on 21 February 2020, the Committee emailed the Tribunal opposing the practitioner's application for an extension and requesting that, if the practitioner's application is granted, then the Committee should be granted a corresponding extension.

19 At 12.30 pm on 21 February 2020, the practitioner emailed the Tribunal, attaching and filing a medical report from Dr Cibulskis dated 18 February 2020, in accordance with Order 2 made on 20 December 2019, and again requesting 'the short extension of 14 days so that I may also receive a report from my Psychiatrist and Psychologist'.

20 On 21 February 2020, the Tribunal made the following orders:

> 1. The time for compliance with Order 2 of the orders made by the Tribunal on 20 December 2019 is extended to 4pm on 6 March 2020 ([practitioner's] submissions in relation to penalty and costs and any evidence, including character references, in relation to penalty and costs, on which she proposes to rely).
>
> 2. The time for compliance with Order 3 of the orders made by the Tribunal on 20 December 2019 is extended to 4pm on 20 March 2020 ([Committee's] submissions in reply).
>
> 3. The [practitioner] is to provide a copy of these orders to Professor Fernandez and Dr Chapman.

21 At 12.46 pm on 6 March 2020, the practitioner emailed the Tribunal as follows:[5]

> Dear Ms Faller
>
> I am now legally represented by Bennett & Co.
>
> Medical reports and references have been sent by the medicos to Mr Bennett as they only arrived yesterday.
>
> I understand that Mr Bennett will contact the Tribunal today.
>
> Please advise if you need anything from me DIRECTLY as I am aware of the impending deadline today. I do not want the Tribunal to think I am doing nothing to comply with my obligations.
>
> Kind regards

22 At 1.19 pm on 6 March 2020, Mr Martin Bennett, the principal of Bennett + Co, sent a letter to the Tribunal by email, referring to Order 2 made by the Tribunal on 20 December 2019 (as extended on 21 February 2020) requiring the practitioner to file and serve her submissions in relation to penalty and costs and any evidence, including character references, in relation to penalty and costs, on which she proposed to rely, by 4.00 pm on that day (6 March 2020), and stating as follows:

> …
>
> [The practitioner] has instructed me to assist her in finalising these submissions and I respectfully write to request a short extension until 4.00pm on Tuesday, 10 March 2020.
>
> …

[5] Original emphasis and as written.

23 At 1.53 pm on 6 March 2020, the Committee emailed the Tribunal indicating that it had no objection to the extension sought by Mr Bennett.

24 On 6 March 2020, the Tribunal made the following orders:

> 1. The time for compliance with Order 2 of the orders made by the Tribunal on 20 December 2019, as amended on 21 February 2020, is extended to 4pm on 10 March 2020 ([practitioner's] submissions in relation to penalty and costs and any evidence, including character references, in relation to penalty and costs, on which she proposes to rely).
>
> 2. The time for compliance with Order 3 of the orders made by the Tribunal on 20 December 2019, as amended on 21 February 2020, is extended to 4pm on 24 March 2020 ([Committee's] submissions in reply).

25 On 10 March 2020, Mr Bennett filed, on behalf of the practitioner:

- five character references;
- a medical report by Dr Chapman dated 3 March 2020;
- a report by Professor Fernandez dated 4 March 2020; and
- the practitioner's 'penalty submissions' dated 10 March 2020,[6]

in accordance with Order 2 made by the Tribunal on 20 December 2019 (as extended on 21 February 2020 and further extended on 6 March 2020).

26 On 24 March 2020, the Committee filed its 'submissions in reply to [practitioner's] submissions in relation to penalty and costs dated 10 March 2020', in accordance with Order 3 made by the Tribunal on 20 December 2019 (as extended on 21 February 2020 and further extended on 6 March 2020).

[6] As indicated below, in her 'penalty submissions', the practitioner makes some submissions in relation to costs (and does not oppose the making of an order for her to pay the Committee's costs of the proceedings) ([practitioner's] penalty submissions dated 10 March 2020 [51]-[55]). In her submissions as to 'an appropriate penalty to be imposed', the practitioner includes an order that '[T]he [p]ractitioner to make a contribution to the [Committee's] costs to be taxed in default of agreement. And the parties to have liberty to make further submissions on the issue of costs' ([practitioner's] penalty submissions dated 10 March 2020 [56.3]). However, for reasons set out at [132]-[137] below, we have determined that the parties should not have liberty to make further submissions on the issue of costs.

Parties' contentions as to appropriate penalty

27 Consequent upon the Tribunal's findings that the practitioner engaged in professional misconduct and its reasons for those findings in the conduct reasons, the Committee seeks a 'global' penalty in the form of an order, under s 438(2)(a) of the LP Act, that the Tribunal make and transmit a report on the findings to the Supreme Court (full bench), with a recommendation, under s 438(4)(b) of the LP Act, that the name of the practitioner be removed from the roll of persons admitted to the legal profession under the LP Act. The Committee also contends that a 'consequential order' should be made, under s 439(b) of the LP Act, that 'no local practising certificate be granted to the practitioner pending the determination of the Supreme Court (full bench)'.[7] The Committee also seeks an order for the payment by the practitioner of its costs in terms of disbursements of the proceeding, fixed in the amount of $22,091.10, such costs to be paid to the Legal Practice Board (Board) within 30 days of the Tribunal's order or as otherwise agreed between the practitioner and the Board.

28 The practitioner also contends that a 'global' penalty is appropriate. However, the practitioner submits that 'an appropriate penalty to be imposed would be as follows':[8]

> [1] The [p]ractitioner be privately reprimanded;
>
> [2] [T]he [p]ractitioner undergo, at her own cost, continuing psychological counselling at least once every month for a period of 4 months under GP Mental Health Care Plan from the date of this Order and provide a mental health assessment to the [Board] after each session; and
>
> [3] [T]he [p]ractitioner to make a contribution to the [Committee's] costs to be taxed in default of agreement. And the parties to have liberty to make further submissions on the issue of costs;
>
> [4] [U]pon compliance with paragraph 2, [t]he [Board] is to issue the [p]ractitioner with a local practising certificate for the year commencing 1 July 2020;
>
> [5] [O]ngoing psychiatric review on a monthly basis for 6 months from the date of the Tribunal orders; [and]
>
> [6] GP review as necessary for ongoing monitoring of pharmaceutical treatment regime.

[7] [Committee's] submissions as to penalty and costs dated 1 October 2019 [1.2].
[8] [Practitioner's] penalty submissions dated 10 March 2020 [56].

29 The practitioner also contends that the penalty should include a three year period of supervised practice. The practitioner submits as follows:[9]

> Supervision of practice management will also assist in ensuring compliance with the [LP] Act. The [p]ractitioner's local practising certificate and any practising certificate to be granted be subject to the following specified conditions:
>
> [1] [F]or the period of three years commencing on 1 July 2020 and ending on 30 July 2023 (Supervision Period), unless or until the conditions are removed or varied by the [Board] in the event of a change in the practitioner's practice arrangements, the practitioner may practise the profession of the law only if under the supervision of a legal practitioner of not less than 10 years' post-admission experience (supervisor)[.]
>
> [2] [A]t the end of the Supervision Period, the supervisor must report to the Board as to whether, in the opinion of the supervisor, the [s]upervision of the practitioner should continue[.]
>
> [3] [U]ntil otherwise agreed by the [Committee] and the Board, the supervisor will be (to insert name), an Australian legal practitioner in the State of Western Australia[.]
>
> [4] [T]he [p]ractitioner will notify the Committee and the Board within seven days of the practitioner becoming aware that the supervisor is unable or unwilling to continue in the role of supervisor. In those circumstances, the practitioner must nominate an alternative supervisor for consideration by the Committee and the Board, and any replacement is to be authorised by the Committee and the Board.
>
> [5] [T]he [p]ractitioner will pay the costs of the supervisor in relation to the supervision of the [p]ractitioner's practice[.]
>
> [6] [T]he [p]ractitioner will within seven days of the date of this Order, provide written notification to existing clients of the practitioner's practice, or of any legal practice in which the [p]ractitioner is engaged as a legal practitioner, of the following matters:
>
> [a] [T]he name of the supervisor as a person who will be assisting; and at times may provide guidance as to the progress of the matter; and

[9] [Practitioner's] penalty submissions dated 10 March 2020 [57].

[b] [T]hat client confidentiality and legal professional privilege will be strictly maintained[.]

[7] [T]he [p]ractitioner will, at the commencement of any new retainer with a client during the Supervision Period, whether a client of the practitioner's practice or of any other practice in which the practitioner is or may be engaged as a legal practitioner, provide notification to the client of the following matters:

[a] [T]he name of the supervisor as a person who will be assisting; and at times may provide guidance as to the progress of the matter; and

[b] [T]hat client confidentiality and legal professional privilege will be strictly maintained.

[8] [T]he [p]ractitioner will request each client referred to at paragraphs 6 and 7 above to provide written acknowledgement of the notification given in accordance with paragraph 6 or 7 together with their written consent for the practitioner's file in relation to the client's matter to be viewed by the supervisor for the purposes of supervision/oversight[.]

[9] [T]he [p]ractitioner will allow unrestricted access by the supervisor to the practitioner's diary and/or electronic calendar, to all client files and records of the practitioner's practice, and to any client files of any other legal practice in which the practitioner is or may be engaged[.]

[10] [T]he [p]ractitioner will meet with the supervisor at intervals of not less than once each calendar month, or more frequently should the supervisor determine in his sole discretion that is necessary, save that the practitioner shall not be in breach of these conditions if the practitioner and/or the supervisor are absent from their respective practices on a period of leave. The first of such meetings is to take place by 31 July 2020[.]

[11] [P]rior to the first meeting required by the terms of paragraph 10 above, the [p]ractitioner will prepare and provide to the supervisor a written summary of all current client matters (Client Summary), including but not limited to the following for each client:

[a] [C]lient name;

[b] [C]lient reference;

[c] [A] brief description of the nature of the matter;

[d] [T]he date and detail of the last action by the practitioner on the file;

[e] [P]rovision for the supervisor to note or make comment to indicate when specific matters are discussed and whether the practitioner's file has been sighted; and

[f] [A]ny other matter that is reasonably required by the supervisor.

[12] [T]he [p]ractitioner must update the Client Summary referred to in paragraph 11 above, including by the addition of any new client matters, prior to the periodic meetings with the supervisor as referred to in paragraph 10 above[.]

[13] [T]he [p]ractitioner will provide to the supervisor such information as the supervisor may reasonably require in relation to the practitioner's client matters and will respond to any enquiries made by the supervisor as soon as is reasonably practicable[.]

[14] [A]t three monthly intervals during the Supervision Period, the [p]ractitioner will provide to the Board a report prepared by the supervisor addressing the following:

[a] [T]he practitioner's level of cooperation with the supervisor including his attendance at meetings and his response to the supervisor's requests for information;

[b] [T]he practitioner's responsiveness to advice and guidance offered by the supervisor;

[c] [T]he supervisor's opinion of the practitioner's management of his [sic] practice;

[d] [T]he supervisor's opinion on whether the practitioner has complied with his [sic] obligations as an officer of the Court;

[e] [W]hether the practitioner has provided notification to clients as required by paragraphs 6 and 7 above;

[f] [W]hether the practitioner has dealt with all client matters competently and diligently; and

[g] [T]he areas of law in which the practitioner has conducted his [sic] legal practice during the Supervision Period. The first such report is to be provided to the Board on or before 31 December 2020.

> [15] [B]y consenting to this Order, the [p]ractitioner authorises the supervisor to respond to requests for information in relation to the practitioner's practice that are reasonably made by the Committee and the Board.
>
> [16] [B]y consenting to this Order, the [p]ractitioner authorises the supervisor to report immediately to the Board and the Committee any matter of concern that the supervisor may have in relation to:
>
> [a] [T]he practitioner;
>
> [b] [T]he practitioner's conduct of her legal practice; and
>
> [c] [T]he practitioner's compliance or non[-]compliance with these Orders.
>
> [17] [T]he [p]ractitioner will notify the Board in writing within seven days if the practitioner ceases sole practice and/or commences employment as an employed practitioner and/or ceases legal practice[.]
>
> [18] [B]y consenting to this Order, the [p]ractitioner authorises the Committee to provide to the supervisor copies of any complaints received by the Committee about the practitioner's conduct during the Supervision Period and any information or material obtained by the Committee in the course of any investigation by the Commissioner [sic] into the practitioner's conduct[.]
>
> [19] [D]uring the Supervision Period, the [p]ractitioner will not conduct or engage in legal practice other than in accordance with these Orders.

30 We will now refer to the practitioner's background, as related in her submissions, the practitioner's disciplinary history, character references filed by the practitioner, and medical and psychological reports filed by her. We will then review the legal framework and principles in relation to penalty, before considering and determining the appropriate penalty in the circumstances of this case. Finally, we will consider and determine the issue of costs.

Practitioner's background

31 The practitioner did not give evidence in this proceeding in relation to conduct or penalty. The following background in relation to the practitioner is given in her penalty submissions, which were

'[p]repared [b]y' her and '[s]ettled by' Mr Bennett.[10] This part of the practitioner's submissions was not disputed by the Committee in its submissions in reply and we accept the following background in relation to the practitioner stated in her submissions as accurate for the purposes of these reasons:[11]

> 9 The [p]ractitioner was born on 2 April 1962 in Brunei. She is primary carer for her Chinese [f]ather (now aged 94) and her Eurasian mother (now aged 83) and lives with them. She has only one sibling, a brother 5 years her [s]enior who is married with adult children. Her immediate family are not lawyers although her paternal [g]randfather was an attorney in pre-communist China who worked for an American company in Shanghai. She is and has always been proud that she was able to resume the paternal connection to the profession of law.
>
> 10 The [p]ractitioner came to Australia with her parents and brother in 1970.
>
> 11 The [p]ractitioner's primary schooling was in WA, NSW and NT. She completed the final 2 years of primary education in 12 months in Darwin so was a year younger compared to other students when she commenced [h]igh [s]chool.
>
> 12 Her secondary education was in WA when the family relocated to WA shortly before Cyclone Tracy.
>
> 13 The [p]ractitioner finished her secondary education in 1978 and then studied at UWA at a compulsory pre-law faculty year in order to compete for the 50 places in [l]aw school at that time when there was only one law school in WA and there was no such thing as getting a law degree online.
>
> 14 The [p]ractitioner commenced her studies in 1979 at UWA and was awarded BJuris in 1982 and LLB in 1983. She served her articles in 1984, and was admitted on 4 [February] 1985. The [p]ractitioner has been employed as a salaried solicitor ever since her admission until she established her own (sole) practice in [approximately] December 2015.
>
> 15 The [p]ractitioner's 2016 Practising Certificate was cancelled on 8 February 2018 by the Board. The Board held over her application for renewal of Practising Certificate for a 2017 Practising Certificate from month to month awaiting determination of VR 183/2016.

[10] [Practitioner's] penalty submissions dated 10 March 2020 page 1.
[11] [Practitioner's] penalty submissions dated 10 March 2020 [9]-[19].

16 However, on 8 February 2018, the Board cancelled her 2016 Practising Certificate without deciding not to renew her application for 2017 Practising Certificate.

17 The [p]ractitioner has no children and have [sic] not re-partnered since her 15 year relationship with her partner ended in January 2013.

18 The [p]ractitioner['s] working history is summarised below:

18.1 1984: Articles with Brian A McMahon, a sole practitioner;

18.2 1985: Employed by John Gladstone, a sole practitioner who later became Registrar of Titles;

18.3 1986: Employed by Tom Bannerman and Bannerman & Co in their Kalgoorlie & Perth offices;

18.4 July 1990 to 30 June 2001: Employed by Murie & Edward until the partnership was dissolved;

18.5 1 July 2001 to 1 March 2002 (approximately): Employed by Verschuer Edward;

18.6 5 March 2002 (approximately): Employed by Wojtowicz Kelly until it ceased to trade in January 2011 and her employment was transferred to an ILP Civic Legal Pty Ltd (Civic was ultimately owned by the parent ASX company ILH) ILH ultimately went into administration;

18.7 2011: Employed by Civic Legal Pty Ltd until terminated in June 2012.

18.8 July 2012 to May 2015: Employed by James Chong Lawyers;

18.9 July 2015 to September 2015: Employed by I-Law and resigned in September[ ]2015;

18.10 December 2015 (approximately): Commenced sole practice and also worked as Consultant Migration Agent by [sic] Australia World Link from approximately September 2015.

19 The [p]ractitioner had exposure to [m]igration law in the early days of her professional career and was thus able to become registered as a Migration Agent in 1992 when the registration regime for those practising in [m]igration [l]aw came into operation.

Practitioner's disciplinary history

32 In ***Legal Practitioners Complaints Committee and Chang*** [2007] WASAT 86, the Tribunal[12] found the practitioner guilty of 'unprofessional conduct', within the meaning of the *Legal Practitioners Act 1893* (WA), 'by receiving cheques from a client and depositing them in her personal account, by failing to make an adequate record of the receipt of the cheques and by setting aside the funds from the cheques while failing to take steps to ensure that the cash was promptly dealt with'.[13] The Tribunal also found the practitioner guilty of unprofessional conduct 'by failing to make an adequate record of the receipt or disposition of the client's funds'.[14] The practitioner was reprimanded and fined the sum of $6,000 for the unprofessional conduct, and was also ordered to pay costs fixed in the sum of $25,000. However, the misconduct in that case did not involve dishonesty and took place in March and May 2001, which was more than 15 years before the misconduct in this case.

33 On 13 September 2017, the Tribunal made consent orders, under s 56(1) of the *State Administrative Tribunal Act 2004* (WA) (SAT Act), finding that the practitioner engaged in professional misconduct. The consent orders were reproduced as Annexure A to the Tribunal's reasons for decision in ***Legal Profession Complaints Committee and Chang*** [2018] WASAT 121.[15] However, the practitioner sought to withdraw admissions made in signing the consent orders and the matter is the subject of a pending appeal. We accept the practitioner's submission that 'very little weight should be accorded by the Tribunal to these matters given that they are under [appeal]'.[16]

34 We do not consider that the practitioner's disciplinary history is an aggravating factor in relation to penalty in the circumstances of this case.

Character references

35 The practitioner filed five character references.[17] None of the character referees were required for cross-examination. We will review each of the character references shortly. However, we observe that,

[12] Justice Barker P, Mr C Edmonds SC S Sess M and Mr K Bradley S Sess M.
[13] ***Legal Practitioners Complaints Committee and Chang*** [3].
[14] ***Legal Practitioners Complaints Committee and Chang*** [3].
[15] Judge Sharp DP.
[16] [Practitioner's] penalty submissions dated 10 March 2020 [38].
[17] One of the character referees, Mr Paul Geoghegan, also attached a character reference that he gave for the practitioner in relation to a different disciplinary proceeding, VR 183 of 2016.

significantly, none of the character referees appear to have any, or any detailed, knowledge of the Tribunal's conduct findings.[18] None of the character referees refer to, or say that they have read, the conduct reasons or the summary of the Tribunal's decision published with the conduct reasons (summary). Most significantly, none of the character referees say that they are aware that the Tribunal has found that the practitioner knowingly sought to mislead the complainant by making the email statements and knowingly sought to mislead the Magistrates Court and the complainant by making the PTC statements. Furthermore, none of the character references are from members of the legal profession and none speak to the practitioner's honesty and integrity as a legal practitioner.[19]

36 The first character reference is from Dunuwila Ialin Rajeewa Jayawickrema and is dated 3 March 2020. This character referee has known the practitioner for approximately 25 years and was first introduced to her when the character referee required urgent assistance in relation to a visa-related issue. That issue was resolved with the practitioner's help. The practitioner has also resolved immigration issues for the character referee's daughter, who had a health condition at the time. The character referee states that '[w]hen I think about everything [the practitioner] has done for me and my family I have no words to thank her or show my gratitude to her' and '[m]y family and I now call Australia home and we would not have had opportunities open to us if it had not been for [the practitioner's] efforts'.

37 The character referee states that '[the practitioner's] character has not changed with the passage of time' and that 'I was shocked to learn that [the practitioner] had her Practising Certificate cancelled in 2018 and I know [the practitioner] was devastated'. The character referee states that the practitioner was 'looking forward to growing her small suburban practice and be able to help disadvantaged and impecunious clients to access justice as well as those whose [m]other tongue is not English'. However, we note that the cancellation of the practitioner's practising certificate by the Board, which took place on 8 February 2018, under s 56 of the LP Act, occurred in consequence of the matters

[18] Cf ***Legal Profession Complaints Committee and Skerritt*** [2012] WASAT 221 (referred to at [108]-[115] below) where the character referees 'were made aware of the Tribunal's finding of professional misconduct and the agreed facts …' [25].

[19] Cf ***Legal Profession Complaints Committee and Skerritt*** [2012] WASAT 221 (referred to at [108]-[115] below) where the practitioner's 'character was supported in strong terms by nine character references from practitioners and a non-practitioner advocate' [25].

the subject of proceeding VR 183 of 2016 and is unrelated to the circumstances of this proceeding. [20]

38 The first character reference concludes as follows:

> [The practitioner] has told me about the pending disciplinary proceedings and her Supreme Court appeal. While I cannot speak to the legal issues I can say that [the practitioner] has not taken leave of her desire to act ethically and properly at all times. An example is that recently I asked [the practitioner] to advise me about strata levies and debt collection. She immediately informed me that owing to the fact that she does not hold a current [p]ractising certificate she could not give legal advice or do legal work even for long time friends like me.
>
> I am more than happy to present my self [sic] personally if needed.

39 The character referee does not say what the practitioner said 'about the pending disciplinary proceedings'. It is unclear whether this relates to these proceedings or proceeding VR 183 of 2016. The words 'her Supreme Court appeal' obviously concern the appeal related to proceeding VR 183 of 2016. The character referee does not say that he or she has read the conduct reasons or the summary and does not say that he or she is aware that the Tribunal has found that the practitioner knowingly sought to mislead the complainant by making the email statements and knowingly sought to mislead the Magistrates Court and the complainant by making the PTC statements. The example of the practitioner's 'desire to act ethically and properly at all times' given in the character reference does not bear testament to the practitioner's honesty and integrity in conducting legal practice, but only to the fact that she recognises that she cannot give legal advice or do legal work, 'even for long time friends like me', when she does not hold a current local practising certificate.

40 The second character reference is from the Venerable Thich Vien Tri of the Phap Hoa Buddha Temple in Pennington, South Australia and is dated 3 March 2020. This character referee states that the practitioner has provided immigration assistance to the Temple and that '[i]n all her dealings with us [the practitioner] has acted professionally and responsibly'. The character referee 'request[s] the Tribunal to extend forgiveness[,] mercy and compassion to [the practitioner]' and expresses the understanding that '[the practitioner] has experienced an anxiety disorder and depression together with health concerns which

[20] [Committee's] submissions as to penalty and costs dated 1 October 2019 footnote 6 and [Practitioner's] penalty submissions dated 10 March 2020 [15]-[16].

she is addressing and this I feel would have contributed to her lapses'. The character referee does not refer to possessing qualifications or experience on the basis of which he or she can express an opinion as to whether the practitioner's anxiety and depression 'contributed to her lapses'. The character referee also does not state his or her understanding of the practitioner's 'lapses'. Certainly, knowingly seeking to mislead the complainant by making the email statements and knowingly seeking to mislead the Magistrates Court and the complainant by making the PTC statements could not reasonably be characterised as mere 'lapses'. This professional misconduct involved deliberate dishonesty, not mere 'lapses'.

41 The third character reference is from Sony Tang of the International Buddhist University Students Association (WA) Inc and is dated 6 March 2020. This character referee has known the practitioner 'for years as she has provided immigration advice and representation … as a Migration Agent concerning a visa for a member of my family'. The character referee states that '[the practitioner] informs me that she has issues concerning a compliant [sic] from a former client of the migration agency' and expresses the view that '[the practitioner] has always behaved appropriately[,] ethically and professionally in her dealings with me as a client'. However, the practitioner's 'issues' do not merely concern 'a [complaint] from a former client of the migration agency'. Rather, they involve findings of the Tribunal that she knowingly sought to mislead that former client and also knowingly sought to mislead the Magistrates Court and the former client when the former client sought compensation in proceedings in that court.

42 The fourth character reference is from the practitioner's employer as a registered migration agent, Ms Doan, and is dated 10 March 2020. Ms Doan has known the practitioner for almost five years and they have developed 'a social as well as professional relationship'. Ms Doan says that after she offered the practitioner employment as a consultant registered migration agent, 'it became clear within a short space of time that there was a need to have an "in house" but separate law firm to provide legal services as my migration agency could not provide immigration legal assistance', and consequently the practitioner established a legal practice in December 2015. Ms Doan thinks 'well enough of [the practitioner] to continue her employment as a consultant Migration Agent … albeit in a limited capacity'. However, Ms Doan does not indicate that she has read the Tribunal's conduct reasons or the summary and does not say that she is aware of the Tribunal's conduct findings.

43 Ms Doan states that she knows 'only too well the great emotional and financial impact that these proceedings have had on [the practitioner] and indeed other unresolved litigation with the [Committee] and the [Board]'. Ms Doan asked the practitioner 'to seek medical help earlier[,] but she told me that she was too afraid she would lose her licence and also [be] stigmatised'. Ms Doan also states that, when the practitioner's 'licence was cancelled, she was devastated and spoke about dying from time to time'.

44 The final character reference is from Mr Paul Geoghegan, who was the practitioner's (domestic) partner for about 15 years, until February 2013.[21] Although Mr Geoghegan has 'not seen [the practitioner] for the last six years', he 'can confidently say that I would expect that [the practitioner's] innate good character would not and never will change, despite the passage of time'. Mr Geoghegan says that the practitioner was 'close to a nervous breakdown at the time she was dismissed from her employment in June 2012', with the weeks leading up to her dismissal being 'extremely stressful for her and she felt devastated by her termination which she considered unfair'. Mr Geoghegan also says that he has 'no doubt that [the practitioner] would have suffered emotional upheaval' from their separation and that 'the fact of separation would have added additional stress for her in her professional life'. However, the practitioner's dismissal from her former employment (in June 2012) occurred about four years prior, and her separation (in February 2013) occurred about three-and-a-half years prior, to her professional misconduct by knowingly seeking to mislead the complainant by making the email statements and by knowingly seeking to mislead the Magistrates Court and the complainant by making the PTC statements. Furthermore, the stress associated with her dismissal from her former employment and emotional upheaval from her separation does not provide a satisfactory explanation for knowingly seeking to mislead the complainant by making the email statements or knowingly seeking to mislead the Magistrates Court and the complainant by making the PTC statements.

45 Mr Geoghegan appears to have the greatest knowledge of the Tribunal's conduct findings of all of the character referees. He states:

> I understand that the present proceedings revolve around a complaint stemming from [the practitioner's] failure to engage with the [Committee] (ie [sic] not answering communications timeously and not

[21] This character reference is undated.

> complying with subpoenas) and also about statements made to a client and to the Fremantle Court.
>
> While I do not know the circumstances, I can only say that if [the practitioner] is in any way blameworthy then it is the result of exceptional and extraordinary circumstances in her life at the time.

46 As Mr Geoghegan concedes, he does 'not know the circumstances'. Furthermore, he only refers to 'a complaint' and does not refer to the Tribunal's findings of professional misconduct. Significantly, he does not refer to the Tribunal's findings of professional misconduct by knowingly seeking to mislead the complainant by making the email statements and knowingly seeking to mislead the Magistrates Court and the complainant by making the PTC statements. Furthermore, the 'exceptional and extraordinary circumstances in [the practitioner's] life at the time' appears to be a reference to her dismissal from her employment and the breakup of her relationship, which occurred three to four years before the professional misconduct in question.

Medical and psychological evidence

47 As indicated earlier, the practitioner filed a report from Dr Cibulskis, her general practitioner, dated 18 February 2020, a report from Dr Chapman, her psychiatrist, dated 3 March 2020, and report from Professor Fernandez, her psychologist, dated 4 March 2020. None of the authors of the medical and psychological reports were required for cross-examination. We will review each of these reports shortly. However, we observe that, significantly, the medical and psychological evidence does not indicate that the practitioner's (now) diagnosed Post-Traumatic Stress Disorder (PTSD) or Depression/Anxiety caused, contributed to, or is in any way related to, the practitioner knowingly seeking to mislead the complainant by making the email statements or knowingly seeking to mislead the Magistrates Court and the complainant by making the PTC statements. Indeed, it appears from their reports that Dr Cibulskis, Dr Chapman and Professor Fernandez are not aware of these findings of serious professional misconduct. None of the three reports refer to these findings and none of the authors of the reports states that he has read the conduct reasons or the summary.[22]

48 It is clear that Dr Cibulskis, who has been the practitioner's general practitioner for the past 15 years, is not aware of the Tribunal's findings of professional misconduct by knowingly seeking to mislead

[22] See further [55]-[56] below.

the complainant by making the email statements and by knowingly seeking to mislead the Magistrates Court and the complainant by making the PTC statements, because he states in the third paragraph of his report:[23]

> I am pleased to provide a medical report on [the practitioner] in relation to disciplinary matter, which stems from [the practitioner's] failure to respond to the regulator's request for information and [the practitioner's] lack of engagement with them.

49 Dr Cibulskis does not refer to any disciplinary matter which stems from statements made by the practitioner to the complainant or to the Magistrates Court.

50 Dr Cibulskis says that the practitioner 'presented to [his practice] in September 2019, complaining of poor mood, poor concentration, poor motivation, helplessness, poor self[-]esteem and lack of confidence'. He says that the practitioner 'also complained of suicidal thoughts but no active suicidal plan'. Although the practitioner had been his patient since 2005, and had only presented with these symptoms in September 2019, Dr Cibulskis expresses the following opinions:[24]

> These symptoms seem to stem from an incident in 2011 whilst [the practitioner] was working in a law firm, and the subsequent protracted legal battle, that will culminate in an appeal to the Supreme Court in 2020. These protracted legal proceedings have had a significant impact on [the practitioner's] family life causing her relationship to breakdown in 2013. There has also been a significant impact financially and also on her physical well[-]being. This has left her socially isolated and vulnerable, as she has lost most of her friends. This protracted legal battle and the stress associated with this, *has led to a pattern of avoidant behaviour. This is evident in her dealing with the [Board]*. This avoidant behaviour also led to poor management of her own medical problems. In the period prior to September 2019, [the practitioner] had presented with poorly controlled asthma, iron deficiency and anaemia and chest pain, possibly ischaemic in nature.

51 As indicated below, in our view, Dr Cibulskis' (and Dr Chapman's) evidence in relation to the practitioner's 'avoidant behaviour', which Dr Cibulskis considers was caused by 'stress' associated with a 'protracted legal battle' stemming from an incident in 2011 and resulting in the practitioner's symptoms presented in September 2019 (and which Dr Chapman considers is a 'coping

[23] Report of Dr Ray Cibulskis dated 18 February 2020 page 1. As written.
[24] Report of Dr Ray Cibulskis dated 18 February 2020 page 3. Emphasis added.

mechanism' that the practitioner appears to have adopted 'to deal with anxiety' and consequent 'long-term stress'[25]), provides some explanation for the practitioner's professional misconduct by, without reasonable excuse, failing to respond to the notification letters and summonses.

52 Dr Cibulskis states that he referred the practitioner to Dr Chapman for an opinion and management and to Professor Fernandez for psychological counselling, and that the combination of medical management and psychological counselling has 'produced a significant improvement in her insomnia, depression and anxiety'. Dr Cibulskis expresses the opinion that 'I feel that [the practitioner] has learned sufficient strategies that would prevent her from reverting to the previous *avoidant behaviour that has led to this disciplinary action*'.[26] Again, the expression of this opinion highlights Dr Cibulskis' lack of awareness of the Tribunal's findings that the practitioner knowingly sought to mislead the complainant by making the email statements and knowingly sought to mislead the Magistrates Court and the complainant by making the PTC statements, and that his report does not bear on those matters.

53 Finally, Dr Cibulskis expresses the opinion that the 'current period of being unable to practice [sic] as a [l]awyer has caused [the practitioner] a marked deterioration in her mental and physical health' and that '[s]hould [the practitioner] be disbarred permanently, I fear that this would lead to irreparable mental impairment'.[27]

54 At the commencement of his report, Dr Chapman lists the documents to which he has had access for the purposes of writing his report. Significantly, this list does not include the conduct reasons or the summary.

55 In recounting the '[h]istory of [l]egal [e]vents as [e]xplained to me by [the practitioner]', Dr Chapman states as follows:[28]

> …
>
> [The practitioner] has also worked [as] a Migration Agent, and a *complaint* was raised in connection with this work, *concerning failure to notify an insurance claim, after telling a client she would do so*. She states that this should have been a fairly simple matter, but that by this stage she was simply not properly focused, having buried her head

[25] Report of Dr Murray Chapman dated 3 March 2020 page 7.
[26] Report of Dr Ray Cibulskis dated 18 February 2020 page 3. Emphasis added.
[27] Report of Dr Ray Cibulskis dated 18 February 2020 page 4.
[28] Report of Dr Murray Chapman dated 3 March 2020 page 3. Emphasis added.

> in the sand, and with her life in chaos. She felt subject to a 'tsunami of correspondence from the [Committee] with tight deadlines', and she admits she dealt with this by putting it all to one side and avoid[ing] them, as to read them was so depressing that it might push her towards suicidal ideation. She also felt she could not seek help because as soon as she admitted to being under stress and being unable to cope, she feared the regulator would seize on the opportunity to take her licence away.
>
> …

56 As emphasised in the quotation immediately above, Dr Chapman says that the practitioner told him that a 'complaint' was raised in connection with her work as a migration agent 'concerning failure to notify an insurance claim, after telling a client she would do so'. However, he does not refer to a *finding* of professional misconduct in this regard. Furthermore, and more significantly, the Tribunal's findings of professional misconduct stemming from the complaint were not that the practitioner '[failed] to notify an insurance claim, after telling a client she would do so'. Rather, the findings of professional misconduct are that the practitioner knowingly sought to mislead the complainant by making the email statements and knowingly sought to mislead the Magistrates Court and the complainant by making the PTC statements. Finally, nowhere in his report does Dr Chapman refer to the Magistrates Court proceedings or to statements made by the practitioner to the Magistrates Court.

57 It is clear from his report that the only finding of professional misconduct of which Dr Chapman appears to be aware is what he describes as the practitioner's 'failure to respond to regulator's communications in a timely manner'.[29] It is in relation to that finding (alone) that Dr Chapman expresses an opinion as to '[t]he contribution of [the practitioner's] psychiatric symptoms' in his report.[30]

58 Dr Chapman has seen the practitioner three times between 23 January 2020 and 27 February 2020. Dr Chapman diagnosed the practitioner as having the following mental illness:[31]

> • Post-Traumatic Stress Disorder - PSTD, of a chronic duration, without dissociative symptoms, accompanied by obsessive rumination of injustice. The precipitant trauma appears to have

[29] Report of Dr Murray Chapman dated 3 March 2020 page 7. See [59] below.
[30] Report of Dr Murray Chapman dated 3 March 2020 page 7. See [59] below.
[31] Report of Dr Murray Chapman dated 3 March 2020 page 6.

> been bullying and harassment in the workplace, and this has been compounded by ongoing and unresolved legal issues.
>
> • A differential diagnosis would include:
>
> Major Depression with marked agitation and an anger component.
>
> She exhibited symptoms of ongoing Anxiety, which might suggest a Generalised Anxiety Disorder[.]

59 Dr Chapman expresses the following opinion in relation to '[t]he contribution of [the practitioner's] psychiatric symptoms in her failure to respond to regulator's communications in a timely manner and any impairment in her judgement':[32]

> It is always challenging to retrospectively estimate the impact of psychiatric symptoms on their judgement and behaviour, especially over such a long period of time. However, there is evidence to suggest that she has tended *to deal with anxiety* and the consequences for herself of *long-term stress* by trying to either deny it or *avoid* it. She mentions this in her history, and this appears to be corroborated by her former partner's observations. *Avoidance* is of course a great short-term *coping mechanism*, as the stress appears to evaporate, however it is a self-defeating mechanism for coping in the long term, and often counterproductive. *Avoidance may* to [sic] *help to explain her failure to respond to communications in a timely manner*.

60 Dr Chapman expresses the following opinion in relation to the practitioner's (psychiatric) '[f]itness to [p]ractise as a [l]awyer':[33]

> From a psychiatric perspective, at the current time it would seem unlikely that she would be considered to be fit to practise in her profession, given her ongoing depressive, anxiety, anger and negative cognition/ distrust symptoms, in the context of chronic stress. However, where [sic] she to receive a favourable decision from the SAT, it may be that with the ongoing support from her therapist and medication (at least in the short term), she would be able to rehabilitate to the point where she would be fit again to resume practise. This would of course ultimately be a matter for the professional regulator bodies.

61 Finally, we also note the following opinion given by Dr Chapman in relation to '[o]ngoing management which will be conducive to [the practitioner's] mental well-being':[34]

[32] Report of Dr Murray Chapman dated 3 March 2020 page 7. Emphasis added.
[33] Report of Dr Murray Chapman dated 3 March 2020 page 7.

…

> Evidently any decision made by the SAT with regard to [the practitioner's] ability to resume legal practise [sic] or not is likely to have a profound impact upon her mental and material state, given the financial, and reputational impact such decisions may incur for her, and the likely consequences upon her self-esteem and self-image.

62 In his report, Professor Fernandez states that he has conducted psychological testing of the practitioner which produced a score 'indicating severe symptomatology in both Anxiety/Depression'. Professor Fernandez then states:[35]

> Her initial symptoms were at a significant level of distress, at having lost her ability to practice [sic] in a profession that she holds dearly. The length [of] time involved since losing her license [sic] has taken a toll on her and it shows in her behaviour.

63 However, Professor Fernandez's indication of the cause of the practitioner's 'initial symptoms', namely 'having lost her ability to practice [sic] in a profession that she holds dearly', occurred in February 2018, that is about a year-and-a-half after the practitioner engaged in professional misconduct by knowingly seeking to mislead the complainant by making the email statements and by knowingly seeking to mislead the Magistrates Court and the complainant by making the PTC statements. It was also after the practitioner was required to provide submissions to the notification letters (by 5 October 2017, 7 November 2017 and 6 December 2017)[36] and after she was required to produce documents by the Summons to Produce Documents dated 15 September 2017 (by 5 October 2017)[37] and by the Summons to Produce Documents and Provide Written Information Verified by Statutory Declaration dated 15 November 2017 (by 6 December 2017).[38]

64 In relation to 'planned future treatment/counselling', Professor Fernandez states as follows:[39]

> Given the current [psychological testing] score, planned future treatment in reducing anxiety and depression is around regaining her licence to practice. In gaining her license [sic] back, I predict that her behaviour will drop to an acceptable level i.e., there should be

[34] Report of Dr Murray Chapman dated 3 March 2020 pages 6-7.
[35] Report of Professor Miguel Fernandez dated 4 March 2020 pages 2-3.
[36] Conduct reasons [97], [100] and [102].
[37] Conduct reasons [98].
[38] Conduct reasons [103].
[39] Report of Professor Miguel Fernandez dated 4 March 2020 page 6. Original emphasis.

> monitoring and maintenance of treatment by me around consolidating solution orientated language that will protect and strengthen her *identity* as a lawyer. The current disciplinary practices have visibly been destructive.

65 Similarly, Professor Fernandez states that the practitioner's 'ability to regain her license [sic] is a significant aspect of her recovery'.[40]

66 In answer to the question '[d]oes [the practitioner] display any insight and judgement into past conduct and how to better manage stress, depression, anxiety, and seek early intervention[?]', Professor Fernandez states as follows:[41]

> This is already happening along the way. All of my work has had both an educative and therapeutic effect (the reduction in the [psychological testing] score). [The practitioner] has to "unlearn" bad habits in order to relearn new ones. I can't fully implement a healing cognitive regime until the situational triggers are minimised or removed. I have, however, identified elsewhere in this letter my proposed approach. Once the current legal process is over, healing can occur and allow her to open up her intellect (cognition) to that powerful identity of hers.

67 However, there is no indication in Professor Fernandez's report that he is aware that the practitioner's 'past conduct' includes knowingly seeking to mislead the complainant by making the email statements or knowingly seeking to mislead the Magistrates Court and the complainant by making the PTC statements. Moreover, as indicated earlier, Professor Fernandez considers that the practitioner's 'initial symptoms' of Anxiety/Depression 'were at a significant level of distress, at having lost her ability to practice [sic] in a profession that she holds dearly'.

68 Finally, and inconsistently with the opinion of Dr Chapman, Professor Fernandez expresses the opinion that 'with the evidence I have, [the practitioner] is fit to practice [sic]'.[42]

Legal framework and principles

69 Sections 438-441 of the LP Act concern the Tribunal's jurisdiction to make a finding that an Australian legal practitioner has engaged in unsatisfactory professional conduct or professional misconduct and the penalties it may impose if it makes such a finding. Sections 438-441 of the LP Act state as follows:

[40] Report of Professor Miguel Fernandez dated 4 March 2020 page 8.
[41] Report of Professor Miguel Fernandez dated 4 March 2020 page 9.
[42] Report of Professor Miguel Fernandez dated 4 March 2020 page 10.

438. Jurisdiction of SAT

(1) The State Administrative Tribunal has jurisdiction to make a finding that an Australian legal practitioner has engaged in unsatisfactory professional conduct or professional misconduct.

(2) If, after it has completed a hearing in relation to a referral under this Part in respect of an Australian legal practitioner, the State Administrative Tribunal is satisfied that the practitioner is guilty of unsatisfactory professional conduct or professional misconduct, the Tribunal may —

(a) make and transmit a report on the finding to the Supreme Court (full bench); or

(b) make any one or more of the orders specified in sections 439, 440 and 441.

(3) If the State Administrative Tribunal transmits a report in respect of a legal practitioner to the Supreme Court (full bench) under subsection (2)(a), the Tribunal may, pending the determination of the Supreme Court (full bench), make the following orders —

(a) an order that the Australian legal practitioner's local practising certificate be suspended for a specified period;

(b) an order that specified conditions be imposed on an Australian legal practitioner's local practising certificate restricting the entitlement of an Australian legal practitioner to practise for a specified period.

(4) Where appropriate, a report forwarded under subsection (2)(a) may include either or both of the following —

(a) a record of the evidence taken at the hearing;

(b) a recommendation that the name of the practitioner be removed from the local roll.

439. Orders requiring official implementation in this jurisdiction

The State Administrative Tribunal may, under section 438(2)(b), make any one or more of the following orders —

(a) an order that the practitioner's local practising certificate be suspended for a specified period or cancelled;

(b) an order that a local practising certificate not be granted to the practitioner before the end of a specified period;

(c) an 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 time; and

(iii) specifies the time (if any) after which the practitioner may apply to the Tribunal for the conditions to be amended or removed;

(d) an order publicly reprimanding the practitioner or, if there are special circumstances, privately reprimanding the practitioner.

440. Orders requiring official implementation in another jurisdiction

The State Administrative Tribunal may, under section 438(2)(b), make any one or more of the following orders —

(a) an order recommending that the name of the practitioner be removed from an interstate roll;

(b) an order recommending that the practitioner's interstate practising certificate be suspended for a specified period or cancelled;

(c) an order recommending that an interstate practising certificate not be granted to the practitioner before the end of a specified period;

(d) an order recommending that —

(i) specified conditions be imposed on the practitioner's interstate practising certificate, or existing conditions be amended; and

(ii) the conditions be imposed or amended for a specified time; and

(iii) the conditions specify the time (if any) after which the practitioner may apply to the Tribunal for the conditions to be amended or removed.

441. Orders requiring compliance by practitioner

The State Administrative Tribunal may, under section 438(2)(b), make any one or more of the following orders —

(a) an order that the practitioner pay a fine to the Board of a specified amount not exceeding $25 000;

(b) an order that the practitioner undertake and complete a specified course of further legal education;

(c) a compensation order;

(d) an order that the complainant pay the amount of legal costs in dispute or that the amount of legal costs be reduced by a specified amount (not exceeding the amount in dispute);

(e) an order that the practitioner provide specified legal services to the complainant either free of charge or at a specified cost;

(f) an order that the practitioner undertake a specified period of practice under specified supervision;

(g) an order that the practitioner do or refrain from doing something in connection with the practice of law;

(h) an order that the practitioner's practice, or the financial affairs of the practitioner or of the practitioner's practice, be conducted for a specified period in a specified way or subject to specified conditions;

(i) an order that the practitioner's practice be subject to periodic inspection for a specified period;

(j) an order that the practitioner undergo counselling or medical treatment or act in accordance with medical advice given to the practitioner;

(k) an order that the practitioner use the services of an accountant or other financial specialist in connection with the practitioner's practice;

> (l) an order that the practitioner seek advice in relation to the management of the practitioner's practice from a specified person;
>
> (m) an order that the practitioner not apply for a local practising certificate before the end of a specified period.

70 If the Tribunal decides to 'make and transmit a report on the finding[s] [that the practitioner is guilty of professional misconduct] to the Supreme Court (full bench)', under s 438(2)(a) of the LP Act, then it may include, under s 438(4)(b) of the LP Act, 'a recommendation that the name of the practitioner be removed from the local roll'. Under s 3 of the LP Act, the expression 'local roll' 'has the meaning given in [s] 28(1) [of the LP Act]'. Section 28(1) of the LP Act states that the Supreme Court 'must maintain a roll of persons admitted to the legal profession under this Act (the ***local roll***)'.[43] Thus, the 'local roll' from which the Tribunal may make a recommendation that the name of the practitioner be removed (if it decides to make and transmit a report on the findings that the practitioner is guilty of professional misconduct to the Supreme Court (full bench)) is the 'roll of persons admitted to the legal profession under [the LP] Act' maintained by the Supreme Court under s 28(1) of the LP Act.

71 In ***Khosa v Legal Profession Complaints Committee*** [2017] WASCA 192, the Court of Appeal[44] set out the following principles in relation to penalty at [188]-[195]:[45]

> 188 The court's, and the Tribunal's, jurisdiction with respect to the regulation of the profession is not to be exercised for the purpose of punishing the practitioner concerned, but for the protection of the public and the maintenance of the reputation and standards of the legal profession.
>
> 189 The protection of the public includes both general deterrence of other practitioners who might otherwise be tempted to engage in such conduct, as well as personal deterrence.
>
> 190 In *New South Wales Bar Association v Hamman*, Mason P said, with reference to the decision of Giles AJA in *Law Society of New South Wales v Foreman (No 2)*:
>
> > Giles AJA described the basis of the court's jurisdiction: at 470-1. Citing *Bannister* and other cases,

[43] Original emphasis.
[44] Murphy and Beech JJA.
[45] Citations omitted.

he referred to the protective function of general deterrence in the following terms (at 471):

> 'But the object of protection of the public also includes deterring the legal practitioner in question from repeating the misconduct, and deterring others who might be tempted to fall short of the high standards required of them. And the public, and professional colleagues who practise in the public interest, must be able to repose confidence in legal practitioners, so an element in deterrence is an assurance to the public that serious lapses in the conduct of legal practitioners will not be passed over or lightly put aside, but will be appropriately dealt with.'

These references to the public's perception of the court's reaction to the professional misconduct do not make the court hostage to the public's assumed sense of anger at the misconduct uncovered. The court must be satisfied that its enunciated views give proper weight to widely and reasonably held public attitudes to practitioners in the context of the administration of justice generally and in the particular case.

191 In general terms, where the conclusion is reached that a practitioner is presently unfit to practise, a choice may be made between suspension and striking off. If an order for suspension is made in that event, it must be made on the basis that, at the termination of the period of suspension, the practitioner will no longer be unfit to practise because, at the end of the relevant period, the practitioner's name will still be on the roll of practitioners and may resume practise. Suspension is a 'serious form of discipline which is usually imposed to discipline the legal practitioner, who has committed an act of unprofessional conduct but who, in the opinion of the court, at the end of the period of suspension, will be a fit and proper person to practise the law'. In the context of suspension, present unfitness to practise may be understood to include a serious breach of professional obligations 'reflecting, to a significant degree, upon the practitioner's fitness to practise'.

192 Where, however, the present unfitness to practise reveals that the practitioner lacks the character and trustworthiness necessary to discharge the responsibilities of legal practice, or that the practitioner is permanently or indefinitely unfit to practise, striking off rather than suspension will (at least ordinarily) be the appropriate response.

> 193 A failure on the part of the practitioner to appreciate the impropriety of his or her conduct may support a finding of unfitness to practise. A reason for this is that the lack of appreciation of impropriety and the lack of insight increases the risk of recurrence of the improper conduct.
>
> 194 A suspension order may also be a valuable measure by way of general or personal deterrence, for the protection of the public and the maintenance of the reputation and standards of the legal profession, even without concluding that the conduct demonstrated or should be characterised as indicating that the practitioner was not a fit and proper person. A suspension order entails greater denunciatory and deterrent effect than a reprimand and fine.
>
> 195 Fitness to practise for the purpose of penalty orders is to be determined at the time of the relevant hearing, and not at the time of the misconduct. The same is true of the question of the appropriate penalty generally.

72 In ***Legal Profession Complaints Committee and A Legal Practitioner*** [2013] WASAT 37 (S),[46] a case in which a practitioner was found to have engaged in professional misconduct by, among other things, intentionally causing a court to be misled that there was no third party who ought to be heard before orders were made in terms of a minute of agreed orders, the Tribunal[47] referred to authorities and principles in relation to penalty, which are also relevant in this case, as follows at [21]-[27]:[48]

> 21 A report and recommendation for a strike off order, as proposed by the Committee, would be appropriate where we regard the misconduct as so serious as to mean that the practitioner is permanently or indefinitely unfit to practise: *New South Wales Bar Association v Cummins* [2001] NSWCA 284; (2001) 52 NSWLR 279 at [26] - [28]. In assessing the appropriate disciplinary consequence of the practitioner's conduct, other remedies which we must consider include suspension of the practitioner's local practising certificate (s 439(a) of the LP Act) or (more appropriately here, as the practitioner does not have a current practising certificate) that a local practising certificate

[46] Referred to below as ***Legal Profession Complaints Committee and A Legal Practitioner (S)***.
[47] Judge Parry DP, Mr J Mansveld M and Mr C Edmonds SC S Sess M.
[48] As in the case of the practitioner in ***Legal Profession Complaints Committee and A Legal Practitioner (S)***, as indicated earlier, the practitioner in this case does not hold a current local practising certificate. Therefore, while suspension of the practitioner's local practising certificate (under s 439(a) of the LP Act) is not open in this case, making an order that 'a local practising certificate not be granted to the practitioner before the end of a specified period' (under s 439(b) of the LP Act) or that 'the practitioner not apply for a local practising certificate before the end of a specified period' (under s 441(m) of the LP Act) is a penalty which is open to the Tribunal under s 438(2)(b) of the LP Act.

not be granted to the practitioner (s 439(b) of the LP Act) / not be applied for (s 441(m) of the LP Act) before a certain time, that conditions be placed on his practising certificate (s 439(c) of the LP Act), that the practitioner be reprimanded (s 439(d) of the LP Act), or that he pay a fine of up to $25,000 to the Legal Practice Board (s 441(a) of the LP Act) (see orders specified in s 439, s 440 and s 441 of the LP Act). …

22 The relevant principles in this type of case were set out by the Supreme Court (full bench) in *Legal Profession Complaints Committee v Brickhill* [2013] WASC 369 at [18] - [21] as follows:

> The principles to be applied in an application of this kind are well established. The court's jurisdiction with respect to the regulation of the legal profession is not to be exercised for the purpose of punishing the practitioner concerned, but for the protection of the public and the maintenance of the reputation and standards of the legal profession: *Re Maraj (a legal practitioner)* (1995) 15 WAR 12, 25 (Malcolm CJ, Kennedy and Franklyn JJ agreeing); *Ziems v Prothonotary of the Supreme Court of New South Wales* [1957] HCA 46; (1957) 97 CLR 279, 286 (Dixon CJ, McTiernan, Fullagar and Kitto JJ agreeing); *Legal Profession Complaints Committee v Masten* [2011] WASC 71 [16] (Martin CJ, Murray and EM Heenan JJ); *Legal Profession Complaints Committee v Brennan* [2010] WASC 198 [10] (Martin CJ, Murray and Hall JJ agreeing); *Legal Profession Complaints Committee v Fitzpatrick* [2011] WASC 320 [43] (Martin CJ, EM Heenan and Jenkins JJ).
>
> Where the motion is to remove a practitioner from the Roll, the critical question for the court is whether the practitioner is shown not to be a fit and proper person to be a legal practitioner: *Ziems* (297-298); *A Solicitor v The Council of the Law Society of New South Wales* [2004] HCA 1; (2004) 216 CLR 253 [15] (Gleeson CJ, McHugh, Gummow, Kirby and Callinan JJ); *Legal Practitioners Complaints Committee v Thorpe* [2008] WASC 9 [43] (Steytler P, Wheeler JA and Newnes J). Fitness to practice [sic] law requires that the practitioner must command the personal confidence of his or her clients, fellow practitioners and judges: *In re Davis* [1947] HCA 53; (1947) 75 CLR 409, 420 (Dixon J); *Legal Practitioners Complaints Committee v Thorpe* [43] (Steytler P, Wheeler JA and Newnes J); *Legal Profession Complaints Committee v Brennan* [11] (Martin CJ, Murray and Hall JJ agreeing).

> Striking off is an order reserved for very serious cases, where the character and conduct of the practitioner is seen to be 'inconsistent with the privileges of further practice': *Barristers' Board v Darveniza* [2000] QCA 253; (2000) 112 A Crim R 438 [38] (Thomas JA, McMurdo P and White J agreeing).
>
> Integrity and honesty are essential characteristics expected of a practitioner, and therefore, the court has generally taken a very serious approach when dealing with dishonesty by a practitioner: *Brennan* [15]; *Legal Profession Complaints Committee v Bachmann* [2011] WASC 309 [47] (Martin CJ, EM Heenan and Jenkins JJ); *Legal Practitioners Complaints Committee v Palumbo* [2005] WASCA 129 [22]-[23] (Steytler P, Wheeler and McLure JJA agreeing); *Kyle v Legal Practitioners Complaints Committee* [1999] WASCA 115; (1999) 21 WAR 56 [69] (Parker J); *Re Maraj* (25) (Malcolm CJ, Kennedy and Franklyn JJ agreeing). In *Barristers' Board v Darveniza*, Thomas JA observed that:
>
> > [T]he quality most likely to result in striking off is conduct which undermines the trustworthiness of the practitioner, or which suggests a lack of integrity or that the practitioner cannot be trusted to deal fairly within the system which he or she practices [33].

23 These principles were recently adopted and restated in *Legal Profession Complaints Committee v Segler* [2014] WASC 159 (*Segler*) at [6]. In *Segler*, the Court added at [7] (citing *A Solicitor v Council of the Law Society of NSW* [2004] HCA 1; (2004) 216 CLR 253):

> The critical question is, therefore, whether [the practitioner] is a fit and proper person to be a legal practitioner. That question is to be decided at the time of the hearing not at the time the conduct was engaged in[.]

24 The practitioner submits also that, in determining the appropriate penalty, care needs to be taken that the penalty reflects the matters with which the practitioner is charged and not other conduct including the defence of the action by the practitioner which is ultimately held to be unsuccessful: *Smith v New South Wales Bar Association* [1992] HCA 36; (1992) 176 CLR 256 (*Smith*) at 267 - 268 and 271 - 272. That principle may generally be accepted, but it is subject to this qualification

expressed by Ipp JA in *Barwick v Council of the Law Society of New South Wales* [2004] NSWCA 32 at [108] - [109]:

> The relevant time for determining the fitness of a practitioner to practise is the time of the determination by the disciplinary body seized with the question: cf *A Solicitor v The Law Society of New South Wales* [2004] HCA 1; (2004) 204 ALR 8. The misconduct charged will have taken place before the decision is made; there will inevitably be a gap between the date of the misconduct and the date of the determination. It will not be unusual for the practitioner concerned to submit that circumstances have changed since the misconduct charged; arguments as to remorse, reform, character change and subsequent good deeds are not uncommon. The practitioner's conduct of the defence and the veracity and candour of his or her testimony will often be the best evidence as to whether these mitigating circumstances are to be accepted.

25 As we understand the position, the principle in *Smith* does not preclude the Tribunal's consideration of matters relevant to the practitioner's fitness to practise and other matters which may be regarded as aggravating the conduct or mitigating its seriousness. Both parties made submissions on this premise.

Strike off as against suspension

26 The Committee refers in this context to the decision in *Legal Practitioners Complaints Committee v Pepe* [2009] WASC 39. This passage appears at [12]:

> Where the choice presented is, as in this case, effectively between suspension and striking off, useful guidance can be obtained from the judgment of Thomas JA, McMurdo P and White J agreeing, in *Barristers' Board v Darveniza* [2000] QCA 253; (2000) 12 A Crim R 438 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. Suspension is a less serious result, firstly because a limited period is specified and secondly because the right to resume practice is then preserved without any further onus upon the practitioner to prove that he or she is now a fit and proper person to practice [sic].

> The proper use of suspension is, in my opinion, 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. (In *Re A Practitioner* (1984) 36 SASR 590 at 593 per King CJ.)

27 Another way to express this distinction is to say that striking off is reserved to those cases where the practitioner is found to be permanently or indefinitely unfit to practise, whereas suspension is suitable where the Tribunal is satisfied that, upon completion of the period of suspension, the practitioner will be fit to resume practice.

73 In the conduct reasons at [167], we set out the Tribunal's review in ***Legal Profession Complaints Committee and A Legal Practitioner*** [2013] WASAT 37; (2013) 84 SR (WA) 158[49] at [148]-[151] of authorities in relation to professional misconduct by knowingly or intentionally seeking to mislead a court or tribunal. As those authorities are also relevant in relation to penalty, we repeat the summary from ***Legal Profession Complaints Committee and A Legal Practitioner*** at [148]-[151] here:[50]

> 148 Knowingly or intentionally misleading a court or tribunal constitutes unprofessional conduct of a most serious nature (historically, professional misconduct) at common law (and under the Legal Practice Act), in that it is conduct that would be reasonably regarded as disgraceful or dishonourable by practitioners of good repute and competence, and is therefore professional misconduct under the LP Act. In *Vogt v Legal Practitioners Complaints Committee* [2009] WASCA 202 at [61] and [70], the Court of Appeal said the following:
>
> > For a practitioner, in the course of his or her practice, intentionally to mislead anyone is a serious breach of the practitioner's professional duty. But the finding in the present case that the appellant intentionally misled the court is of particular significance. It goes to the very heart of a practitioner's duty as an officer of the

[49] Judge Parry DP, Mr J Mansveld M and Mr C Edmonds SC S Sess M.
[50] Original emphasis.

court and therefore to the proper administration of justice. We would respectfully adopt what was said in that respect by the Queensland Court of Appeal in *The Council of the Queensland Law Society Inc v Wright* [2001] QCA 58, a case involving a solicitor who (among other things) intentionally misled a court in relation to an affidavit relied upon to resist a summary judgment application and as to the availability of a witness. The court said:

> A practitioner's duty to the court arises out of a practitioner's special relationship with the court; it overrides the duties owed by a practitioner to clients or others … The lawyer's duty to the court includes candour, honesty and fairness … 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. … (Footnotes omitted).

As we have observed, it is a matter of the utmost seriousness for a practitioner intentionally to mislead a court. The effective administration of the justice system and public confidence in the system depends upon the absolute and unconditional discharge by practitioners of their duty of honesty and candour to the court. It is a duty so fundamental that factors such as relative inexperience and lack of supervision do not weigh so heavily in mitigation as they might in other situations. …

149 After setting out this statement, the Tribunal, in *Legal Profession Complaints Committee and Segler* [2010] WASAT 135 (*Segler 2*), held at [69] as follows:

> Complete truthfulness and absolute candour with courts and tribunals is, as these authorities show, an essential and fundamental incident of being a member of the legal profession. It is no less the case when a member

of the legal profession is engaged in court or tribunal proceedings in an individual capacity as when he or she represents a client. In striking off a legal practitioner for having misled the Family Court of Western Australia in relation to his assets in proceedings between himself and his wife, the Supreme Court of Western Australia (Full Bench) observed and held in *Legal Practitioners Complaints Committee v Dixon* [2006] WASCA 27 at [10] as follows:

> This was therefore a case of a practitioner who must have known that he had a duty to disclose his ownership of funds which would have a material impact upon the orders to be made by the Family Court in respect of the property settlement and maintenance. The evidence amply supported the conclusion of very serious unprofessional conduct in failing to make the necessary disclosure by deliberately concealing the true position from his wife, who was the applicant before the Family Court and, more importantly, from the Court itself. Further, the practitioner was guilty of illegal conduct in the form of perjury committed by the deliberately false statements made in his affidavits. That was a form of perjury which related directly to the practitioner's duty as an officer of the Court and to the integrity of the proceedings before the Court. (See also GE Dal Pont *Lawyers' Professional Responsibility* (Lawbook Company, 4th Edition, 2010) at [25.140]).

150 In the section of *Lawyers' Professional Responsibility* referred to in *Segler 2* at [69], Professor Dal Pont states as follows:

> The concern is that misleading the court in a personal capacity displays a lack of integrity that may directly translate to dishonesty in a professional environment. As explained by de Jersey CJ in *Barristers' Board v Young* [[2001] QCA 556 at [15]] in striking off a barrister who had knowingly given false evidence on oath before a Criminal Justice Commission Inquiry:
>
> > The notion of a barrister's deliberately giving false evidence on oath is utterly repugnant to the essence of what goes to make up a barrister's fitness to practise: such as to erode, if not destroy, the complete confidence which a client, a fellow practitioner, the courts and

> the public should be able, without hesitation, to assume. It is fanciful to think those persons would not be at least sceptical about the honesty, thence fitness and propriety, of a barrister who had so recently lied on oath on important matters before a significant Commission of Inquiry.
>
> **It follows that the lawyer's duty of candour to a court or tribunal is not diminished where the lawyer acts in a personal capacity**. For instance, it has been doubted that there would be a case "where a practitioner who knowingly swears a false affidavit that is filed in court could be regarded as fit to practice [sic]" ([*Coe v New South Wales Bar Association* [2000] NSWCA 13 (Mason P)]. **The same applies as regards lawyer-litigants who deliberately conceal matters that should be disclosed to the court**. [Citing the passage from *Legal Practitioners Complaints Committee v Dixon* (2006) WASCA 27 at [10] set out in the extracted passage from *Segler 2* above]. (Emphasis in bold added).

151 Finally, as the Tribunal said in *Legal Profession Complaints Committee and Skerritt* [2012] WASAT 221 at [10]:

> … 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.

74 In ***Legal Profession Complaints Committee and A Legal Practitioner (S)***, the Tribunal said the following in relation to a 'global' approach to penalty in disciplinary proceedings at [18]-[19]:

> 18 Whilst the imposition of separate penalties for each ground is the preferable course, there are circumstances in which a 'global' approach to penalty may be more appropriate in vocational disciplinary proceedings: *Stirling v Legal Services Commissioner* [2013] VSCA 374 (*Stirling*) at [72] - [75]. This is such a case.
>
> 19 As revealed in the conduct reasons, the practitioner's professional misconduct formed part of a course of conduct over several months such that it is convenient to impose a global penalty in respect of the separate findings of professional misconduct, rather than seeking to impose separate penalties for each charge. That is the basis upon which the parties proceeded and it was also the course followed by the Tribunal when it

> imposed a penalty in respect of Ms B's conduct in relation to the consent orders and Mr A's interest. …

75 Referring to the passage in ***Legal Profession Complaints Committee and A Legal Practitioner (S)*** set out immediately above, the Committee submits that:[51]

> Given the gravity of the dishonesty findings against the practitioner [that is, the findings that she knowingly sought to mislead the complainant by making the email statements and knowingly sought to mislead the Magistrates Court and the complainant by making the PTC statements] and the close factual relationship of all the grounds in this matter, this is a situation in which it is both convenient and preferable to impose a global penalty[.]

76 Although the practitioner contends that the 'dishonesty findings against the practitioner' are less 'grave' than that contended by the Committee, she also, in effect, submits that a 'global' approach to penalty is appropriate in the circumstances of this case.

77 We accept what is, in effect, the joint position of the parties that, in the circumstances of this case, it is both convenient and appropriate to impose a global penalty in respect of the separate findings of professional misconduct, rather than seeking to impose separate penalties for each of the three findings. The practitioner's professional misconduct in terms of knowingly seeking to mislead the complainant by making the email statements and by knowingly seeking to mislead the Magistrates Court and the complainant by making the PTC statements involved a course of conduct over about four months and the false and misleading email statements and PTC statements were made, respectively, for the related purposes 'to defer or delay the complainant from commencing legal proceedings against [the practitioner]'[52] and 'to defer and delay the [Magistrates Court] proceedings'.[53] The practitioner's professional misconduct by, without reasonable excuse, failing to respond to three notification letters and two summonses is also factually related to the other findings of professional misconduct, namely the dishonesty findings, because the letters and summonses stemmed from the complainant's complaint about the practitioner which lead to the dishonesty findings of professional

[51] [Committee's] submissions as to penalty and costs dated 1 October 2019 [60].
[52] Conduct reasons [129].
[53] Conduct reasons [165].

misconduct against the practitioner. As the Committee submits, there is a 'close factual relationship of all the grounds in this matter'.[54]

78 Finally, in relation to the legal framework and principles, we note that, in their submissions, both parties refer to the statement of the (so-called) '12 matters' or '12 factors' set out by the Tribunal in identical terms in ***Legal Profession Complaints Committee and Bower*** [2017] WASAT 47 (S)[55] at [16] and ***Legal Profession Complaints Committee and Park*** [2017] WASAT 89; (2017) 92 SR (WA) 33[56] at [26]. Under the heading 'The 12 factors', the Committee submits that 'in considering the appropriate penalty to be imposed for misconduct in professional matters, the Tribunal routinely has regard to twelve factors' and then summarises the '12 matters' or '12 factors' stated in ***Legal Profession Complaints Committee and Bower (S)*** at [16] and ***Legal Profession Complaints Committee and Park*** at [26].[57] Similarly, the practitioner 'accepts that the applicable legal principles are as summarised' in those two decisions and then summarises the first 11 of the '12 matters' or '12 factors' in the expression of headings ('Factor 1: …', 'Factor 2: …', 'Factor 3: …', etc.) and seeks to address each of those 'factors' under the relevant heading.[58]

79 As we have said, the Tribunal stated the (so-called) '12 matters' or '12 factors' in identical terms in ***Legal Profession Complaints Committee and Bower (S)*** at [16] and ***Legal Profession Complaints Committee and Park*** at [26]. Under the same heading, 'Twelve matters for consideration', the Tribunal said the following in both of those decisions:

> In determining an appropriate sanction, twelve matters may require consideration. Those matters are interrelated and are not mutually exclusive. The list of matters is not exhaustive. The twelve matters are:
>
> 1) Any need to protect the public against further misconduct by the practitioner *(Legal Profession Complaints Committee and Amsden* [2014] WASAT 57 (S) (*Amsden (S*)) at [8]; *Foreman* at 440C; *Hamman* at [77]).
>
> 2) The need to protect the public through general deterrence of other practitioners from similar conduct (*Veterinary*

[54] [Committee's] submissions as to penalty and costs dated 1 October 2019 [60].
[55] Justice Curthoys P, Ms M Connor M and Mr M Harford S Sess M. Referred to below as ***Legal Profession Complaints Committee and Bower (S)***.
[56] Justice Curthoys P, Mr D Aitken SM and Mr P de Villiers M.
[57] [Committee's] submissions as to penalty and costs dated 1 October 2019 [30].
[58] [Practitioner's] penalty submissions dated 10 March 2020 [8].

Practitioners Board of NSW v Johnson [2010] NSWADT 308 (*Johnson*) at [103]; *Hamman* at [77]).

3) The need to protect the public and maintain public confidence in the profession by reinforcing high professional standards and denouncing transgressions and thereby articulating the high standards expected of the profession (*Amsden (S)*) at [8]; *Foreman* at 444F; and *Hamman* at [77] and [79]), such that, even where there may be no need to deter a practitioner from repeating the conduct, the conduct is of such a nature that the Tribunal should give an emphatic indication of its disapproval (*Craig v The Medical Board of South Australia* [2001] SASC 169 at [64]; *Johnson* at [103]).

4) In the case of conduct involving misleading conduct, including dishonesty, whether the public and fellow practitioners can place reliance on the word of the practitioner (*Johnson* at [109]; *Foreman* at 445B - 445G).

5) Whether the practitioner has breached any:

   a) Act;

   b) Regulations;

   c) Guidelines or Code of Conduct, issued by the relevant professional body; and

   d) whether the practitioner has done so knowingly.

6) Whether the practitioner's conduct demonstrated incompetence, and if so, to what level.

7) Whether or not the incident was isolated such that the Tribunal can be satisfied of his or her worthiness or reliability for the future (*Foreman* at 442E - 442G; *New South Wales Bar Association v Evatt* (1968) 117 CLR 177 at 183; *Council of the Law Society (NSW) v A Solicitor* [2002] NSWCA 62 at [80]; *Chamberlain v Law Society of the Australian Capital Territory* (1993) 118 ALR 54 at 62 and 63).

8) The practitioner's disciplinary history (*Legal Profession Complaints Committee v O'Halloran* [2013] WASC 430 at [93]);

9) Whether or not the practitioner understands the error of his ways, including an assessment of any remorse and insight (or a lack thereof) shown by the practitioner, since a practitioner who fails to understand the significance and consequences of misconduct is a risk to the community (*Law Society of New South Wales v Walsh* [1997] NSWCA 185 per Beazley JJA

(*Walsh*); *Legal Profession Complaints Committee v Lashansky* [2007] WASC 211 (*Lashansky*) at [31]-[52] and (second) at [35]; *Amsden (S)* at [8]; *Foreman* at 444E; *Love* at [9]).

10) The desirability of making available to the public any special skills possessed by the practitioner.

11) The practitioner's personal circumstances at the time of the conduct and at the time of imposing the sanction. However, the weight given to personal circumstances cannot override the fundamental obligation of the Tribunal to provide appropriate protection of the public interest in the honesty and integrity of legal practitioners and in the maintenance of proper standards of legal practice (*Love* at [59]); *Paridis v Settlement Agents Supervisory Board* [2007] WASCA 97; (2007) 33 WAR 361 (*Paridis*) at [30(5)]).

12) The Tribunal may consider any other matters relevant to the practitioner's fitness to practise and other matters which may be regarded as aggravating the conduct or mitigating its seriousness (*A Legal Practitioner (S)* at [25]). In general, mitigating factors such as no previous misconduct or service to the profession are of considerably less significance than in the criminal process because the jurisdiction is protective not punitive (*Walsh*).

80 The '12 matters' or '12 factors' are neither a statutory pronouncement, nor an authoritative statement by a superior court, of the considerations or principles which are applicable in relation to penalty in disciplinary proceedings in general or in any particular case. Indeed, in identical words in ***Legal Profession Complaints Committee and Bower (S)*** at [16] and ***Legal Profession Complaints Committee and Park*** at [26], the Tribunal recognised that the '12 matters' are factors that 'may' require consideration (not that they will require consideration in all cases or in any particular case), 'are interrelated and are not mutually exclusive', and are 'not exhaustive'.

81 Notwithstanding these qualifications, the formulation and identical expression of the '12 matters' in the two cases referred to above may give those matters or factors, and their particular expression, the appearance of a code or of having a level of authority which they do not possess. The parties' submissions in this case appear to assume that the '12 matters' or '12 factors' have such a status. As indicated earlier, under the heading 'The 12 factors', the Committee submits that 'in considering the appropriate penalty to be imposed for misconduct in professional matters, the Tribunal routinely has regard to twelve

factors', which the submissions then summarise.[59] Similarly, as also indicated earlier, the practitioner submits that 'the applicable legal principles are as summarised'[60] in the two decisions referred to and then summarises the first 11 of the '12 matters' or '12 factors' in the expression of headings ('Factor 1: …', 'Factor 2: …', 'Factor 3: …', etc.) and seeks to address each of those 'factors' under the relevant heading.

82 However, it is not correct that the Tribunal 'routinely has regard to twelve factors' or that all of those factors (or only those factors) are 'the applicable legal principles' in determining the appropriate penalty for unsatisfactory professional conduct or professional misconduct. Rather, the relevant factors and principles are to be determined from statute and case authority in the particular circumstances of the case. In this case, having summarised the '12 matters' or '12 factors' in its submissions, the Committee did not address all of them, obviously because not all of them are relevant in this case. However, having summarised the first 11 of the '12 matters' or '12 factors' in the expression of headings, the practitioner sought to address each of them, whether relevant or not,[61] and with considerable overlap.

83 Furthermore, the expression and formulaic repetition of the '12 matters' or '12 factors' may divert the parties and the Tribunal from focussing on, or even identifying, the key matters which are relevant to determining the appropriate disciplinary consequence of the conduct in question in the particular circumstances of the case at hand.

84 For these reasons, the expression and formulaic repetition of the '12 matters' or '12 factors' in penalty submissions and reasons should be avoided. Rather, the focus of the parties and the Tribunal should be on identifying and assessing the particular matters which are relevant to the determination of the appropriate disciplinary consequence of the conduct in question in the circumstances of the case.

Appropriate penalty

85 As indicated earlier, the Committee contends that the appropriate penalty in this case is for the Tribunal to make and transmit a report to the Supreme Court (full bench) with a recommendation that the name of the practitioner be removed from the roll of persons admitted to the

[59] [Committee's] submissions as to penalty and costs dated 1 October 2019 [30].
[60] [Practitioner's] penalty submissions dated 10 March 2020 [8].
[61] As an example, the practitioner's submissions identify and then seek to address 'Factor 6: Does the [p]ractitioner's conduct demonstrate incompetence?', when the professional misconduct in this case does not involve incompetence.

legal profession under the LP Act. The Committee also seeks a 'consequential order' that no local practising certificate be granted to the practitioner pending the determination of the Supreme Court (full bench). In contrast, as also indicated earlier, the practitioner contends that the appropriate penalty in this case is a private reprimand, psychological counselling at least once a month for four months, psychiatric review on a monthly basis for six months, review by a general practitioner as necessary 'for ongoing monitoring of pharmaceutical treatment regime', and a three year period of supervised practice following completion of the four months of psychological counselling.

86 As the authorities referred to earlier indicate, not all instances of professional misconduct involving even deliberate misleading of a court or tribunal will necessarily result in a report to the Supreme Court (full bench) and a recommendation that the practitioner be struck off the roll. However, for the reasons which follow, in our view, the appropriate disciplinary consequence of the practitioner's serious professional misconduct by knowingly seeking to mislead the complainant by making the email statements and by knowingly seeking to mislead the Magistrates Court and the complainant by making the PTC statements, in the circumstances of this case, is that the Tribunal should make and transmit a report on the findings of professional misconduct to the Supreme Court (full bench) with a recommendation that the name of the practitioner be removed from the roll of persons admitted to the legal profession under the LP Act. In our view, the protection of the public in their dealings with legal practitioners (the honesty and integrity of legal practitioners being of paramount importance in that regard) and the maintenance of the reputation and standards of the legal profession require that the practitioner be struck off. Furthermore, for the reasons which follow, in our view, the penalty suggested in the practitioner's submissions would be manifestly inappropriate and inadequate to protect the public in their dealings with legal practitioners and maintain the reputation and standards of the legal profession.

87 As we said in the conduct reasons at [172]-[173]:

> 172 … By knowingly seeking to mislead the Magistrates Court and the complainant, so as to defer or delay the Magistrates Court proceedings, the practitioner breached her fundamental ethical duties of candour and fairness to the Court and to the complainant. As the authorities referred to in *Legal Profession Complaints Committee and A Legal Practitioner* at [148]-[151]

> show, courts and tribunals necessarily place significant trust and confidence in legal practitioners in order to be able to administer justice effectively and efficiently. Knowingly seeking to mislead a court (and the other party to litigation), whether in a professional or personal capacity, strikes at the very heart of, and is an anathema to, a legal practitioner's core ethical duties as an officer of the court and fundamentally undermines the trust and confidence between court and practitioner which is essential to the administration of justice. The practitioner's conduct in terms of ground 2 is therefore most serious professional misconduct.
>
> 173 In the circumstances, it is unnecessary to determine whether the practitioner's conduct would also constitute professional misconduct on the alternative basis contended by the Committee in terms of the statutory definition of the term in s 403(1)(b) of the LP Act. However, as the authorities show, knowingly seeking to mislead a court, whether in a professional or personal capacity, displays a lack of integrity, which is a basic requirement for the privilege of legal practice.

88 Knowingly seeking to mislead the complainant by making the email statements, so as to defer or delay the complainant from commencing proceedings against the practitioner, is also serious professional misconduct, because it involves and displays a lack of honesty and integrity. This professional misconduct is all the more serious, because, as we said in the conduct reasons at [139], the practitioner made the email statements '… in the knowledge of, and in response to, contemplated and foreshadowed court proceedings against her'. Lawyers routinely respond to letters of demand foreshadowing legal proceedings, and defend proceedings when commenced, on behalf of clients. Although the practitioner engaged in professional misconduct by making the email statements and the PTC statements in her personal capacity, rather than in her professional capacity as a legal practitioner, her conduct demonstrates that she lacks the honesty and integrity which are necessary to be entrusted with the privilege and responsibility of being a legal practitioner, particularly because she was dishonest in responding to a letter of demand and in defending court proceedings, which are routine aspects of a lawyer's work.

89 Furthermore, not only was the practitioner's professional misconduct in making the email statements and the PTC statements dishonest, it did not involve an isolated instance of dishonesty, but rather comprised three instances and a course of dishonest conduct over a period of about four months. The email statements were made over a two week period. The first PTC statement was made about six weeks

after the period during which the email statements were made. By making the second PTC statement five weeks after she made the first PTC statement, the practitioner continued her dishonest course of conduct and compounded her serious professional misconduct by lying to the Magistrates Court and to the complainant again. The practitioner could have ended her dishonest conduct with the email statements. However, she continued the dishonest course by lying to the Magistrates Court and to the complainant at the first pre-trial conference about six weeks later. Rather than ceasing her dishonest conduct at that point, the practitioner again lied to the Magistrates Court and to the complainant five weeks later.

90 In addressing whether her professional misconduct was isolated, the practitioner submits that '[t]he 3 conduct findings, whilst separately identified, arise from the same factual substratum of circumstances' and '[t]he issues arose in respect of the same complainant dealing with this matter'.[62] However, these submissions miss the point. As the Committee correctly submits, '[t]his case involved repeated and continuing dishonesty, not a mere isolated error of judgment'.[63] In 'regard' to her submission that '[t]he issues arose in respect of the same complainant dealing with this matter', the practitioner also submits:[64]

> … [I]t is important to note that the complainant, in question, suffered no loss. Any loss suffered had already crystalised by the time the complainant approached the [Committee] complaining of the failure of the [p]ractitioner to pay the judgment sum. There is no allegation of misconduct in dealing with the complainant arising from alleged negligence.
>
> Despite obtaining judgment in default, even to this day, the complainant/judgment creditor has chosen not to enforce the judgment. Indeed, the [Committee] has conceded that the complainant, by suing the [p]ractitioner, sued the wrong party. The [Committee] duly amended its application deleting an allegation of misconduct due to the [p]ractitioner's failure to pay the judgment sum.
>
> In fact, the complainant appears to have conceded that judgment was wrongly entered against the wrong defendant. In this circumstance, there was no benefit flowing to the [p]ractitioner from her conduct - delay had no relevance and the [p]ractitioner had every benefit to be gained by reporting the action to her insurer or otherwise dealing with

[62] [Practitioner's] penalty submissions dated 10 March 2020 [32]-[33].
[63] [Committee's] submissions as to penalty and costs dated 1 October 2019 [31].
[64] [Practitioner's] penalty submissions dated 10 March 2020 [33]-[35].

> it. Her conduct demonstrates an irrational response to a stress rather than an act of any calculated dishonesty for personal gain.

91 These submissions also miss the point. It matters not whether the complainant suffered loss as a result of the practitioner's professional misconduct, nor whether the Committee conceded that the complainant sued the wrong party (which the Committee did not concede[65]), nor whether the complainant conceded that judgment was wrongly entered against the wrong defendant (as to which there is no evidence before the Tribunal[66]). The point is that the practitioner knowingly sought to mislead her client and the Magistrates Court. Furthermore, although the complainant did not suffer any 'loss' as a result of the practitioner's dishonesty, there was in fact (misguided) 'benefit flowing to the [p]ractitioner from her conduct', namely deferring or delaying the complainant from commencing legal proceedings against her in respect of the claim made in the letter of demand[67] and deferring or delaying the Magistrates Court proceedings.[68]

92 In relation to the submission that '[h]er conduct demonstrates an irrational response to a stress rather than an act of any calculated dishonesty for personal gain', it appears from elsewhere in her submissions that the practitioner refers to three sources or elements of 'stress'. First, stress associated with her (now) diagnosed mental illness of PTSD and Depression/Anxiety. The practitioner submits that '[i]t is essential to note that … [her] conduct occurred in the context of enormous personal stress and a temporary mental condition associated with that stress'.[69] Secondly, the practitioner submits that she was 'a practitioner engaged in sole practice and becoming overwhelmed by stress, anxiety and financial pressures [associated with that practice].[70] Thirdly, the practitioner submits that 'she had been the subject of separate disciplinary proceedings (currently the subject of a Supreme

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[65] [Committee's] submissions in reply to [practitioner's] submissions in relation to penalty and costs dated 10 March 2020 [30].

[66] We found in the conduct reasons at [95] as follows: 'As at the date of her witness statement, the complainant had not taken any steps to enforce the judgment, initially because she believed that the practitioner was 'obliged to pay' and, after the complainant found out that she had to apply to enforce the judgment herself, she did not have 'the time or energy to do the necessary research and the Court paperwork'.'

[67] As we found in the conduct reasons at [138], in the letter of demand, the complainant said that, if the practitioner was 'not willing [to] pay us any compensation … you will leave me no other choice than [to] take legal action', and in her email to the practitioner on 29 June 2016, the complainant said that 'I was going to lodge the paperwork with the [M]agistrates [C]ourt tomorrow' and that '[i]f I do not hear from you I will proceed with lodging the paperwork with the [C]ourt'.

[68] As we found in the conduct reasons at [165], 'the practitioner requested each of the first two pre-trial conferences to be adjourned after she made the relevant statement concerning the insurer and the Registrar then adjourned the first two pre-trial conferences'.

[69] [Practitioner's] penalty submissions dated 10 March 2020 [3]-[3.1].

[70] [Practitioner's] penalty submissions dated 10 March 2020 [24].

Court [a]ppeal) relating to allegations of misconduct dating as far back as 2008 and 2011 and those proceedings gave rise to a constant stress'.[71]

93 However, as we said earlier, the medical and psychological evidence does not indicate that the practitioner's PTSD or Depression/Anxiety caused, contributed to, or is in any way related to, the practitioner knowingly seeking to mislead the complainant by making the email statements or knowingly seeking to mislead the Magistrates Court and the complainant by making the PTC statements. Although the practitioner did not give evidence, we assume, for the purposes of these reasons, that the practitioner's commencement of sole practice in December 2015 led to her becoming 'overwhelmed by stress, anxiety and financial pressures [associated with that practice]' and that the matters the subject of proceeding VR 183 of 2016 and the pending appeal in relation to that proceeding 'gave rise to a constant stress'. However, as the Supreme Court (full bench)[72] said in ***Legal Profession Complaints Committee v Love*** [2014] WASC 389 at [59], in relation to a practitioner's submission that 'his misconduct had occurred in the course of a busy and stressful practice when he was under considerable financial pressure':[73]

> … At the risk of stating the obvious, that cannot excuse dishonest conduct in the practice of law. As White J stated in *Legal Practitioners Conduct Board v Kerin*, practitioners are expected to maintain high standards of conduct even in times of personal stress. Moreover, the weight given to personal circumstances cannot override the fundamental obligation of the court to provide appropriate protection of the public interest in the honesty and integrity of legal practitioners and in the maintenance of proper standards of legal practice.

94 Although the practitioner's dishonest conduct occurred in the practitioner's personal capacity, and not 'in the practice of law', she was in fact a legal practitioner, and practising as such, at the time, and her dishonest conduct was in response to a letter of demand foreshadowing legal proceedings against her and in the course of defending legal proceedings brought against her. Of course, as indicated earlier, 'the practice of law' routinely involves responding to letters of demand foreshadowing legal proceedings and defending legal proceedings. Moreover, as we found in the conduct reasons at [139], at the time the practitioner made the email statements, the complainant understood '… that the practitioner was a lawyer', and as we found in the conduct

[71] [Practitioner's] penalty submissions dated 10 March 2020 [21].
[72] Beech, Kenneth Martin and Edelman JJ.
[73] Citations omitted.

reasons at [168], '[t]he Registrar of the Magistrates Court was aware that the practitioner is a lawyer and would therefore have placed significant trust and confidence in what the practitioner said at the pre-trial conferences'. Adopting the language of the Supreme Court (full bench) in ***Legal Profession Complaints Committee v Love*** at [59] in these analogous circumstances, '[a]t the risk of stating the obvious', 'stress, anxiety and financial pressure' associated with the practitioner's sole practice and stress created by disciplinary proceedings against her 'cannot excuse dishonest conduct' in responding to a letter of demand foreshadowing legal proceedings against the practitioner and in defending legal proceedings brought against her.

95 In the circumstances of this case, none of the three sources or elements of 'stress' the practitioner refers to provides a satisfactory explanation for her serious professional misconduct by knowingly seeking to mislead the complainant by making the email statements or by knowingly seeking to mislead the Magistrates Court and the complainant by making the PTC statements.

96 In ***Legal Profession Complaints Committee v Love***, the Supreme Court (full bench) held at [19] as follows:[74]

> The degree to which a practitioner appreciates the seriousness of the misconduct is a relevant factor in the choice of the court, exercising a protective jurisdiction, between the alternatives of suspension or striking off. A practitioner who fails to understand the significance and consequences of misconduct is a great risk to the community.

97 The practitioner has demonstrated no real remorse or insight into her wrongdoing in terms of knowingly seeking to mislead the complainant by making the email statements and knowingly seeking to mislead the Magistrates Court and the complainant by making the PTC statements. The practitioner's failure to understand the 'significance and consequences' of knowingly seeking to mislead the complainant and the Magistrates Court is, as the Supreme Court said, in itself 'a great risk to the community'.

98 In relation to whether she has demonstrated remorse and insight, the practitioner submits as follows:[75]

> The [p]ractitioner submits that her lapse in professional standards does not indicate she lacked the qualities of character which are necessary attributes of a person entrusted with the responsibilities of a legal

[74] Citations omitted.
[75] [Practitioner's] penalty submissions dated 10 March 2020 [39].

> practitioner. Her insight has shown and demonstrated contrition. She sought medical intervention and psychological counselling. The [p]ractitioner was entitled to contest the matter before the Tribunal and to require the [Committee] to prove that she was guilty of professional misconduct. It cannot be said the [p]ractitioner's defence was either scandalous or without merit.

99 We accept the submission that the practitioner was 'entitled to contest the matter before the Tribunal'. However, the matters referred to by the practitioner in her submissions do not demonstrate remorse or insight into her wrongdoing. The practitioner acknowledges that 'the [f]indings made by the Tribunal against her are of the utmost seriousness and in particular the finding of knowingly misleading the Court and a litigant',[76] but suggests that her personal circumstances referred to in her submissions 'can satisfactorily explain [her] conduct'.[77] However, the practitioner's personal circumstances referred to in her submissions do not provide a satisfactory explanation for the practitioner knowingly seeking to mislead the complainant by making the email statements or knowingly seeking to mislead the Magistrates Court and the complainant by making the PTC statements. In particular, as we have said, the medical and psychological evidence and submissions about 'stress' do not satisfactorily explain the practitioner's dishonest conduct. Furthermore, although seeking 'medical intervention and psychological counselling' (in September 2019, that is at around the same time as the Tribunal published the conduct reasons on 9 September 2019) may have been a response to the stress created by these proceedings in general or the conduct findings in particular, it is not a reflection of remorse or insight into her wrongdoing. Indeed, the practitioner's language in her submissions in relation to remorse and insight (which, as we noted earlier, she '[p]repared' and Mr Bennett '[s]ettled'[78]), namely that 'her *lapse* in professional standards does not indicate she lacked the qualities of character which are necessary attributes of a person entrusted with the responsibilities of a legal practitioner',[79] reflects her lack of insight. Deliberately seeking to mislead the complainant and the Magistrates Court cannot be reasonably characterised as a mere 'lapse in professional standards'. Rather, as we said in the conduct reasons at [172], it 'strikes at the very heart of, and is an anathema to, a legal practitioner's core ethical duties as an officer of the court and fundamentally undermines the trust and confidence between court and

[76] [Practitioner's] penalty submissions dated 10 March 2020 [5.1].
[77] [Practitioner's] penalty submissions dated 10 March 2020 [6].
[78] [Practitioner's] penalty submissions dated 10 March 2020 page 1.
[79] Emphasis added.

practitioner which is essential to the administration of justice'. While lack of remorse or insight is not an aggravating factor in relation to penalty, as the Supreme Court (full bench) said in ***Legal Profession Complaints Committee v Love*** at [19], the practitioner's failure to understand the significance of her misconduct is a relevant factor in favour of striking off the practitioner rather than suspending her from legal practice.

100 In addressing whether 'the public and fellow practitioners [can] place reliance on the word of the practitioner', the practitioner submits that '[i]t is clear from the [character] references provided on [her] behalf … that members of the public to whom [the practitioner] is known continue to trust her implicitly and continue to maintain this view in light of the Tribunal's Reasons for Decision and its Findings'.[80] However, as we said earlier, none of the character referees say that they have read the conduct reasons or the summary and none appear to have any, or any detailed, knowledge of the Tribunal's conduct findings. The only character referee who refers to 'statements made to a client and to the Fremantle Court', namely Mr Geoghegan, said that he does 'not know the circumstances'. Furthermore, as we also said earlier, none of the character references are from members of the legal profession and none speak of the practitioner's honesty and integrity as a legal practitioner. Consequently, while relevant to penalty, the character references are of little weight in the circumstances of this case.

101 In our view, the practitioner's professional misconduct by knowingly seeking to mislead the complainant by making the email statements and by knowingly seeking to mislead the Magistrates Court and the complainant by making the PTC statements, in the circumstances of this case, 'erode[s], if not destroy[s], the complete confidence which a client, a fellow practitioner, the courts and the public should be able, without hesitation, to assume' of the practitioner.[81]

102 The practitioner also submits that she:[82]

> … has already been the subject of other regulatory disciplinary sanctions such that she has already served a considerable period of suspension of her practice [sic] certificate at enormous personal and professional expense.

[80] [Practitioner's] penalty submissions dated 10 March 2020 [28].
[81] ***Barristers' Board v Young*** [2001] QCA 556 at [15] (de Jersey CJ).
[82] [Practitioner's] penalty submissions dated 10 March 2020 [3.4].

and that she:[83]

> … has effectively already served a lengthy period of suspension. Any further period of suspension from legal practice would have a significant personal impact on the [p]ractitioner given her financial state and her age. Her practice, as a start-up practice was not operating at a profit and not generating an income.

103 However, as indicated earlier (and as appears to be acknowledged in the first submission set out in the preceding paragraph), the cancellation of the practitioner's local practising certificate in February 2018 related to matters the subject of other disciplinary proceedings. The practitioner has not 'effectively already served a lengthy period of suspension' in respect of her professional misconduct which is the subject of this proceeding. No doubt the practitioner's inability to practise law since February 2018 has had a significant financial and personal impact upon her. No doubt, also, if the practitioner were struck off by the Supreme Court (full bench), it would have a very significant financial and personal impact upon her. However, as the Supreme Court (full bench) said in ***Legal Profession Complaints Committee v Love*** at [59], 'the weight given to personal circumstances cannot override the fundamental obligation of the court to provide appropriate protection of the public interest in the honesty and integrity of legal practitioners and in the maintenance of proper standards of legal practice'.

104 Finally, the practitioner submits that 'it is important for the Tribunal, in assessing penalty, to be guided by a central understanding of the proper role of regulation affecting people (practitioners) experiencing mental illness'.[84] The practitioner is correct in her submission that there is 'consensus' between Dr Cibulskis, Dr Chapman and Professor Fernandez that 'an order restoring [the practitioner's] ability to practise would be in her psychological interest and disbarment or continuing inability to practice [sic] would be catastrophic'.[85] As indicated earlier, Dr Cibulskis said in his report that '[s]hould [the practitioner] be disbarred permanently, I fear that this would lead to irreparable mental impairment'.[86] As also indicated earlier, Dr Chapman said the following in his report:[87]

[83] [Practitioner's] penalty submissions dated 10 March 2020 [43].
[84] [Practitioner's] penalty submissions dated 10 March 2020 [24].
[85] [Practitioner's] penalty submissions dated 10 March 2020 [47].
[86] Report of Dr Ray Cibulskis dated 18 February 2020 page 4.
[87] Report of Dr Murray Chapman dated 3 March 2020 page 7.

…

> Evidently any decision made by the SAT with regard to [the practitioner's] ability to resume legal practise [sic] or not is likely to have a profound impact upon her mental and material state, given the financial, and reputational impact such decisions may incur for her, and the likely consequences upon her self-esteem and self-image.

105 Further, as also indicated earlier, Professor Fernandez said in his report that '[the practitioner's] ability to regain her license [sic] is a significant aspect of her recovery'.[88]

106 The Tribunal is certainly conscious of issues of mental illness and psychological distress in the legal profession and the importance of identifying, supporting and encouraging lawyers to obtain appropriate treatment. As the Tribunal[89] said in ***Legal Profession Complaints Committee and Skerritt*** [2013] WASAT 7 at [22]-[23], referring to the Law Society's *Report on Psychological Distress and Depression in the Legal Profession* (March 2011):

> The research surveyed by the Law Society report indicates that there is an alarming level of psychological distress and depression within the legal profession and a general reluctance among lawyers to seek help for mental health issues.
>
> Although there has been a significant improvement in general community awareness of the issues associated with mental health and disability, there arguably remains an unfortunate stigma attached to mental illness which may partly explain the reluctance of lawyers suffering from depression and other mental health issues to seek help. The Law Society report is an important and timely wake-up call for the legal profession and legal regulators, as well as for judges and tribunal members before whom lawyers appear and, in particular, who exercise professional disciplinary jurisdiction, that mental illness and psychological distress are real and legitimate health issues facing lawyers and that lawyers who are or may be suffering from such problems should be identified, supported and encouraged to obtain appropriate treatment.

107 However, the weight to be given to the medical and psychological evidence in relation to the psychological impact of disbarment on the practitioner does not, in our view, override the need to impose a penalty which will appropriately protect the public in their dealings with lawyers and maintain the reputation and standards of the legal profession, in all the circumstances of this case. For reasons set out

[88] Report of Professor Miguel Fernandez dated 4 March 2020 page 8.
[89] Judge Parry DP.

above and below, in our view, these objectives of the disciplinary jurisdiction require the disbarment of the practitioner.

108 Although each case must be considered on its own facts and in its own circumstances, given the significance placed in the practitioner's submissions on the medical and psychological reports and character references she filed, it is instructive to compare the circumstances of this case with the circumstances in ***Legal Profession Complaints Committee and Skerritt*** [2012] WASAT 221.[90] In that case, the practitioner admitted that he engaged in professional misconduct by sending a letter, which he knew was misleading, to the Tribunal, in relation to a matter in which he was briefed to appear as counsel. 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. The Tribunal determined as follows at [15]:[91]

> 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 … 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.

109 The Tribunal's first reason for its decision was as follows at [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. …

110 The Tribunal found 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 [in which he was also counsel and which was increasing in length] and the SAT

[90] Judge Parry DP, Mr S Ellis S Sess M and Dr A McCutcheon S Sess M.

[91] The penalty imposed by the Tribunal comprised a six month suspension, a requirement for the practitioner to undergo medical treatment and psychological counselling, and a requirement for the practitioner to submit a report by his psychiatrist to the Board within a week of his 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.

hearing in a timely manner …'.[92] Ultimately, on the last business day before the SAT hearing, the practitioner sent the letter, which he knew was misleading, to the Tribunal in relation to the conflict. The Tribunal also found that:[93]

> … 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.

111 In contrast, in this case, as we said earlier, the medical and psychological evidence does not indicate that the practitioner's PTSD or Depression/Anxiety caused, contributed to, or is in any way related to, the practitioner knowingly seeking to mislead the complainant by making the email statements or knowingly seeking to mislead the Magistrates Court and the complainant by making the PTC statements.

112 The second reason for the Tribunal's determination in ***Legal Profession Complaints Committee and Skerritt***, 'although less significant than the first', was that '[the practitioner's] 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 …'.[94] In particular, the character referees spoke positively about the practitioner's honesty and integrity as a legal practitioner.

113 In contrast, in this case, none of the character referees appear to have any, or any detailed, knowledge of the Tribunal's conduct findings, none of the character referees are legal practitioners, and none speak of the practitioner's honesty and integrity as a legal practitioner.

114 The third reason for the Tribunal's determination in ***Legal Profession Complaints Committee and Skerritt*** was that, although the practitioner lacked 'a complete understanding of the impropriety of his conduct' and had 'not demonstrated any real contrition or remorse', he had 'shown some insight by admitting the allegation and accepting that his conduct constituted professional misconduct'.[95] Although, as we have said, the practitioner in this case was entitled to contest the matter before the Tribunal, she has not

[92] ***Legal Profession Complaints Committee and Skerritt*** [23].
[93] ***Legal Profession Complaints Committee and Skerritt*** [24].
[94] ***Legal Profession Complaints Committee and Skerritt*** [25].
[95] ***Legal Profession Complaints Committee and Skerritt*** [26].

shown the same insight as the practitioner in ***Legal Profession Complaints Committee and Skerritt***.

115 A fourth distinction between the circumstances in ***Legal Profession Complaints Committee and Skerritt*** and this case is that, in that case, 'the practitioner engaged in a single event of misleading conduct',[96] whereas in this case, after knowingly seeking to mislead the complainant by making the email statements, about six weeks later she knowingly sought to mislead the Magistrates Court and the complainant by making the first PTC statement, and did so again five weeks later by making the second PTC statement.

116 We have considered whether suspension from legal practice for a period of time, by means of an order that 'a local practising certificate not be granted to the practitioner before the end of a specified period' (under s 439(b) of the LP Act) / an order that 'the practitioner not apply for a local practising certificate before the end of a specified period' (under s 441(m) of the LP Act), whether with or without a requirement that 'the [p]ractitioner undergo, at her own cost, continuing psychological counselling at least once every month for a period of 4 months',[97] 'ongoing psychiatric review on a monthly basis for 6 months'[98] and 'GP review as necessary'[99] (as suggested by the practitioner), is an appropriate penalty in this case. However, in our view, suspension from legal practice for a period of time would not be an appropriate penalty, because we are not satisfied that, at the end of the suspension, the practitioner will be a fit and proper person to practise law. Moreover, in our view, in the circumstances of this case, suspension from practice (or a reprimand or fine) would not provide a sufficient personal deterrent to the practitioner or general deterrent to other practitioners who might otherwise be tempted to engage in such conduct, or a sufficient denunciation of the practitioner's serious professional misconduct by knowingly seeking to mislead the complainant by making the email statements and by knowingly seeking to mislead the Magistrates Court and the complainant by making the PTC statements, to achieve the objectives of the disciplinary jurisdiction, namely protection of the public in their dealings with legal practitioners and maintenance of the reputation and standards of the legal profession. We have also considered whether any or all of the forgoing penalties together with a period of supervised practice,

[96] ***Legal Profession Complaints Committee and Skerritt*** [12].
[97] [Practitioner's] penalty submissions dated 10 March 2020 [56.2].
[98] [Practitioner's] penalty submissions dated 10 March 2020 [56.5].
[99] [Practitioner's] penalty submissions dated 10 March 2020 [56.6].

as suggested by the practitioner, would be an appropriate penalty. However, in the circumstances of this case, the professional misconduct did not occur because of a lack of supervision or legal knowledge. It occurred because of a lack of honesty.

117 In our view, in the circumstances of this case, the practitioner's professional misconduct by knowingly seeking to mislead the complainant by making the email statements and by knowingly seeking to mislead the Magistrates Court and the complainant in making the PTC statements demonstrates that she is not a fit and proper person to remain a member of the legal profession and that her character and conduct are inconsistent with the privileges of further practice, as she lacks the honesty and integrity which are essential to practise law. We consider that 'the practitioner lacks the character and trustworthiness necessary to discharge the responsibilities of legal practice' and that she is 'permanently or indefinitely unfit to practise'.[100]

118 In the conduct reasons we found at [203] that the practitioner's failure 'to engage at all with, and to simply ignore correspondence from, and summonses issued by, the Committee' is:

> … manifestly unacceptable, because it fundamentally undermines the authority of the Committee and its capacity to effectively investigate complaints about legal practitioners and thereby to seek to protect members of the public in their dealings with lawyers and to maintain the proper standards of the legal profession.

119 However, as we said earlier, the medical evidence provides some explanation for the practitioner's professional misconduct in this respect. Dr Chapman said that although '[i]t is always challenging to retrospectively estimate the impact of psychiatric symptoms on their judgement and behaviour, especially over such a long period of time', 'avoidance', which he considers is a 'coping mechanism' that the practitioner appears to have adopted 'to deal with anxiety' and consequent 'long-term stress', 'may … help to explain her failure to respond to communications in a timely manner'.[101] Similarly, Dr Cibulskis said that 'stress' associated with a 'protracted legal battle' stemming from an incident in 2011 and resulting in symptoms of poor mood, poor concentration, poor motivation, helplessness, poor self-esteem and lack of confidence, and suicidal thoughts, led the practitioner to 'a pattern of avoidant behaviour', which he considers 'is evident in her dealing with the [Board]'.

[100] ***Khosa v Legal Profession Complaints Committee*** at [192] (Murphy and Beech JJA).
[101] Report of Dr Murray Chapman dated 3 March 2020 page 7.

120 Although the medical evidence does not excuse the practitioner's serious professional misconduct in not responding at all to three notification letters and two summonses, it, together with her engagement with psychiatric and psychological help, mitigates this aspect of her professional misconduct. If we were addressing this aspect of the practitioner's professional misconduct on its own, in the circumstances of this case, the appropriate penalty would be an order publicly reprimanding the practitioner (under s 439(d) of the LP Act) and an order that the practitioner pay a fine of $10,000 to the Board (under s 441(a) of the LP Act). If we were addressing this aspect of the practitioner's professional misconduct on its own, in the absence of the mitigating circumstances, the appropriate penalty would be a suspension from practice for a period of three months by means of an order that a local practising certificate not be granted to the practitioner before the end of that period (under s 439(b) of the LP Act). However, as we have determined that the appropriate disciplinary consequence of the practitioner's professional misconduct by knowingly seeking to mislead the complainant by making the email statements and by knowingly seeking to mislead the Magistrates Court and the complainant by making the PTC statements is that the Tribunal should make and transmit a report on its findings of professional misconduct to the Supreme Court (full bench) (under s 438(2)(a) of the LP Act), with a recommendation that the name of the practitioner be removed from the roll of persons admitted to the legal profession under the LP Act (under s 438(4)(b) of the LP Act), and given that the Committee seeks this global penalty, we will not impose a separate penalty in relation to the practitioner's professional misconduct by, without reasonable excuse, failing to respond to the notification letters and summonses.

121 Finally, as indicated earlier, the Committee seeks 'a consequential order pursuant to s 439(b) of the LP Act that no local practising certificate be granted to the practitioner pending the determination of the Supreme Court (full bench)'. However, in our view, in circumstances where the Tribunal makes and transmits a report on its findings of unsatisfactory professional conduct or professional misconduct to the Supreme Court (full bench) under s 438(2)(a) of the LP Act, it does not have power to make a 'consequential order' under s 439(b) of the LP Act. This is because s 438(2) of the LP Act uses the disjunctive particle 'or' between paragraphs (a) and (b) of that subsection (and not the conjunctive particle 'and'). The particle 'or' is relevantly 'used … to connect words, phrases or clauses representing

alternatives: *to be or not to be*'.[102] The clear ordinary grammatical meaning indicated by the use of the word 'or' is that the Tribunal may *either* 'make and transmit a report on the finding[s] to the Supreme Court (full bench)' (under s 438(2)(a) of the LP Act) *or* 'make any one or more of the orders specified in sections 439, 440 and 441' (under s 438(2)(b) of the LP Act). The Tribunal cannot do *both* in respect of the same finding of unsatisfactory professional conduct or professional misconduct.

122 The ordinary grammatical meaning of the text of s 438(2) of the LP Act also has contextual support in terms of s 438(3) of the LP Act, which expressly confers power on the Tribunal to make orders suspending the practitioner's local practising certificate and imposing conditions on the practitioner's local practising certificate where the Tribunal makes and transmits a report in respect of the finding of unsatisfactory professional conduct or professional misconduct to the Supreme Court (full bench) under s 438(2)(a). The Tribunal has power under s 439(a) of the LP Act to make an order that the practitioner's local practising certificate be suspended and has power under s 439(c) of the LP Act to make an order that specified conditions be imposed on the practitioner's local practising certificate. If, in circumstances where the Tribunal makes and transmits a report in respect of a finding of unsatisfactory professional conduct or professional misconduct to the Supreme Court (full bench) under s 438(2)(a) of the LP Act, the Tribunal also has power to make an order specified in s 439, s 440 and s 441 of the LP Act, under s 438(2)(b) of the LP Act, then the additional power conferred on the Tribunal under s 438(3) of the LP Act would be otiose. The express conferral of the additional powers by s 438(3) of the LP Act therefore provides a further legislative indication that the Tribunal does not have power, where it decides to make and transmit a report on its finding that the practitioner is guilty of unsatisfactory professional conduct or professional misconduct to the Supreme Court (full bench), to also make an order, relevantly, under s 439(b) of the LP Act, that a local practising certificate not be granted to the practitioner before the end of a specified period (relevantly, pending the determination of the Supreme Court (full bench)).

[102] *Macquarie Dictionary* (6th edition, 2013) p 1034.

Costs

123 The Committee seeks an order, under s 87(2) of the SAT Act, that the practitioner pay the Committee's costs of these proceedings in terms of disbursements fixed in the amount of $22,091.10. The Committee does not seek an order in respect of its legal officers' time in relation to this matter.

124 The Committee has provided a schedule of disbursements amounting to $23,591.10 (including GST) comprising:

- Counsel's fees of $16,709 for work done prior to and appearing at a directions hearing and at the conduct hearing;
- Counsel's fees of $5,929 for work done after the publication of the Tribunal's conduct reasons, including settling submissions on penalty and costs and submissions in reply;
- $628.60 for Tribunal fees for the filing of the application and the issuing of witness summonses; and
- $324.50 for company search, photocopying and service of witness summonses.

125 The Committee has 'discounted' its disbursements totalling $23,591.10 by $1,500 on account of the withdrawal, with the Tribunal's leave under s 46(1) of the SAT Act at the commencement of the conduct hearing, of what had formerly been Ground 3 in the application. The Committee had notified the practitioner and her counsel of its intention to withdraw that ground by letter dated 7 May 2019. The ground which was withdrawn had alleged:[103]

> That the practitioner, on and after 22 November 2016, following the Court entering judgment for [the complainant] against the practitioner in the Proceedings in the sum of $10,118.20 inclusive of costs and interest (**Judgment sum**), engaged in professional misconduct within the meaning of sections 403 and 438 of the Act in that her conduct would be reasonably regarded as disgraceful or dishonourable by practitioners of good repute and competence and fell short, consistently and to a substantial degree, of the standard of professional conduct observed or approved by members of the profession of good repute and competence by, without reasonable excuse, failing to pay any or all of

[103] Original emphasis.

> the Judgment sum to [the complainant], in breach of rules 6(1)(e) and/or 6(2)(c) of the *Legal Profession Conduct Rules 2010* (WA) (**LPCR**).

126 Counsel's fees have been charged in accordance with the maximum rate for Senior Counsel in Table A of the Schedule to the *Legal Profession (State Administrative Tribunal) Determination 2018* (SAT Determination), made under s 275 of the LP Act, of $539 hourly rate and $5,390 daily rate (including GST). Although the SAT Determination strictly only applies to regulate legal fees between lawyer and client (in the absence of a written costs agreement), where the Tribunal makes an order for costs and fixes or assesses the amount of costs, the Tribunal applies 'as a useful guide as to the maximum rates which might be allowed on a party/party basis, the relevant hourly or daily rate specified in the [SAT Determination]'.[104]

127 Subsections (1) and (2) of s 87 of the SAT Act state as follows:

> (1) Unless otherwise specified in this Act, the enabling Act, or an order of the Tribunal under this section, parties bear their own costs in a proceeding of the Tribunal.
>
> (2) Unless otherwise specified in the enabling Act, the Tribunal may make an order for the payment by a party of all or any of the costs of another party or of a person required to produce a document or other material on the application of the party under section 35.

128 As is apparent from the terms of s 87(1) of the SAT Act, and as Murphy JA said in ***Western Australian Planning Commission v Questdale Holdings Pty Ltd*** [2016] WASCA 32; (2016) 213 LGERA 81 at [50]:[105]

> … the presumptive position or starting point under s 87(1) of the SAT Act [is] that each party is to bear its own costs.

129 For this reason, SAT is often referred to as a generally 'no costs' or 'costs-neutral' jurisdiction. However, as is apparent from the terms of s 87(2) of the SAT Act, that provision confers a broad discretion on the Tribunal to make an order for the payment by a party of all or any of the costs of another party in SAT proceedings. As Murphy JA said in ***Western Australian Planning Commission v Questdale Holdings Pty Ltd*** at [51], '[t]he onus is on the party seeking an order [for costs] in its favour'. As his Honour also said there:

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[104] ***Legal Profession Complaints Committee and in de Braekt*** [2012] WASAT 58 (S); (2012) 80 SR (WA) 194 at [53] (Judge Parry DP, Ms H Leslie S Sess M and Ms K Kemp Sess M).
[105] Martin CJ at [1] and Corboy J at [75] agreeing.

> … generally speaking, the question is whether, in the particular circumstances of the case, it is fair and reasonable that a party should be reimbursed for the costs it incurred.

130 The practitioner does not oppose an order that she pay the Committee's costs of this proceeding, although she says that '[t]he Tribunal should note the [Committee] has no realistic prospect of the [practitioner] being capable of meeting a costs order'.[106] As indicated earlier, as part of her submission as to 'an appropriate penalty to be imposed', the practitioner includes the following proposed order:[107]

> [T]he [p]ractitioner to make a contribution to the [C]ommittee's costs to be taxed in default of agreement. And the parties to have liberty to make further submissions on the issue of costs[.]

131 However, for the following reasons, the parties should not have liberty to make further submissions on the issue of costs.

132 It is clear from the Tribunal's programming orders in relation to the issues of penalty and costs that it would be determining both whether to order the practitioner to pay the Committee's costs of these proceedings and, if so, the amount of costs to be fixed, in these reasons. On 9 September 2019, the Tribunal:

- ordered the Committee to file and serve its 'submissions in relation to penalty and *costs* together with *a schedule of the amount of costs and disbursements it seeks and supporting accounts*';[108]
- ordered the practitioner to file and serve her 'submissions in relation to penalty and *costs* …';[109] and
- listed '[t]he issues of penalty and *costs* … for hearing to commence at 10.00 am on 4 November 2019 for half a day'.[110]

[106] [Practitioner's] penalty submissions dated 10 March 2020 [51].
[107] [Practitioner's] penalty submissions dated 10 March 2020 [56.3]. The SAT Act and the *State Administrative Tribunal Rules 2004* (WA) (SAT Rules) do not contemplate 'taxation'. Rather, s 89 of the SAT Act and r 43 of the SAT Rules refer to the Tribunal 'fixing' the amount of costs, when an order for costs is made, or otherwise 'assessing' the amount of costs in accordance with the SAT Rules.
[108] Emphasis added.
[109] Emphasis added.
[110] Emphasis added.

133 On 1 October 2019, the Committee filed its submissions, including in relation to costs, and a schedule of the amount of costs and disbursements it seeks together with supporting accounts.

134 On 20 December 2019, the Tribunal ordered that '[s]ubject to any further order, the issues of penalty and *costs* are to be determined entirely on the documents pursuant to s 60(2) of the [SAT Act]'.[111] Ultimately, on 10 March 2020, the practitioner filed and served her submissions, including in relation to costs.

135 Furthermore, as the Tribunal said in ***Western Australian Planning Commission and Scutti*** [2019] WASAT 99 at [42]-[43]:[112]

> 42 Section 89 of the SAT Act concerns the assessment of the amount of costs where an order for costs is made by the Tribunal, and states as follows:
>
> > If the Tribunal makes an order under this Division for the payment of costs and does not fix the amount of costs, that amount is to be assessed or settled in accordance with the rules.
>
> 43 As contemplated by the terms of s 89 of the SAT Act, the Tribunal may - and often does - fix the amount of costs, if, and at the time when, it makes an order for costs under s 87(2) of the SAT Act. The Tribunal assesses costs 'in a relatively robust fashion', consistently with its main objectives set out in s 9 of the SAT Act, in particular, 'to act as speedily and with as little formality and technicality as is practicable, and to minimise the costs to parties'. As the Tribunal has said, 'any award [of costs] should be approached in a broad fashion and should not have to descend into [an] enquiry into small items of expenditure', and:
>
> > [T]he preferable approach is not to look at what has actually been charged to the client, but rather what reasonable allowance should be made, taking a robust and broad brush approach, for the work necessarily done to bring the proceedings to a conclusion.

136 The Tribunal's objective 'to act as speedily and with as little formality and technicality as is practicable, and minimise the costs to parties', set out in s 9 of the SAT Act, also militates against the parties being granted liberty to make further submissions on the issue of costs and supports the determination of both whether to order the practitioner to pay the Committee's costs of these proceedings and, if so, the amount

[111] Emphasis added.
[112] Judge Parry DP. Citations omitted.

of costs to be fixed, in these reasons, as contemplated in the Tribunal's programming orders for determination of 'the issues of penalty and costs' referred to above. This is all the more so the case where the practitioner filed and served her submissions in relation to penalty and costs about four-and-a-half months after she was initially ordered to do so and over five months after the Committee filed and served its submissions in relation to penalty and costs, and it is now over eight months since the Tribunal published its conduct reasons.

137 It is also the Tribunal's usual practice in vocational disciplinary proceedings, as contemplated by the terms of s 89 of the SAT Act and consistently with the Tribunal's objective 'to act as speedily and with as little formality and technicality as is practicable, and minimise the costs to parties', to fix the amount of costs at the time when it makes an order for costs under s 87(2) of the SAT Act.

138 In our view, in the circumstances of this case, it is fair and reasonable that the practitioner should pay the Committee's costs of these proceedings. As the Tribunal has recognised almost since its inception, vocational regulatory bodies, such as the Committee, 'perform a function which promotes the public interest, and usually with limited resources' and '[t]he financial burden of bringing disciplinary action if the body had no capacity to recover some or all of its costs may be such as to provide a disincentive to bring disciplinary action, or when brought, to ensure that the allegations against the practitioner concerned are properly and thoroughly presented'.[113] It is clearly in the public interest, in terms of protection of the public in their dealings with lawyers and the maintenance of the reputation and standards of the legal profession, for the Committee to have commenced and prosecuted these proceedings alleging professional misconduct against the practitioner. The Tribunal has found that the practitioner committed serious professional misconduct and, indeed, has determined that she is not a fit and proper person to be a legal practitioner in consequence of two of the findings.

139 We are satisfied that the complexity of the allegations against the practitioner justified the briefing of Senior Counsel and, looking at the matter broadly and having regard to the rates prescribed in the

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[113] ***Medical Board of Western Australia and Roberman*** [2005] WASAT 81 (S); (2005) 39 SR (WA) 47 at [30] (Judge Chaney DP, Dr K McKenna S Sess M, Dr P Quartermass S Sess M and Brig A Warner S Sess M) referred to with approval in ***Paridis v Settlement Agents Supervisory Board*** [2007] WASCA 97; (2007) 33 WAR 361 at [35] (Buss JA, Wheeler JA at [1] and Pullin JA at [2] agreeing).

Determination as a guide to the maximum rate which might be allowed, that the work performed by Mr Yovich and the fees charged by him are reasonable and appropriate in the circumstances of this case. As indicated earlier, the Committee has not charged for its own legal officers' time in the conduct of these proceedings.

140 As also indicated earlier, the Committee has 'discounted' the disbursements it incurred by $1,500 to take into account the fact that the Committee withdrew its original Ground 3. As that ground was one of four that were originally alleged against the practitioner, in our view, 25% of the fees charged by Mr Yovich prior to the conduct hearing should be discounted. Mr Yovich's fees prior to the conduct hearing amounted to $11,319 (including GST). Twenty-five per cent of that amount is $2,829.75. It does not appear that any of the other disbursements claimed by the Committee are greater as a result of former Ground 3 then they would have been had the former Ground 3 not been alleged against the practitioner in the application.

141 In our view, in the exercise of discretion under s 87(2) of the SAT Act, it is fair and reasonable that the practitioner should pay the Committee's costs of these proceedings fixed in the sum of $20,761.35, being the disbursements incurred by the Committee ($23,591.10) less $2,829.75.

Conclusion

142 The appropriate disciplinary consequence of the serious professional misconduct committed by the practitioner, by knowingly seeking to mislead the complainant by making the email statements and by knowingly seeking to mislead the Magistrates Court and the complainant by making the PTC statements, is that the Tribunal should make and transmit a report on the findings that the practitioner is guilty of professional misconduct to the Supreme Court (full bench), under s 438(2)(a) of the LP Act, with a recommendation that the name of the practitioner be removed from the roll of persons admitted to the legal profession under the LP Act, under s 438(4)(b) of the LP Act. The Tribunal's report comprises the conduct reasons and these reasons and includes a record of the evidence taken at the hearing, under s 438(4)(a) of the LP Act, namely a copy of the exhibits and transcript of the proceeding and the character references, medical and psychological reports and submissions filed in relation to penalty and costs.

143 The practitioner should pay the Committee's costs of these proceedings in terms of disbursements fixed in the amount of $20,761.35 to the Board within 30 days or as otherwise agreed between the practitioner and the Board.

Orders

144 The Tribunal makes the following orders:

1. Pursuant to s 438(2)(a) of the *Legal Profession Act 2008* (WA), a report be transmitted to the Supreme Court (full bench) on the Tribunal's findings that the respondent is guilty of professional misconduct, with a recommendation, pursuant to s 438(4)(b) of the *Legal Profession Act 2008*, that the name of the respondent be removed from the roll of persons admitted to the legal profession under the *Legal Profession Act 2008*. The report comprises the Tribunal's reasons for decision in ***Legal Profession Complaints Committee and Chang*** [2019] WASAT 67 and ***Legal Profession Complaints Committee and Chang*** [2019] WASAT 67 (S) and is to be transmitted with a copy of the exhibits and transcript of the proceeding and the character references, medical and psychological reports and submissions filed in relation to penalty and costs.

2. Pursuant to s 87(2) *of the State Administrative Tribunal Act 2004* (WA), the respondent must pay the applicant's costs of the proceeding in terms of disbursements fixed in the amount of $20,761.35, such costs to be paid to the Legal Practice Board within 30 days of the date of this order or as otherwise agreed between the respondent and the Legal Practice Board.

I certify that the preceding paragraph(s) comprise the reasons for decision of the State Administrative Tribunal.

JUDGE D PARRY, DEPUTY PRESIDENT

15 MAY 2020