

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Legal Services Commissioner v Keliher* [2021] QCAT 211

PARTIES: **LEGAL SERVICES COMMISSIONER**
(applicant)

V

STEPHEN JAMES KELIHER
(respondent)

APPLICATION NO/S: OCR053-20

MATTER TYPE: Occupational regulation matters

DELIVERED ON: 15 June 2021

HEARING DATE: 23 November 2020

Supplementary written submissions of Respondent filed on
9 December 2020

Supplementary written submissions of Applicant filed on
14 December 2020

HEARD AT: Brisbane

DECISION OF: Justice Daubney, President

Assisted by:
Dr John Kees de Groot
Dr Julian Lamont

- ORDERS:
- 1. There is a finding that the Respondent engaged in professional misconduct.**
 - 2. It is recommended that the name of Stephen James Keliher be removed from the Roll of Legal Practitioners of Queensland.**
 - 3. The Respondent shall pay the Applicant's standard costs of and incidental to this discipline application, such costs to be assessed as if this were a matter before the Supreme Court of Queensland.**

CATCHWORDS: PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – PROFESSIONAL MISCONDUCT AND UNSATISFACTORY PROFESSIONAL CONDUCT – CRIMINAL OFFENCES – where respondent convicted of serious offences involving child exploitation material – where respondent pleaded guilty and sentenced to seven and a half years imprisonment – where applicant filed application or referral – disciplinary

proceeding in Tribunal – where respondent has admitted the charge brought in that application – where respondent admits there should be a finding of professional misconduct – where Tribunal to make finding on sanction – whether the respondent’s name ought be removed from the local roll

Criminal Code Act 1995 (Cth), s 474.24A

Legal Profession Act 2007 (Qld), s 9, s 419, s 420, s 456, s 462, sch 2

Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 66

Allinson v General Council of Medical Education and Registration [1894] 1 QB 750

Attorney-General of the State of Queensland v Legal Services Commissioner & Anor; Legal Services

Commissioner v Shand [2018] QCA 66

Barristers’ Board v Pratt [2002] QCA 532

Legal Services Board v McGrath (No 2) [2010] VSC 332

Legal Services Commissioner v CBD [2012] QCA 69

Legal Services Commissioner v CBD (No 2) [2011] QCAT 446

Legal Services Commissioner v Madden [2009] 1 Qd R 149

Legal Services Commissioner v Meehan [2019] QCAT 17

Legal Services Commissioner v Munt [2019] QCAT 160

Legal Services Commissioner v Woodman [2017] QCAT 385

Prothonotary of the Supreme Court of NSW v P [2003] NSWCA 320

Ziems v The Prothonotary of the Supreme Court of New South Wales (1957) 97 CLR 279

REPRESENTATION:

Applicant: P Prasad instructed by the Legal Services Commissioner

Respondent: Self-represented

REASONS FOR DECISION

- [1] In this discipline application under the *Legal Profession Act 2007 (Qld)* (“LPA”), the Applicant, the Legal Services Commissioner, charged the Respondent, Stephen James Kelher, for having been convicted of a serious offence.
- [2] The Respondent was admitted to practice in Queensland as a barrister on 31 July 2000. He practised as a barrister until September 2010. From then, he held a solicitors employee level practising certificate, except during a period of about six months from October 2011. From 2010, he was employed as a solicitor at various firms. He surrendered his practising certificate on 21 July 2017, and has not held a practising certificate since then.

- [3] The Respondent has:
- (a) admitted the charge brought against him; and
 - (b) admitted that there should be a finding of professional misconduct on that charge.
- [4] The only issue for the Tribunal is that of sanction. The Applicant contends that the Respondent should be struck off. The Respondent, however, says that his practising certificate should be suspended.

Background

- [5] On 8 December 2017, the Respondent was convicted on his own plea of guilty of four counts involving child pornography.¹ The learned sentencing Judge imposed a head sentence of seven and a half years imprisonment, with a non-parole period of four and a half years. The 262 days the Respondent had already spent in custody were declared as time served under the sentence.
- [6] The offending conduct can be summarised as follows:
- (a) Between 26 December 2014 and 3 September 2015, the Respondent, on three or more occasions, used a carriage service to make child pornography material available. The offence is an aggravated offence pursuant to s 474.24A of the *Criminal Code Act 1995* (Cth) and involved nine occasions on which the Respondent posted child exploitation material on to the internet. The first post involved the Respondent putting up a message with the title “Testing Security” and the message “Can someone please tell me if I have any security holes here ahead of posting more?”. This was followed by an obscene image of a child, around eight years old, with the comment that the image was “more in line with my tastes”. The Respondent then posted 713 similarly obscene images of young girls. Most of the children appear to have been under ten years of age. Some of the images contained content of physical sexual contact between adults and very young children. The second posting occurred between the middle of January 2015 and 4 February 2015 where the Respondent replied to a message which requested videos of a particular sex act. The Respondent replied by attaching such a video showing a girl of about eight being grossly defiled.
 - (b) Between 31 December 2014 and 18 November 2015, the Respondent made child exploitation material which involved the Respondent having written a two-page typewritten story which described events which had an overlap with his interactions with real people in his life. There was a folder of photographs which contained 49 category 1 images, which had been taken of those real people, and 91 category 1 images of someone who looked very much like one of those real people. The learned sentencing Judge noted that while only one story was involved in this count, the fact that what was in the story and what was happening in the Respondent’s real life coincided or overlapped was a matter she regarded as particularly serious and as an escalation in the Respondent’s offending.

¹ He also pleaded guilty to two summary offences, but these do not form part of the charge under this discipline application.

- (c) Two counts of possessing child exploitation material between 26 December 2014 and 18 November 2015, involving the possession of 8,735 images. Most of these (6,281) contained no sexual activity – that is, they fell into category 1, the least serious category of child pornographic images. 471 images fell into category 2. 1,051 images showed non-penetrative adult intercourse. 895 images showed adults and children being penetrated. 35 images were in the category of sadism or bestiality. Two images were animated or virtual. Charges 3 and 4 against the Respondent also included some 266 videos. 55 were category 1, 177 showed adult/child penetration, and four showed sadism or bestiality. The number of images and videos the Respondent had in his possession was, in fact, more than the numbers recorded by the learned sentencing Judge. It is unnecessary for present purposes to descend into further detail of the contents of those videos, although it should be noted that at least some extended to themes of violence and incest.

Characterisation of the conduct

- [7] The Respondent has admitted that the conduct with which he is charged under this discipline application should be characterised as professional misconduct.
- [8] By s 419(1)(b) of the LPA, the term “professional misconduct” includes:
- conduct of an Australian legal practitioner, whether happening in connection with the practice of law or happening otherwise than in connection with the practice of law that would, if established, justify a finding that the practitioner is not a fit and proper person to engage in legal practice.
- [9] Section 419(2) relevantly provides to the effect that for finding that a person is not fit and proper, regard may be had to the “suitability matters” which are considered for a person’s admission to the profession. Those “suitability matters” include whether a person has been convicted of an offence.²
- [10] In any event, s 420(1)(c) of the LPA relevantly provides that conduct for which there is a conviction for a serious offence is capable of constituting unsatisfactory professional conduct or professional misconduct. There is no issue that each of the offences of which the Respondent was convicted was a “serious offence”, as that term is defined in the LPA Schedule 2 Dictionary.
- [11] There can be no argument that the conduct for which the Respondent was convicted would be reasonably regarded as disgraceful or dishonourable by other members of the profession of good repute and competency.³
- [12] Accordingly, the Tribunal finds that, by the conduct charged, the Respondent engaged in professional misconduct.

Sanction

- [13] Having found that the Respondent engaged in professional misconduct, the discretion of the Tribunal is enlivened under s 456(1) of the LPA to “make any order as it thinks fit”.

² LPA, s 9(1)(e).

³ *Allinson v General Council of Medical Education & Registration* [1894] 1 QB 750.

- [14] As has previously been observed in this Tribunal,⁴ in approaching the exercise of this discretion, it is appropriate to recall the well-established proposition that the purpose for imposing orders in the legal professional disciplinary jurisdiction is to protect the public, not to punish the practitioner. In the present case, the Respondent was punished for his criminal conduct, which is coextensive with his professional misconduct, by being sentenced to a lengthy term of imprisonment. In this disciplinary jurisdiction, orders are shaped in the interests of the protection of the community from unsuitable practitioners, and in determining what orders should be made “regard should primarily be had to the protection of the public and the maintenance of proper professional standards”.⁵
- [15] The Applicant submits that the Respondent should be struck off. In that regard, the following propositions are well established:⁶
- (a) an order removing a practitioner’s name from the roll should only be made when the probability is that the practitioner is permanently unfit to practise; and
 - (b) the determination is as to present fitness, not fitness at the time of the offending conduct.
- [16] This Tribunal has previously noted that the application of the test as to whether a practitioner is probably permanently unfit to practise “is not without nuance, nor does it occur in a vacuum”.⁷ In *Attorney-General of the State of Queensland v Legal Services Commissioner & Anor; Legal Services Commissioner v Shand* (“*Shand*”),⁸ the Court of Appeal referred to the protective nature of this jurisdiction and to the fact that removal of a practitioner’s name from the roll serves the interests of the public in more extensive ways, including the standing of the profession, general deterrence, and the fact that the roll of practitioners is an endorsement by the Court of the fitness of those who are enrolled. The test of probable permanent unfitness is, therefore, “a way of identifying that the character of the practitioner is so indelibly marked by the misconduct that he cannot be regarded as a fit and proper person to be upon the Roll”.⁹
- [17] In *Prothonotary of the Supreme Court of NSW v P*,¹⁰ the New South Wales Court of Appeal considered a case in which a solicitor had pleaded guilty to importing a trafficable quantity of cocaine and served a sentence of imprisonment. Young CJ in Eq, with whom Meagher and Tobias JJA agreed, said:
- 16 However, the Court does not decide this type of case by some draconian rule of thumb, but looks closely at the facts of each individual case. The decision in this case might be devastating for the opponent; however, whether this be so or not the Court must keep its eye firmly on the basic feature of the case, which is the protection of the community and the profession should this person continue to be on the Roll of Legal Practitioners.

⁴ *Legal Services Commissioner v Meehan* [2019] QCAT 17, [31] (“*Meehan*”).

⁵ *Legal Services Commissioner v Madden* [2009] 1 Qd R 149,[122].

⁶ As noted in *Legal Services Commissioner v Munt* [2019] QCAT 160, [43].

⁷ *Meehan* [2019] QCAT 17, [40].

⁸ [2018] QCA 66, which this Tribunal quoted at length in *Legal Services Commissioner v Meehan*.

⁹ *Shand* [2018] QCA 66, [57].

¹⁰ [2003] NSWCA 320.

- 17 A series of propositions as to the law clearly have appeared from the cases and I will briefly summarise them.
- (1) The onus is on the claimant to show that the opponent is not a fit and proper person. It is a civil onus: **Re Evatt; Ex parte NSW Bar Association** (1967) 67 SR (NSW) 236. However **Briginshaw v Briginshaw** (1938) 60 CLR 336, 362 shows the particular standard that must be applied when working out the civil onus of proof.
 - (2) An order striking off the Roll should only be made when the probability is that the solicitor is permanently unfit to practice: **Prothonotary v Richard** (NSWCA 31.7.1987 per McHugh JA) and see **NSW Bar Association v Maddocks** (NSWCA 23.8.1988).
 - (3) The fact that the opponent has a conviction for a serious offence is not necessarily sufficient reason for an order striking that person off the Roll; see **Ziems v Prothonotary** (1957) 97 CLR 279, 283.
 - (4) The fact of conviction and imprisonment is, however, far from irrelevant and may be regarded as carrying a degree of disgrace itself. See **Ziems** case at 288.
 - (5) The Court needs to consider the conduct involved in the conviction and see whether it is of such personally disgraceful character that the opponent should not remain a member of an honourable profession: **Re Weare** [1893] 2 QB 439, 446; **Barristers' Board v Darveniza** (2000) 112 A Crim R 438 (QCA).
 - (6) The fact that the opponent pleaded guilty to the charge will usually be counted in her favour: **NSW Bar Association v Maddocks**. Though we do not assume that all pleas of guilty necessarily show remorse, it is significant that in the instant case Keleman DCJ said that it did.
 - (7) Conduct not occurring in the course of professional practice may demonstrate unfitness if it amounts to incompatibility with the personal qualities essential for the conduct of practice. There may not even have been any criminal conviction with respect to that conduct. This is particularly so where the conduct over a long period shows systematic non-compliance with legal and civic obligations: **NSW Bar Association v Cummins** (2001) 52 NSWLR 279, 289; **NSW Bar Association v Somosi** (2001) 48 ATR 562.
 - (8) The concept of good fame and character has a twofold aspect. Fame refers to a person's reputation in the relevant community, character refers to the person's actual nature: **McBride v Walton** (NSWCA 15.7.1994 per Kirby P); **Clearihan v Registrar of Motor Vehicle Dealers** (1994) 117 FLR 455, 459.
 - (9) The attitude of the professional association is that the application is of considerable significance.
 - (10) The question is present fitness, not fitness as at the time of the crime: **Prothonotary v Del Castillo** [2001] NSWCA 75 at para 71.

- [18] In opposing an order that he be struck off, the Respondent submitted that his character and conduct are not inconsistent with the privileges of further practice and that he is not permanently unfit to practise.
- [19] The Respondent filed an affidavit in which he set out his personal antecedents at some length, including his prior teaching career, his educational accomplishments, and his time as a practising barrister engaged particularly in planning and environment law. He said he provided this detail to impress upon this Tribunal how important it has been for him to be part of the legal community. He recognises that he is no longer eligible to hold a Blue Card and cannot return to his previous career as a teacher. If he is unable to hold a practising certificate, all of his years of study and legal practice “will all have been for nothing”.¹¹
- [20] In relation to his offending conduct, the Respondent asserts that his life was thrown into turmoil in 2011 when his wife walked out on him, taking their two small children with her. This led to him drinking heavily. There were acrimonious proceedings in the Family Court. As the Family Court trial loomed, the Respondent, who had been sober for more than a year, began to drink heavily, using alcohol as a crutch. In this context, the Respondent deposed:¹²
- To further unwind and to take my mind off what I had been concentrating on for the past few hours, I would often search the internet for pornography. After a time I found I would be searching for more and more pornography of more extreme kinds. For a period from late 2014 until my arrest in November 2015, this search for pornography also included searching for, saving, and, on seven separate occasions, reposting downloaded child exploitation material..
- [21] Further in his affidavit, the Respondent said he was extremely remorseful for his offending and acknowledged it had brought great shame on him and his family. He called the offending behaviour an aberration and said that “offending of this (or any other) nature has never interested me before this traumatic period of my life and it certainly will not interest me in the future”.¹³
- [22] In his submissions before this Tribunal, the Respondent relied on a report which had been prepared prior to the sentencing hearing by his then treating psychologist, Dr Morgan, who expressed the view that the Respondent appreciated the key risk factors which led to his offending, and noted that the Respondent had undergone treatment to address these risk factors. The Respondent highlighted Dr Morgan’s opinion that the Respondent’s risk of reoffending was negligible, and the factors which led to that expression of opinion.
- [23] The Respondent also provided the Tribunal with the following:
- (a) A report prepared for the sentencing hearing (redacted in accordance with the directions of the sentencing Judge) by Dr Jeremy Butler, a consultant psychiatrist. On the basis of the history provided to him, Dr Butler formulated a diagnosis of the Respondent having suffered from a major depressive episode, which was in remission, with differential diagnoses of adjustment disorder with disturbance of mood and mild to moderate Alcohol Use Disorder. With respect to potential recidivism, Dr Butler noted the treatment to date and the

¹¹ Respondent’s affidavit, para 12.

¹² Respondent’s affidavit, para 14.

¹³ Respondent’s affidavit, para 16.

Respondent's motivation not to reoffend and re-establish a productive and positive social role. Dr Butler concluded that if the Respondent was able to do this, the doctor believed that the risk of reoffending in a similar manner was low. Dr Butler recorded statements by the Respondent to the effect that he recognised the gravity of his offending as it had caused significant harm to others and, as such, he deeply regretted it. Dr Butler, however, believed that the Respondent's tendency to over interpret the role of his drinking represented a psychological barrier preventing the Respondent from fully engaging with the implications of his underlying inclinations. Dr Butler considered that if the Respondent was more able to progressively reflect upon and acknowledge underlying unpleasant inclinations, he would be in a better position to comprehensively take responsibility for his behaviour and, as such, to empathically connect with the experience of those who may have been harmed by his offending. Dr Butler thought that, with appropriate counselling, the Respondent had the capacity to do this.

- (b) A redacted report prepared upon completion by the Respondent of the Medium Intensity Sexual Offending Program while in custody. It is unnecessary for present purposes to set out the detail of that report, beyond noting that it concluded that the Respondent presented as being motivated to reintegrate safely and responsibly into the community, whilst identifying particular aspects of management of the Respondent which would need to be addressed in order to manage ongoing risk factors.
- [24] The Respondent's invocation of, and reliance on, these opinions needs, however, to be tempered by a number of findings made by the learned sentencing Judge.
- [25] As her Honour recorded in the sentencing remarks, when the matter first came before the Court, the Judge raised with the Respondent's counsel a number of matters going to remorse and prospects of rehabilitation. These went, amongst other things, to material before the Court which suggested that the Respondent had been engaged in possessing child pornography for many years. The Respondent's counsel told the Judge that he had "express instructions" that statements which the Respondent had posted online which suggested long term engagement in child pornography were not true, but were just his attempts to boast or big note himself in the online paedophile community. The Judge said that she was not going to accept such statements from the bar table, and the matter was stood down to allow counsel to take further instructions. Having taken further instructions, the Respondent's counsel informed the Court that the Respondent's instructions were that he would give evidence on the topic. Her Honour found that the necessary implication was that it was to be evidence along the lines that counsel had just foreshadowed as being his express instructions. The matter was then adjourned and listed for further hearing on a subsequent date.
- [26] The Crown then filed a further exhibit, which contained proof of many more messages which the Respondent had posted online over a period between November 2014 and November 2015. Her Honour said that it was sufficient to say that these messages showed an extensive knowledge of child pornography material and forums which went back to 2007, or in one case, back to 1990. When the sentence hearing then resumed before her Honour, the Respondent's instructions were that he did not wish to give evidence after all. The learned sentencing Judge drew the inference that this was because of the overwhelming nature of the extra evidence which had been provided by the Crown. Her Honour expressly drew an inference that the Respondent

had provided dishonest instructions to his counsel, which were relayed to the Court, about not having been a member of the online paedophile community for any length of time. The learned sentencing Judge expressly found that the Respondent's boasts online about how long he had been part of the paedophile community were true, and the evidence established that he had been part of that community for sixteen years prior to 2014. She considered the evidence produced by the Crown to be compelling in that respect. Her Honour continued:

This conclusion means that I find you have given dishonest versions of events to both the psychologist you attended for treatment prior to the commencement of the sentencing process, Dr Morgan, and the psychiatrist who you engaged to examine you and make a report for the sentence in Court, Dr Butler. This greatly diminishes the value of the opinions they express in those reports.

- [27] Her Honour further found that the case which the Respondent instructed to be presented ultimately at the sentencing hearing was on the basis of the same dishonest instruction, namely the instruction that the Respondent had not been involved in this type of activity for any lengthy period, but just for a short period when he was emotionally distressed because of a marriage breakdown and using alcohol to excess. The case advanced by counsel for the Respondent, on instruction, was that what the police found on the Respondent's computers and postings was some sort of aberrant activity. As to that, the learned sentencing Judge found:

In fact, I find the activity was not aberrant. You had sophisticated equipment and sophisticated systems to avoid detection. You had a large TV screen to set up to watch pornography on. You had a great deal of material. You had an interest in girls who were pre-pubescent and an interest in pornography which showed them humiliated and physically hurt. My finding ... is that you had these interests for 16 years. You did not just look at this material when you were drunk or depressed in the wake of a marriage break up. You posted it online and you did so as carefully as you could.

- [28] Her Honour made these findings because, whilst the Respondent was being sentenced only for the possession and distribution for the periods charged, these findings were important because they very much reduced the weight of the reports from Dr Morgan and Dr Butler, and, importantly, the dishonesty involved in the versions given to the psychologist, the psychiatrist, the Respondent's counsel and the Court, demonstrated a lack of remorse and a cynical attitude to the proceedings.
- [29] After being sentenced, the Respondent applied to the Court of Appeal for leave to appeal against sentence. Leave to appeal was refused. The findings of the learned sentencing Judge referred to above were not sought to be challenged on appeal. Morrison JA, giving the judgment of the Court, recorded the following:

The applicant, a practising solicitor, participated in the exchange of child pornography, or child exploitation material, on what is called the "dark web". That is a part of the internet used by those interested in the exchange and distribution of child pornography, often by peer-to-peer file sharing programs.

By his own statements to other participants on the dark web, the applicant had been engaging in that area for that purpose for over 12 years prior to 2015. Of course his history of activity on the dark web is distinct from the offences with which the applicant was charged, and to which he pleaded guilty, but it provides a context to the applicant himself, the offences, and the degree of sophistication he applied to protect his activity from scrutiny. For example, the offences were committed at a time when he used a variety of software and encryption

applications to facilitate and shield his use and exchange of the child exploitation material.

[30] Morrison JA said further:

Significantly, the learned sentencing judge held that the applicant had been dishonest with the court in the course of the sentencing process. The dishonesty related to statements and instructions from the applicant, denying that he had been a member of an online paedophile community for some time. The dishonesty extended to dishonest versions given to a psychologist and psychiatrist who were engaged to prepare reports for the sentencing. Part of the further material filed by the Crown consisted of online statements by the applicant showing he had been an active user of child pornography material and forums back to 2007, and even 1990.

...

Then, having rejected the conclusions in the psychologist's and psychiatrist's reports because they were based on the applicant's lies, her Honour continued:

“As I say, at the moment I do not think you are remorseful. I do not think you take responsibility for your offending. And until you are both of those things you will not be in a position to begin therapy with the sincere aim of preventing reoffending. This bears on my assessment of your prospects of rehabilitation.”

There is no challenge to the findings set out in paragraphs [redacted] above.

- [31] The Respondent submitted to this Tribunal that his misconduct was not such as would preclude him from ever practising law again because the misconduct:
- (a) did not occur in the course of, or as part of, his practice as a lawyer;
 - (b) did not involve any dishonesty;
 - (c) did not result in any financial gain;
 - (d) did not impact upon his professional work, his clients, other practitioners or the judiciary;
 - (e) did not involve any contact offences; and
 - (f) occurred over a discrete period of time, during which he was suffering from depression, abusing alcohol, and displaying poor coping methods and poor judgment.
- [32] That final submission must be discounted in light of the express findings of the learned sentencing Judge, which were not challenged on appeal.
- [33] The Respondent further contended that factors which counted in his favour included his significant positive history of full engagement with the legal profession, what he described as his “extensive work” on personal rehabilitation, his psychologist's opinion that his risk of reoffending is negligible, the Respondent's early plea of guilty, his voluntary surrender of his practising certificate, and his assertion that he could maintain the highest standards of integrity of the profession.
- [34] Consistent with the authorities referred to above, it can be said that the mere fact that a legal practitioner is convicted of an offence involving child pornography does not automatically mean that the practitioner must be struck off. So much was observed

by Warren CJ in *Legal Services Board v McGrath (No 2)*.¹⁴ It is important, however, to have regard to the full content of the observations made by Warren CJ:¹⁵

12 Convictions for, or arising out of, child pornography offences are not prima facie evidence that a person is not a fit and proper person to remain on the roll kept by this Court. The nature of the material involved, the extent and circumstances of the offending in question, its relationship to the offender's professional life, and the behaviour of the offender before, during and after the legal processes which result from that offending will all be relevant to deciding any application to strike that offender from the roll. As the High Court's decision in *A Solicitor v Council of the Law Society of New South Wales* indicates, even an individual convicted for the sexual abuse of minors can, albeit in a very small number of conceivable circumstances, remain a fit and proper person to practise law in this country.

13 That being said, I wish to make three additional points.

14 First, conviction for any serious breach of the law must call into question a practitioner's willingness and ability to obey the law which is integral to the civic office which they perform and the trust reposed in them to properly perform that function. As Spigelman CJ held in *New South Wales Bar Association*:

The judiciary must have confidence in those who appear before the courts. The public must have confidence in the legal profession by reason of the central role the profession plays in the administration of justice. Many aspects of the administration of justice depend on the trust by the judiciary and/or public in the performance of professional obligations by professional people.

...

Neither the relationship of trust between a legal practitioner on the one hand, and his or her clients, colleagues and the judiciary on the other hand, nor public confidence in the profession can be established or maintained, without professional regulation and enforcement.

15 Secondly, the legal profession is one which demands both empathy and insight into the victims of criminal behaviour if it is to be performed to the standard expected by the courts, fellow practitioners and the general public. Any conviction which appears to show a disdain for such victims will raise a serious concern about a practitioner's professional and moral fitness to remain an officer of the court.

16 Finally, any suggestion that crimes committed at arm's length, such as those which involve child pornography, can be considered of lesser seriousness in deciding upon an individual's fitness to remain on the roll should be the subject of intense scrutiny. As Mason P observed in *New South Wales Bar Association v Hamman* in the context of tax fraud:

I emphatically dispute the proposition that defrauding 'the Revenue' for personal gain is of lesser seriousness than defrauding

¹⁴ [2010] VSC 332, [12].

¹⁵ Ibid, [12]-[16] (and omitting footnotes and citations). See also *Legal Services Commissioner v CBD* [2012] QCA 69, [18] (Muir JA).

a client, a member of the public or a corporation. The demonstrated unfitness to be trusted in serious matters is identical. Each category of ‘victim’ is a juristic person whose rights to receive property are protected by law, including the criminal law in the case of dishonest interception. ‘The Revenue’ may not have a human face, but neither does a corporation. But behind each (in the final analysis) are human faces who are ultimately worse off in consequence of fraud.

[35] There are examples of legal disciplinary proceedings in respect of offences involving children in which the practitioners were not struck off.

[36] One of those is the decision of this Tribunal in *Legal Services Commissioner v CBD (No 2)* (“*CBD*”).¹⁶ An appeal against that decision was dismissed by the Court of Appeal.¹⁷ The respondent’s solicitor in that case was described by Muir JA, with whom Margaret Wilson AJA and Applegarth J agreed, as a middle-aged male with no criminal history and a previously unblemished professional record. The offending conduct was briefly summarised by Muir JA as follows:¹⁸

The offending occurred when the respondent, to use the words of the sentencing Judge, “stumbled upon” the offending material when looking for legal adult pornography. His mistake, according to the sentencing judge, was that he failed to deal with the material that had inadvertently come before him and continued to look at it. The offending material was stored with a greater mass of material which was not unlawful and the sentencing remarks recorded that the vast majority of the offending material fell at the lower end of the spectrum of offensiveness for the type of material under consideration.

[37] At first instance, the Tribunal held that the offending conduct amounted to professional misconduct. However, the Tribunal’s analysis of the factors relevant to that particular case, including the extent and circumstances of the offending in question, told against a finding that the respondent was not a fit and proper person to resume practice. That conclusion was not disturbed by the Court of Appeal.

[38] On any view, the offending conduct in this case was much more extensive and much more serious than had occurred in *CBD*. The present Respondent’s illegal conduct was characterised by the quantity of the material, its content, the duration of his offending conduct and technical sophistication involved in his offending. He did not just “stumble upon” the offending material, as had happened in *CBD*. Those distinctions are important for present purposes as they go, at the very least, to the Respondent’s professional and moral fitness to retain membership of the legal profession.

[39] In *Legal Services Commissioner v Woodman* (“*Woodman*”),¹⁹ the respondent was a solicitor who had been convicted of two counts of grooming a child under 16 years, and one count of using the internet to procure a child under 16.

[40] In fact, the conduct did not involve a real child, but a police officer using a covert identity in an operation run by Taskforce Argos. The respondent engaged in sexualised discussion and behaviour over the internet with the child, and made

¹⁶ [2011] QCAT 446.

¹⁷ *Legal Services Commissioner v CBD* [2012] QCA 69.

¹⁸ *Ibid*, [1].

¹⁹ [2017] QCAT 385.

overtures to meeting her. He was sentenced to two years imprisonment, wholly suspended for three years. The respondent had prior serious family and health issues. Within a week of being charged with these offences, he attempted suicide, and then underwent extensive psychological and psychiatric treatment.

[41] On the hearing of the discipline application, this Tribunal held that the offending conduct amounted to professional misconduct. The main issue for the Tribunal was whether the solicitor ought be struck off, or whether he should be suspended. The Tribunal observed:²⁰

38 A finding that a respondent at a particular time is not a fit and proper person to engage in legal practice does not necessarily mean that he or she is not fit to remain on the roll. Different purposes and considerations apply to the maintenance of the roll and to the granting or the withdrawing, suspending or imposing of conditions concerning practising certificates.

39 In some cases, the circumstances of the offence are themselves enough to permanently stigmatise the offender as unfit to be a member of an honourable profession, as for example where the circumstances show an ingrained, unacceptable character raising concern that the practitioner ought never to be admitted to practice again.

[42] In that case, the Tribunal came to the view that the particular respondent's convictions and conduct did not reach the necessary level to justify removal of his name from the Roll. In looking at recent comparable cases, the Tribunal observed that:²¹

... in cases where striking off has been held to be justified there was sustained misconduct of a kind that marked each respondent as a person who would never be fit to trust with the powers and functions entrusted to a solicitor.

[43] The Tribunal took account of the fact that, by then, the solicitor had not practised for more than two years, and ordered a further four year period of disqualification from practice.

[44] Again, the level and duration of the offending conduct was significantly less serious than that engaged in by the present Respondent. Moreover, the Tribunal in *Woodman* expressly found that the evidence of events and conduct since the commission of the offences suggested a great deal of shame, apology and remorse. That is to be contrasted with the present Respondent's conduct and presentation, all of which were the subject of the adverse findings by the sentencing Judge referred to above.

[45] Acknowledging that the fact of conviction for child exploitation offences does not automatically mean a practitioner will be struck off, this Tribunal is firmly of the view in the present case that the nature, extent and duration of the present Respondent's offending conduct provide "instant demonstration of unfitness" for membership of the legal profession.²² That conclusion accords with the following germane observations by de Jersey CJ in *Barristers' Board v Pratt*,²³ concerning a barrister who had pleaded guilty to twelve child sex offences:

²⁰ Ibid, [38]-[39] (and omitting footnotes and citations).

²¹ Ibid, [43].

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

²³ [2002] QCA 532.

Personal offending of such gravity carried on over a substantial period is inimical to the high standard of respect for the law, integrity, trustworthiness and common decency expected of members of the Bar both by the Courts of law and the public. It is intolerable to think that the Court would hold out as fit to practise as a barrister a person who has shown such blatant disrespect for the law he is ethically and otherwise obliged to uphold. No response, short of striking off, should be made in this situation.

- [46] For the reasons identified above by the learned sentencing Judge and in the Court of Appeal, this Tribunal can place little weight on the opinions expressed by the treating psychologist and the examining forensic psychiatrist. The Medium Intensity Sexual Offending Program Report does not assist. If anything, it reaffirms that the Respondent continues to seek to limit the offending conduct to having been precipitated by the immediately surrounding events of family breakdown and alcohol abuse.
- [47] The Tribunal notes that the Respondent has, in the present proceeding, filed an affidavit in which he again seeks to limit his engagement in accessing child pornography to the period from late 2014 to the time of his arrest in 2015. He “vehemently” denies any allegation that he engaged in illegal activity prior to late 2014 and says that he posted false information on the internet forums so as to disguise his real identity and so as not to appear like a “newbie”. He was highly critical of the way in which the learned sentencing Judge conducted the sentence hearing. He asserted that he had decided not to give evidence because of his traumatic experience in the Family Court. He said:²⁴

Her Honour did not seem to miss any opportunity to draw an adverse inference against me, and seemed to conclude I must have been ‘scared off’ from giving evidence at the resumption of the sentencing hearing by the prosecution’s tendering of a further affidavit. I have never seen this affidavit and its production had absolutely no impact on my decision to not give evidence.

- [48] These depositions by the Respondent for the purposes of this discipline application cannot stand when one has reference to what actually occurred at the sentence hearing. The transcripts of those hearings are in evidence before this Tribunal.²⁵ The first day of the hearing was in early March 2017. As outlined above, that hearing was adjourned to enable the Respondent to provide notice of the evidence and material on which he proposed to rely in making good the statement made by his barrister to the Court.
- [49] The hearing was resumed some eight months later. In the meantime, Dr Butler’s report had been prepared, as had a statement from a Crown witness evidencing the Respondent’s online child pornography activity over many years. The transcript records an exchange between the sentencing Judge and the Respondent’s counsel in which the Judge referred, for reasons she had expressed on the previous occasion, to her scepticism about some of the factual assumptions made by Dr Butler in the forensic psychiatrist’s report on the basis of matters recounted to him by the Respondent. At that point, the Respondent’s counsel stated:

²⁴ Respondent’s affidavit, para 22.

²⁵ Affidavit of Caroline Jane Snell, Exhibit CJS1.

Further instructions have been taken since the adjourned hearing or adjourned sentence and those instructions ended in the result that Mr Keliher will not provide an affidavit or ... give evidence.

- [50] There was then further discussion between the Judge and the Respondent's counsel about a particular matter (which is the subject of a suppression order) which led again to her Honour expressing scepticism about the factual bases on which Dr Butler formulated his opinion. Her Honour then adjourned briefly to enable counsel to confer with the Respondent. When the Court resumed, the Respondent's counsel informed the Court:

My client has – was paying attention during the observations that your Honour made in relation to Dr Butler's report. Further instructions have been taken, and Mr Keliher will not be giving evidence.

- [51] The Crown's case then proceeded, with the prosecutor tendering a the statement that set out details of other electronic evidence going to the prior length of time the Respondent had been accessing child pornography. Notably, the statement was tendered on the basis that it was "a redacted statement by agreement between the parties".
- [52] In other words, not only was the tender of the document done with the knowledge of the Respondent, he had agreed to its redacted format.
- [53] This review of what actually occurred at the sentence hearing not only causes the Respondent's particular deposition before this Tribunal to ring hollow, it reinforces the relevant and fundamental character flaws which compel a conclusion that he is not fit for membership of the profession. Apart from a bare denial, he has given no explanation of the material which was accepted as demonstrating his lengthy engagement in child exploitation material. All of this erodes any confidence that the Court, other practitioners, or clients might have in dealing with the Respondent. That aspect compounds the concerns arising from the fact that, while a practising lawyer, the Respondent was engaged in serious criminal conduct demonstrating moral turpitude over an extended period. To adopt the words of Warren CJ quoted above, it was offending of a nature that showed such a disdain for the victims as to raise serious questions about the Respondent's professional and moral fitness to remain an officer of the Court.
- [54] These matters also undermine the Respondent's protestations of remorse and rehabilitation.
- [55] The fact that the Respondent was prepared to advance before this Tribunal the same arguments which had been rejected as dishonest by the learned sentencing Judge also tells heavily against his insight and fitness of character for membership of the profession.

Conclusion

- [56] In all the circumstances, the Tribunal has concluded that the character of the Respondent is so indelibly marked by the misconduct that he cannot be regarded as a fit and proper person to retain membership of an honourable profession. His name should be struck from the Roll, and the Tribunal will recommend accordingly.
- [57] Whilst not formally applying for a non-publication order under s 66 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld), the Respondent has asked that his

name not be published. His principal reason for seeking anonymisation of these Reasons is to minimise embarrassment to his family. That consideration does not, however, outweigh the interests of public protection which underpin these disciplinary proceedings. Otherwise, the Respondent has advanced no proper basis for a non-publication order under s 66.

[58] The Tribunal notes that the learned sentencing Judge made suppression orders with respect to particular matters which were before the Supreme Court in connection with the sentencing hearing. Nothing in these Reasons discloses any of the information which is subject to those suppression orders.

[59] It is not suggested that there are exceptional circumstances such as to obviate the making of the costs order required by s 462(1) of the LPA.

[60] Accordingly, the Tribunal orders:

1. There is a finding that the Respondent engaged in professional misconduct.
2. It is recommended that the name of Stephen James Keliher be removed from the Roll of Legal Practitioners of Queensland.
3. The Respondent shall pay the Applicant's standard costs of and incidental to this discipline application, such costs to be assessed as if this were a matter before the Supreme Court of Queensland.