

JURISDICTION : STATE ADMINISTRATIVE TRIBUNAL

STREAM : VOCATIONAL REGULATION

ACT : LEGAL PRACTICE ACT 2003 (WA)

CITATION : LEGAL PRACTITIONERS COMPLAINTS
COMMITTEE and TOMLINSON [2005] WASAT 214

MEMBER : JUSTICE M L BARKER (PRESIDENT)
MR C RAYMOND (SENIOR MEMBER)
MR J MANSVELD (MEMBER)

HEARD : 22 JUNE 2005

DELIVERED : 19 AUGUST 2005

FILE NO/S : VR 5 of 2004

BETWEEN : LEGAL PRACTITIONERS COMPLAINTS
COMMITTEE
Applicant

AND

MICHAEL MURRAY TOMLINSON
Respondent

Catchwords:

Legal practice - Legal Practitioner - Professional disciplinary proceedings - Conviction for "stalking" offence contrary to *Criminal Code* (WA) s 338E - Finding of "unsatisfactory conduct" under *Legal Practice Act 2003* (WA) - Evidence concerning practitioner's psychological state at time of offence and at time of disciplinary hearing - Whether penalty should lead to striking off Roll of Practitioners or suspension for a period in excess of two years

Legislation:

Criminal Code (WA), s 338E, s 338E(2)

Legal Practice Act 2003 (WA), Pt 12, s 162, s 164(1)(f), s 185(2)(a), s 187

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

State Administrative Tribunal Act 2004 (WA), s 167(4), s 185(1)

Result:

Practitioner guilty of unsatisfactory conduct; report transmitted to Supreme Court (full bench) to enable Court to determine whether practitioner should either be struck off or suspended for a period in excess of two years; pending determination of Supreme Court (full bench) practitioner suspended from legal practice; Complaints Committee at liberty to apply for costs of the proceedings; Reasons for decision may be published

Category: B

Representation:

Counsel:

Applicant : G H Murphy SC
Respondent : Mr M F Rynne

Solicitors:

Applicant : Legal Practitioners Complaints Committee
Respondent : Michael Rynne

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

New South Wales Bar Association v Cummins (2001) 52 NSWLR 279

Re A Barrister and Solicitor (1979) 40 FLR 1

Re A Practitioner unreported Supreme Court of Western Australia Library No 970354 delivered 18 July 1987

Re Maraj (a legal practitioner) (1995) 15 WAR 12

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

Case(s) also cited:

Nil

REASONS FOR DECISION OF THE TRIBUNAL:

Summary of Tribunal's decision

1 On 9 July 2004, Michael Murray Tomlinson (the practitioner)
pleaded guilty in the Court of Petty Sessions at Carnarvon to one count of
pursuing another, namely Ms A, to intimidate, contrary to s 338E(2) of the
Criminal Code (WA).

2 The *Criminal Code* s 338E introduce the offence of "stalking".

3 Following his plea of guilty, the practitioner was sentenced to a term
of nine months of imprisonment, suspended for a period of 18 months.

4 The Legal Practitioners Complaints Committee complained that the
practitioner was guilty of "unsatisfactory conduct" under the *Legal
Practice Act 2003* (WA) by virtue of his illegal conduct for which had
been convicted.

5 The practitioner acknowledged his unsatisfactory conduct and the
Tribunal formally found him guilty of unsatisfactory conduct by a legal
practitioner in that between 16 January 2004 and 7 May 2004 at Carlisle
with intent to intimidate Ms A, contrary to *Criminal Code* s 338E(2).

6 The main question in the professional disciplinary proceedings in the
Tribunal was the form of penalty to be imposed on the practitioner.

7 While the practitioner failed to attend the disciplinary proceedings,
although he was represented by counsel, psychological evidence was
presented on his behalf. The psychological evidence explained that the
practitioner's illegal conduct arose out of the ending of his relationship
with Ms A.

8 The psychological evidence also strongly suggested that the
practitioner has not recovered from the psychological trauma caused by
the ending of the relationship although, if he were to undergo
psychological therapy, there is a chance that he may recover from his
trauma within about 18 months or two years from now.

9 The Tribunal was not satisfied that it was presently appropriate for
the practitioner to practice the law and that mere reprimand, fine or
suspension for up to two years would sufficiently protect the public
interest.

10 As a result, the Tribunal decided to transmit a report of its findings to the Supreme Court (full bench) so that the appropriate form of discipline, either striking off the Roll of Practitioners or suspension for a period in excess of two years, could be considered by the Court.

11 Pending the determination of the Supreme Court (full bench) the practitioner was suspended from legal practice.

Reference to the Tribunal

12 The *Legal Practice Act 2003* (WA) (the Act) currently regulates legal practice and legal practitioners in the State of Western Australia. Complaints and discipline concerning legal practitioners are governed by Part 12 of the Act. Section 162 of the Act establishes the Legal Practitioners Complaints Committee. By the Act s 164(1)(f), the functions of the Complaints Committee include the function, "if the Complaints Committee considers it appropriate to do so, and whether or not it has conducted an inquiry, to institute professional disciplinary proceedings against a legal practitioner before the State Administrative Tribunal".

13 Prior to 1 January 2005, when the State Administrative Tribunal came into operation, s 164(1)(f) gave the Complaints Committee the same function but provided for the institution of professional disciplinary proceedings against a legal practitioner before the Legal Practitioners Disciplinary Tribunal.

14 Since 1 January 2005, pursuant to the terms of the *State Administrative Tribunal Act 2004* (WA) and *State Administrative Tribunal (Conferral of Jurisdiction) Act 2004* (WA), the State Administrative Tribunal (the Tribunal) has replaced the Legal Practitioners Disciplinary Tribunal for the purpose of complaints and discipline under the Act. Under the *State Administrative Tribunal Act* s 167(4), matters that were pending before the Disciplinary Tribunal as at 1 January 2005, have been transferred to the Tribunal.

15 By a reference from the Complaints Committee to the Disciplinary Tribunal dated 27 September 2004 the Complaints Committee alleged that:

"[T]he practitioner Michael Murray Tomlinson was guilty of unsatisfactory conduct by illegal conduct in that between 16 February 2004 and 7 May 2004 at Carlisle

Michael Murray Tomlinson pursued with intent to intimidate [Ms A]."

16 On 1 January 2005 the disciplinary proceedings were transferred from the Disciplinary Tribunal to the State Administrative Tribunal.

17 At the hearing of the reference in the Tribunal, a minor amendment was made to this allegation concerning the commencement of the period in question and a further allegation was added with leave of the Tribunal, in these terms:

- "1. That the practitioner Michael Murray Tomlinson was guilty of unsatisfactory conduct by illegal conduct in that between 16 January 2004 and 7 May 2004 at Carlisle, Michael Murray Tomlinson pursuant with intent to intimidate [Ms A].
2. Alternatively to par 1 above, that the practitioner Michael Murray Tomlinson was guilty of unsatisfactory conduct by:
 - (a) illegal conduct in that between 16 February 2004 and 7 May 2004, at Carlisle, Michael Murray Tomlinson pursued with intent to intimidate [Ms A]; and
 - (b) unprofessional conduct in that between 16 January 2004 and 16 February 2004 he engaged in conduct in relation to [Ms A] which interfered with and was destructive of her property and which was designed to cause her concern for her security and humiliation."

18 For reasons of privacy, the Tribunal has ordered that the name of the person in respect of whom it is alleged the practitioner conducted himself not be published, and so she is simply referred to as "Ms A".

The practitioner's answer

19 The practitioner filed a response to the reference, prior to its amendment at the hearing, dated 13 June 2005 but signed 14 June 2005 in which he admitted that he engaged in illegal conduct between "16 February 2004 and 7 May 2004".

20 The reference as noted was amended with the leave of the Tribunal at the hearing by adding a second allegation as an alternative to the first and

amending the first allegation by bringing the period of illegal conduct in question back a month to 16 January 2004.

21 The amendment of the date from February to January 2004 was in essence a formal matter. The reference had initially been drafted on the basis of a statement of material facts read out in the Court of Petty Sessions in Carnarvon where the practitioner pleaded guilty on 9 July 2004 in that Court to the conduct that is now the subject of the complaint. That statement of material facts incorrectly stated the period of illegal conduct as commencing on 16 February 2004, when in fact it commenced on 16 January 2004.

22 The amendment to the reference, by adding the second allegation, was intended to ensure that the conduct of the practitioner complained of throughout the full period from January to May 2004 was encompassed by the reference.

23 At the hearing, the practitioner did not appear but was represented by counsel. Counsel did not dispute that the earlier admission would also apply in respect of the period referred to in par 1 of the reference as amended.

The unsatisfactory conduct

24 By *Legal Practice Act 2003* s 185(1) the State Administrative Tribunal has jurisdiction to make a finding that a legal practitioner is guilty of unsatisfactory conduct.

25 The expression "unsatisfactory conduct" is defined by s 3 of the Act to include –

"(b) illegal conduct on the part of a legal practitioner, whether occurring before or after admission as a legal practitioner;"

26 In this case, the illegal conduct complained of by the Tribunal was conduct of the practitioner in respect of Ms A which culminated in the practitioner pleading guilty to and being convicted in the Court of Petty Sessions on 9 July 2004 of one count of pursuing another to intimidate, contrary to s 338E(2) of the Criminal Code (WA).

27 Criminal Code s 338E introduced the offence of "stalking". Section 338E(2) makes it an offence for a person to pursue another person in a manner that could reasonably be expected to intimidate, and that does in fact intimidate, that person or a third party. The penalty for this offence

was at the material time a fine of up to \$6000 or 18 months imprisonment, upon a summary conviction, or up to three years imprisonment, on indictment.

28 In the Court of Petty Sessions the practitioner, having pleaded guilty to the offence, was sentenced to a term of nine months imprisonment, suspended for a period of 18 months.

The Complaints Committee's case

29 The material facts that led to the Court of Petty Sessions imposing this sentence on the practitioner was set out in the transcript of proceedings in the Court of Petty Sessions at Carnarvon on 9 July 2004 between "The Police and Michael Murray Tomlinson", which is attached to these reasons as Annexure A. The Tribunal relies on this transcript in these proceedings.

30 The Tribunal also received evidence at the hearing by way of a statement of agreed facts and in the form of testimony given by Ms A.

31 The agreed facts were that the practitioner and Ms A were engaged in a personal relationship for approximately 18 months which ended on 16 January 2004.

32 The practitioner was distressed at the break up and the circumstances leading to it.

33 On 16 January 2004, Ms A provided the practitioner with the keys to her house to enable him to recover some of his property from it.

34 The practitioner attended Ms A's home on 16 January 2004 at which time he slashed two shirts, burnt a dress and destroyed a handbag belonging to Ms A. In addition, he removed one shoe from each of four pairs of shoes belonging to Ms A. He then exited the house and entered Ms A's car, switched on the left hand indicator and snapped off the end of the indicator.

35 On 17 January 2004, the practitioner again attended Ms A's home, removed the fuel cap from her car and put a quantity of green jelly like material to the petrol tank.

36 On 19 January 2004, the practitioner again attended Ms A's home and poured a liquid material over every panel of her car, damaging the paint on the vehicle.

37 On or before 21 January 2004, the practitioner posted and delivered a video cassette tape to Ms A at her workplace. The tape was found to be an edited copy of a video recording that Ms A and the practitioner had made during their relationship showing the complainant and the practitioner engaged in various sexual acts.

38 On 25 January 2004, the practitioner attended Ms A's home once again, took several items of clothing and property and left the home after damaging the door between Ms A's bedroom and the backyard, leaving the door unsecured.

39 On or before 3 February 2004, the practitioner posted or delivered a video tape to Ms A's workplace, which tape was viewed by her supervisor and several staff members. The tape was a copy of the tape received by Ms A from the practitioner on 21 January 2004.

40 On 24 February 2004, the practitioner again attended at Ms A's home and scratched the paintwork of each of the panel's on the driver's side of the vehicle.

41 On the evening of 12 April or the morning of 13 April 2004, the practitioner again attended Ms A's home and spray painted every panel of Ms A's vehicle with blue spray paint. In addition, the practitioner slashed the soft-top canopy on the top of her vehicle, the driver's canopy window, and the rear window.

42 On 24 April 2004, the practitioner again attended at Ms A's home where he made new slashes into the vehicle canopy, windows and the roof of the vehicle. The practitioner also made larger the existing cuts that he had previously made.

43 Ms A made a complaint to the police. In response, a police surveillance camera was installed at Ms A's home.

44 On 29 April 2004, the practitioner again attended at the home of Ms A without permission while she was away. Ms A returned home while the practitioner was still on the premises and he left the premises without declaring himself to her.

45 On 7 May 2004, the practitioner again attended Ms A's home and took various items of her property. Later that same afternoon the practitioner attended the property again and removed the dog belonging to Ms A.

46 On 10 May 2004, the police executed a search warrant of the practitioner's home. On completion of the search warrant the practitioner was arrested and the police attempted to interview him. The practitioner denied knowledge of taking Ms A's dog until confronted by the video tape evidence.

47 The practitioner was subsequently charged with pursuing with intent to intimidate Ms A.

48 In her testimony, Ms A elaborated upon her relationship with the practitioner explaining that it commenced in June or July 2002. She dated the practitioner for six months until she was transferred to Port Hedland to work in February 2003. She worked in Port Hedland until August 2003. The practitioner and she continued their relationship during that time by correspondence, telephone calls and on one occasion the practitioner flew to Port Hedland to visit her. On another occasion she came to Perth for work and saw the practitioner.

49 In August 2003, Ms A returned to Perth to work. After her discussions with the practitioner, the two of them decided to drive Ms A's car to Perth from Port Hedland. The practitioner flew to Port Hedland to meet her for this purpose.

50 In August 2003, once back in Perth, the relationship between the practitioner and Ms A continued. However, Ms A says during this time she realised she did not wish to continue her relationship with the practitioner and she was planning to end it.

51 Ms A explained that during this period, while she dated the practitioner, she and the practitioner lived separately. She had two dogs so any time that was spent at either of their houses together, was spent at her house. In the six months prior to the relationship ending, Ms A says the practitioner spent an average of three or four nights a week at her house. Ms A says the practitioner and she did not discuss the future of their relationship at any point during the time they were dating. She says they never discussed living together and certainly did not discuss the relationship becoming more serious, for example by way of an engagement to marry. The practitioner did not have a key to her house and she lived with a housemate.

52 Ms A said that part of her reason for wanting to end the relationship was that she considered the practitioner's behaviour to be unusual and by reason of his responses to things that happened in the relationship, for example his refusal to see his parents or discuss them in any way.

53 Ms A indicated that while she was working in Port Hedland she met another man socially and had a "one night fling" with him. However, during the six months she was back in Perth prior to the ending of the relationship with the practitioner, she again saw this person on three or four occasions.

54 Ms A said the relationship with the practitioner came to an end on 16 January 2004 when she admitted to him, following his demands to know whether she had been seeing someone else, that indeed she was. Ms A said she told the practitioner about the person she had seen.

55 Ms A said the practitioner then ended the relationship. He demanded that she provide him with a key to her unit so that he could go there and remove his possessions, being some clothes and other items which he had left there.

56 As at 16 January 2004, the practitioner worked at the Youth Legal Service which was located in Pier Street Perth. Ms A was a solicitor based at the May Holman Centre in St Georges Terrace Perth. However, the practitioner knew that Ms A was soon to start work at the Midland Legal Aid Office on 2 February 2004.

57 When Ms A arrived home on the night of 16 January 2004 she found the clothes in her bedroom had been slashed, burnt and destroyed. Her handbag was also destroyed. One shoe from each of four pairs of shoes had been taken. There was also a strong smell of fly spray on her pot plants. They subsequently died. Also removed from the house were photos and some gifts that the practitioner had given her. When she went outside she found the indicator stick on her car had been snapped off.

58 Ms A then proceeded to testify as to the various incidents that have already been set out from the statement of agreed facts.

59 Ms A explained that in the week following the week of 19 January 2004 she received a video tape at her workplace. It was covered with a note, which stated words to the effect:

"I found this in the video recorder at the police prosecution unit in Midland. I am so sorry but I thought you should know."

60 Ms A said the note was not signed, but because she was unknown to any police in Midland she thought it unlikely that anyone there would have been able to recognise her from the tape so as to contact her. Also, she thought that if the police had received the tape and had known who

she was, they would have contacted her officially. She looked at the tape and found it was an edited copy of a sex tape that the practitioner and she had made. She says it had been carefully edited so as to remove any footage of the practitioner.

61 Ms A further explained that she started work at the Midland Legal Aid Office on 2 February 2004 and that she had previously informed the practitioner. On 3 February 2004 her supervisor asked to speak with her. The supervisor told her she had received a video tape. Ms A immediately started crying because she knew what the tape would be. The supervisor told her that the police prosecution section of Midland had also received one the same day and they had telephoned her. The tape to the police prosecution section had a note attached to it saying it was regarding the new duty lawyer. The note attached to the video sent to the work place said words to the effect:

"I found this in my son's video. I believe it is one of your lawyers. Thought you should know."

62 Ms A said she was obliged to speak about the tape to the police at Midland; police she would have to work with in the future. The supervisor also spoke to others at Legal Aid about it and the matter was ultimately discussed with the Director of Legal Aid who was told in case it was a matter of a client harassing her. Ms A said she felt professionally compromised and humiliated.

63 Ms A said the experience with the tapes was extremely distressing. She felt absolutely humiliated and sick to her stomach about it. It was a horrific experience and she still can't really describe the full effect of it on her.

64 At that time, Ms A started seeing the Legal Aid employed counsellor about these events and she also reported them to the police.

65 It was only a week or so later, however, when the next event occurred. On 24 February 2004, her car was scratched, as set out in the earlier account from the agreed facts.

66 As noted in the account of the agreed facts, it was after an incident on 7 May 2004, when surveillance tapes showed the practitioner entering Ms A's house and then taking one of her two pet dogs, that the police ultimately arrested and charged the practitioner. Ms A said the dog had never been returned to her.

67 Ms A states that she found what the practitioner did to be profoundly traumatic and devastating. She was having regular counselling sessions with a psychologist until she left Perth and took employment elsewhere. She was prescribed anti-depressant medication that she took until recently before the hearing of these proceedings commenced in June 2005. She said she stopped taking the medication because she was concerned about the effect on her, but she was still suffering from ongoing depression. She says she also developed a reliance on alcohol as a coping mechanism and was drinking, which she considered to be to a problem degree, until recently.

68 Ms A says she also received a lot of publicity as a result of the practitioner's trial in 2004, including having the story on the front page of "The West Australian" newspaper. Although not named, the information was sufficient for many people to identify her. She points out the legal profession is a relatively small one and that the fact that the tape was published to various members of the legal profession and the police, and mentioned in the newspaper, professionally compromised her and caused ongoing humiliation.

69 Ms A said that the other attacks, particularly because they involved the invasion of her home, made her depressed and fearful. She says she is more nervous, finding establishing a new relationship difficult and fearful for her safety and that of her pets. As a result of these events, she has left Perth and finds the thought of living in Perth very difficult. She says:

"I just don't feel safe being in Perth."

70 The practitioner did not attend the hearing but was represented by counsel. In cross examination by counsel for the practitioner concerning the nature of the relationship, Ms A acknowledged that she had keys to the practitioner's home in Perth and that they spoke by telephone regularly, communicated by email regularly, and saw much of each other.

71 Ms A also accepted that she holidayed in Tasmania with the practitioner in September 2003. She denied however that she had entered into discussions with the practitioner concerning the establishment of a legal practice in Tasmania.

72 Concerning the video tape and the extent to which it showed a relationship of trust with the practitioner, Ms A said that she had previously told the practitioner she did not want to make such a tape but she subsequently agreed on the proviso that she could keep it. When the taping was made she believed it had not worked and that the tape was in

fact blank. However, the practitioner later mentioned to her that it had operated successfully.

73 Ms A also accepted that the practitioner believed their relationship was a monogamous one. However, she said marriage was never discussed. She accepted the practitioner personally may have believed that marriage might later occur, although he had not broached the topic with her.

74 As to why she had not mentioned the other relationship she had prior to the events of 16 January 2004, Ms A said that she was confused and did not think that the earlier relationship would continue. She said it wasn't so much a "relationship" as a "friendship". She slowly realised that her relationship with the practitioner had to end and was relieved in the end that it did.

The practitioner's account

75 In the proceedings in the Tribunal the practitioner attended neither the hearing on 22 June 2005, when the matter first came on for hearing, nor the hearing on 5 August 2005. The Tribunal adjourned the proceedings after the first day of hearing in order to let the practitioner's counsel obtain instructions and also to provide the practitioner with the opportunity to obtain evidence from a psychologist bearing upon his conduct and to consider attending the hearing.

76 In any event, the practitioner did not attend the adjourned hearing on 5 August 2005 and at no time gave any direct account of his actions to the Tribunal.

77 However, in the Court of Petty Sessions in Carnarvon on 9 July 2004, after he pleaded guilty to the stalking offence, the practitioner did purport to give a brief account of his actions to the Magistrate. That can be seen at pages 4 - 5 of the transcript of those proceedings in Annexure A.

78 In short, the practitioner told the Magistrate that:

"Sir, I can only say that this discovery absolutely devastated me. I was under the impression that we were soon to be engaged and she'd led me to -- to believe that. Sir, I became angry, depressed, clinically depressed as it turns out. Unfortunately at that particular time, it's the nature of this condition, I just didn't

realise it. Sir, for the last couple of months I've been in a very dark place.

The initial damage outlined in the statement of material facts was done to items that I'd bought the complainant as part of gifts in our relationship. Initially, obviously I was angry, and I thought that would be the end of it, and -- and I could move on.

In the week subsequent to that, I was unable to complete my duties as a solicitor at the Youth Legal Service. I was becoming more depressed. I was absolutely no use to my clients or my colleagues and I unfortunately I -- I was forced to resign my position because of this situation. I took two weeks off, sir, and basically wasn't able to resolve anything and just became more and more depressed."

79 The practitioner then indicated to the Magistrate that he had been seeing Mr Bruce Beaton, a clinical psychologist, who had provided a report especially for the Court that morning. That report was handed to the Magistrate.

The clinical and forensic psychological evidence

80 At the hearing before the Tribunal the report of Mr Beaton was again presented, although the copy initially tendered in evidence by counsel for the practitioner was missing a number of pages.

81 At the adjourned hearing on 5 August 2005, counsel for the practitioner called Dr Phil Watts, clinical and forensic psychologist, to give evidence on behalf of the practitioner.

82 Dr Watts had obtained from Mr Beaton a full copy of his earlier report and a copy of a psychological test which Mr Beaton had earlier administered. The full copy of Mr Beaton's report was admitted into evidence. However he did not obtain any other notes or copies of tapes from Mr Beaton's earlier interviews with the practitioner because Mr Beaton apparently felt that this other information would give Dr Watts sufficient information and that "the notes are in deep storage."

83 Dr Watts had met with Mr Tomlinson on 30 July 2005 in his rooms in Mt Pleasant. He interviewed him and administered the Millon Clinical Multiaxial Inventory (MCMI-III).

84 Dr Watts said he had regard to the Personality Assessment Inventory (PAI) results that he had received from Mr Beaton. He said the PAI is a

psychological test completed by the participant, in this case the practitioner. It consists of 375 questions. Mr Beaton provided the raw scores to Dr Watts for him to re-interpret. Dr Watts says, as best he could ascertain, his profile was pretty similar to Mr Beaton's.

85 Dr Watts says there was a moderately to severely elevated depression scale, suggesting that the practitioner was significantly depressed at the time of the previous assessment. There were elevations to do with a traumatic past event. The test alone does not indicate whether this trauma was related to current or past events, however, the results were manifesting PTSD (Post Traumatic Stress Disorder) symptoms. There were some elements of an "instable"(sic) sense of identity and self and his suicide scale at that time would be "through the roof" to a level which suggests he was actively making plans of self-harm and certainly preoccupied with suicidal thoughts much of the time.

86 Dr Watts then administered the MCMI-III. Dr Watts explained this was a psychological test which screens for pathology and consists of 175 questions.

87 Dr Watts re-interviewed the practitioner "on issues to do with the original offence and current situation." He found the practitioner was co-operative, articulate and generally co-operative. Physically he looked quite tired and when he asked him about his sleep the night before the practitioner said, "I haven't slept all that well. I knew that we would be talking about it again."

88 Dr Watts ascertained that the practitioner had sold his Northam property and his Perth house because they were two properties in which he and Ms A, according to the practitioner, had spent time in associating together. The practitioner told Dr Watts that he had taken a job in the country and generally avoids coming to the city. Dr Watts said that this and other factors made him aware that the practitioner has "significant anxiety over his behaviour of that time".

89 Dr Watts said it was evident that the practitioner was avoiding triggers and reminders of the relationship and is still quite traumatised by the experience. Dr Watts also explained that the practitioner summed up his view of the relationship break up and his subsequent behaviour as:

"What she did was morally wrong and what I did was illegal, I didn't really think what I was doing was illegal at the time but I understand from when I was caught that it was."

90 The practitioner had explained to Dr Watts that, in his view, there were no repercussions on Ms A for her behaviour that led to their break up.

91 Dr Watts reported that in other respects psychologically he found the practitioner to be doing a lot better than the information relating to the time of Mr Beaton's report suggested. The practitioner is no longer suicidal and was quite embarrassed that he could have reached that state, especially given that he had not only degrees in law but also in psychology. The practitioner described himself as having integrated well within his new local community and was engaged in sporting activities. He was not in another personal relationship as he did not feel ready to trust someone again.

92 Dr Watts noted that Mr Beaton's earlier view had been that the practitioner was psychologically extremely overwhelmed when he found his partner having "an affair". This initially put him into a state of shock and then anger. As a result, he subsequently tried to destroy the various "reminders" of the relationship. Mr Beaton's report indicated that the practitioner was so emotionally overwhelmed that he was not thinking rationally about what he was doing and he did not see his conduct as illegal until the police pointed it out to him. He then stopped and there has been no further acting out since.

93 Dr Watts considered that, on the information available to him, those aspects of Mr Beaton's assessment were correct. However, he said several additional aspects also warranted consideration.

94 Dr Watts noted that Mr Beaton had not provided a lot of detail of the practitioner's past relationships. The practitioner had described a relatively normal family background. However, Dr Watts noted from his discussions with the practitioner that while he seemed to have had a relatively normal background, Mr Beaton had reported that neither of his brothers or sister were married and the practitioner himself reported having had a few prior relationships but had not settled down. Dr Watts said that this may suggest that within the family system there are some aspects of emotional avoidance which may have ill-equipped the practitioner for dealing with emotional issues.

95 Dr Watts reported that, on a positive note, the practitioner reports no past history of similar behaviour at time of break up and said that other relationships had broken up mutually.

96 Dr Watts said the other feature that he found of particular note was that the practitioner appears to have very strong avoidance of the emotional clues to the relationship. Dr Watts was uncertain whether this related to personality traits or is a feature of PTSD - Post Traumatic Stress Disorder. However, he concluded it is evident from the way he described selling the properties, changing jobs, moving to the country, that the practitioner is trying to escape from "triggers and reminders" associated with the event leading to his conduct. At the micro level this appears to be much of what the offence is related to – he was trying to destroy factors related to their relationship. But there was also an expression of anger evident in his actions.

97 Dr Watts referred to PTSD as a characteristic set of symptoms following an extreme traumatic stressor. If correctly diagnosed it is more than just trauma. It has to have various sets of symptoms including persistence, re-experiencing of the event, persistent avoidance of the stimuli associated with the event, and increased arousal. It is an anxiety disorder. Normal trauma is often called "adjustment disorder", when people have trouble coming to terms with any event or "acute stress disorder" and are overwhelmed by a crisis. However, they usually recover within four weeks. The event is usually less severe and the effects not so marked. Dr Watts expressed the opinion that the practitioner "seemed to be showing symptoms of PTSD nature". However, he did not conclude that he was suffering PTSD.

98 Dr Watts expressed the opinion, as did Mr Beaton, that he could find no evidence that the practitioner is a physical risk to anyone. He was of the opinion that basically the practitioner had an existential break down as a result of an overwhelming traumatic response to his partner "having an affair". The practitioner was unable to cope with what he considered an overwhelming sense of betrayal.

99 As to future risk, Dr Watts expressed the view that he could see no reason to expect anything of similar nature from the practitioner in regards to either the offences or the suicidal behaviour. He understood there had been no re-occurrence since the practitioner was charged by the police, and there was no prior record. Dr Watts stated:

"In my opinion the circumstances was [sic] an overwhelming crisis which he was unable to process."

100 Dr Watts added that, in his opinion, it would take some time before the practitioner works through issues in regards to relationships and that,

at this stage, he is avoiding starting another relationship. He suspected it will take up to another 18 months before he is confident enough to attempt another relationship. Out of a relationship, Dr Watts assessed the practitioner's risk is very low.

101 Dr Watts, however, recommended that the practitioner undertake further personal counselling to deal with psychological avoidance, but in other respects he believes the depression and suicidal crisis had resolved. There is however residual trauma.

102 Dr Watts placed significance on the fact the practitioner had failed to attend the hearings concerning him in the Tribunal and that it had taken him quite some effort to have the practitioner attend upon him for interviews for the purpose of preparing his report for this hearing. In Dr Watts opinion, the practitioner needs further psychological counselling and that it could take 18 months to two years, in his view, before the practitioner could be considered to be "over" the trauma of the events he had experienced that led to his conduct. Dr Watts remained concerned, in the meantime, that certain situations could acts as a "trigger" in respect of the practitioners emotional state.

103 Dr Watts was cross-examined by senior counsel for the Complaints Committee. He was pressed to explain whether in his opinion the practitioner had understood at material times that what he was doing was "illegal". Dr Watts explained that normally a well balanced person would make decisions on a basis involving 90% thought and 10% emotions. However after a particular traumatic experience that balance can change so that, perhaps, in this instance, the practitioner after learning about Ms A's meeting with another person, made his decisions on the basis of 10% thought and 90% emotion. Dr Watts expressed the view that, in that sense, the conduct of the practitioner complained of did not involve him engaging in any thinking process as to the "legality" of his conduct, but that he was motivated by his belief that what Ms A had done was "morally wrong".

104 In that sense, Dr Watts expressed the opinion that the practitioner may well have considered his actions to have had a "high moral justification", even though he thought the practitioner would have been aware that what he was doing was wrong, especially later in the four month period of conduct in question.

105 Dr Watts said that, at least closer to the time of 16 January 2004, the actions of the practitioner were not rational. The practitioner was initially

in a state of shock, then anger followed. Dr Watts expressed the opinion that the practitioner was still in some shock today and still doesn't apparently understand what he did or why. He only ceased his actions concerning Ms A after the intervention of the police. But for that intervention the practitioner's actions might have continued for some time, until he appreciated they were pointless, or his emotions were worked through, or there was some occasion of intervention.

106 There was some suggestion by Dr Watts that the excessive reaction of the practitioner to learning that Ms A had met with another person might be due to the practitioner seeing that as a "major violation of his personal code of conduct". However, as to what his personal code of conduct might have been, was not the subject of any direct evidence to the Tribunal. The implication is that the practitioner believed that he was in a monogamous relationship with Ms A, that he would not have acted as she did, and that he felt utterly betrayed by her conduct when he found that their relationship was not monogamous.

107 Neither Dr Watts nor Mr Beaton suggest that the practitioner was not responsible for his actions during the period in question. What is suggested, in short, is that the practitioner's conduct may be explained by his emotional reaction to learning of Ms A's apparent infidelity.

The Tribunal's findings

108 The Tribunal finds that the practitioner is guilty as alleged in par (1) of the amended reference of unsatisfactory conduct by illegal conduct, in that between 16 January 2004 and 7 May 2004 at Carlisle he pursued with intent to intimidate Ms A, contrary to Criminal Code s 338E(2).

109 There is no question in these proceedings that the practitioner was not responsible for his actions.

110 The question raised in these proceedings is what penalty is or may be appropriate.

111 In an often cited passage in *Re A Barrister and Solicitor* (1979) 40 FLR 1, Blackburn CJ, Connor and Davies JJ explained, at 24 - 25, that:

"The object of disciplinary proceedings is the protection of the public and the maintenance of proper standards in the legal profession. Disciplinary legal proceedings are not taken by way of punishment, per Barwick CJ in *Harvey v Law Society of New*

South Wales (1975) 49 ALJR 362, at p. 364, or to exact retribution, per Fox, Blackburn and Woodward JJ in *Ex parte Attorney-General for the Commonwealth; Re A Barrister and Solicitor* (1972) 20 FLR, at p. 244."

112 See also *Re Legal Practitioners Act 1893* (Supreme Court, WA, Full Court, Library No 930527, 30 September 1993, unreported) at 8; *Re Maraj (a legal practitioner)* (1995) 15 WAR 12 at 25.

113 In dealing with the question of penalty it is understood that it is not just the fact that the practitioner has been convicted of an offence that attracts disciplinary penalty. In deciding what penalty is appropriate, the facts upon which the conviction is based are important. The whole of the practitioner's conduct, including those facts which were additional to those required to prove the offences, are relevant to the findings of fact to disciplinary purposes: see *Ziems v The Prothonotary of the Supreme Court of New South Wales* (1957) 97 CLR 279 at 288; *Re A Practitioner* unreported Supreme Court of Western Australia Library No 970354 delivered 18 July 1987 of 12 – 13.

114 It is also well understood that there may be disciplinary outcomes for a practitioner even though the conduct complained of did not occur in the course of professional practice but which otherwise demonstrates an unfitness to practice because it amounts to incompatibility with the personal qualities essential for the conduct of practice and membership of a self respecting profession: *New South Wales Bar Association v Cummins* (2001) 52 NSWLR 279 at 289; *Ziems v The Prothonotary of the Supreme Court of New South Wales* (*supra*) 297-299.

115 Without any relevant justification or mitigating factors, the conduct of the practitioner complained of here is not merely "unsatisfactory"; it is utterly deplorable.

116 The practitioner's illegal conduct towards Ms A commenced almost immediately after their relationship had been terminated on 16 January 2004 and continued for a period of nearly four months, until the police surveillance of his conduct brought it to an end. It left a trail of physical destruction and, more significantly, resulted in Ms A feeling humiliated, intimidated and fearful in the course of living her professional and daily life.

117 At material times, the practitioner was about 37 years of age. He had earlier completed a degree of psychology at Murdoch University and a masters degree in psychology at The University of Western Australia,

before practising in psychology for a short period. He then obtained a law degree from The University of Western Australia and was admitted to practice in 2001. At the time of the offence he was, on the face of it, a mature man, although a person relatively inexperienced in the practice of the law.

118 Nonetheless, the personal qualities exhibited by the practitioner in this case are entirely incompatible with the personal qualities a person must possess to practise the law and to be a member of a self-respecting profession. The practitioner's behaviour showed a complete disrespect for the rights of his former partner and for the law more generally. A member of the broader community could not reasonably be expected to invest trust and confidence in such a person if they were obliged to consult them to handle their legal affairs.

119 No doubt circumstances may arise from time to time when a legal practitioner, like any other member of the broader community, may behave irrationally, or in an illegal way, in the heat of the moment. That is not to say their conduct is legally excusable, but it may help to explain it. In those types of cases, a legal practitioner with a formerly unblemished record, who has put the events that led to his irrational behaviour behind him and who, on all appropriate advice, may be expected not to offend again, may well be disciplined in a way that will not result in the practitioner losing his or her livelihood as a lawyer. Counselling, a reprimand, and a fine may be appropriate in such cases.

120 The difficulty in this case is that the practitioner seems initially to have reacted, in the heat of the moment, by destroying or damaging property belonging to Ms A, after she confessed to him, on his demands, that she had seen another person. The confession appears to have been contrary to the practitioner's belief that she and he were in a close and faithful personal relationship. If the facts of this case were that the illegal conduct of the practitioner had come to an end after a few days, that the practitioner had in effect "got over" that incident, and on all appropriate advice, appeared unlikely to offend again, then the appropriate form of discipline might have been less severe than we think is now called for.

121 Here, the practitioner's conduct went on for nearly four months, such that he was convicted of the stalking offence. It escalated in ways designed to cause harm to Ms A in public ways. The practitioner's conduct in sending a video of their sexual conduct to Ms A's work place supervisor and to the Midland police was obviously designed to cause her

maximum hurt, embarrassment and humiliation. It seems to have succeeded in doing so.

122 The conduct of the practitioner in removing Ms A's pet dog from her home is a further instance of his behaviour calculated to cause Ms A personal hurt, distress and generally to be fearful of what might happen next. Again, it had the desired effect because Ms A became fearful and was eventually forced to take the unfortunate step of leaving Perth to live elsewhere.

123 The psychological evidence produced before the Tribunal suggests that because he was so emotionally distressed at material times, the practitioner did not give much, if any, real consideration to whether or not he was acting illegally. He was bent on destroying "reminders" of his former relationship with Ms A and he was intent on ensuring that Ms A should suffer as much as he was suffering.

124 It seems from the psychological evidence that the practitioner was strongly motivated to act in the way he did because he considered that what Ms A had done was "morally wrong" and that, as time went by, there seemed to be "no repercussions" for Ms A arising from her conduct. At least that was the view of the practitioner. As Dr Watts said in his evidence, it cannot properly be presumed that Ms A did not suffer repercussions from the ending of the relationship. In any event, the practitioner's conduct was calculated to ensure that there were repercussions for her.

125 The Tribunal does not understand the psychological evidence to mean the practitioner did not know what he was doing. It is not suggested by counsel for the practitioner, or by the practitioner in anything he said to the Magistrate when he was convicted of the offence against the Criminal Code, or in his answer in these proceedings, or to the psychologists, that he was not responsible for what he did. The Tribunal considers that, properly understood, the psychological evidence merely goes to help explain that, because the practitioner was in an aroused emotional state following what he considered to be the "betrayal" of Ms A, he could not help himself by acting the way that he did. Only when the police intervened following surveillance of his removal of Ms A's pet dog from her home, did the full consequences of his actions strike home to the practitioner.

126 The Tribunal accepts that, in the ordinary course of life, as the psychological evidence suggests, persons occasionally suffer emotional

stresses that cause them for a period to act in ways that are quite out of character and that, once they are over that event, they revert to their normal behaviour and there is no particular reason to think they will act that way again.

127 However, in this case, the reaction of the practitioner to the emotional crisis he experienced was quite inordinate. Dr Watts thought that there were some indications that the practitioner manifested post traumatic stress disorder, but he did not conclude that he in fact was suffering that disorder. He also accepted it was difficult to understand why the practitioner's conduct continued for so long after the events of 16 January 2004, for nearly four months.

128 What became extremely evident from Dr Watts' evidence, and it must be remembered that Dr Watts only quite recently interviewed the practitioner, was that the practitioner has not recovered from the events that caused him to behave in the way that he did. Dr Watts believed that it may be another 18 months to two years, with the help of therapy, before he does finally recover. The practitioner has not left these events behind him. Dr Watts said that the conduct of the practitioner in not attending the disciplinary hearing, in reluctantly attending an interview with him, in selling his Perth and Northam properties and in moving to the country to work and live, are all indications the practitioner is using the technique of avoidance to avoid "triggers" to his emotional state. By these measures the practitioner tries to ensure that there will be no reminders of the events that caused him to behave in the way he did. Dr Watts' evidence strongly suggests that, without such psychological therapy the practitioner will not recover quickly from his initial and continuing responses of frustration and anger to the events that caused him to behave in this way in early 2004.

129 The Tribunal, on the basis of all this evidence, is not at all satisfied that it is open to conclude that the practitioner has recovered from the events that caused his emotional subsidence at the time of learning that his relationship with Ms A had come to an end. Nor can the Tribunal confidently assume that the practitioner is in any relevant sense remorseful for his conduct. Dr Watts' evidence suggests that the practitioner still holds to the view that Ms A's conduct at the time was "morally wrong" and that he was in some way justified to maintain his rage against her for a period of nearly four months until the police intervened.

130 The Tribunal does not consider that a reprimand, a fine or suspension for period to up to two years would be appropriate in the practitioner's case. If the practitioner were to be permitted to practice law at this point there would be a real concern about the public being properly protected. The public's interest in being able to consult and be represented by legal practitioners, who are free from any sense that they are entitled to disrespect or disregard the law and the rights of other persons, would be put at risk if the practitioner were allowed to resume the practise of the law at this time.

131 On the basis of the psychological evidence before us, it is not at all clear that this position is likely to be rectified at any time soon. Dr Watts thought that, with psychological therapy, the practitioner may recover from his trauma within about 18 months to two years from now. There is, however, no indication that the practitioner is interested in obtaining psychological therapy or wanting to put the effects of the trauma behind him, except by continuing to adopt the avoidance technique described by Dr Watts in his evidence.

132 In those circumstances, the Tribunal is not confident that suspension of the practitioner for a period of up to two years would adequately protect the public.

133 Under the *Legal Practice Act 2003* s 187, where the Tribunal finds a practitioner guilty of unsatisfactory conduct, the Tribunal may impose disciplinary penalties such as reprimand, fine and suspension for up to two years. If suspension beyond two years seems justified or striking off the Roll of Practitioners seems called for, the Tribunal must transmit a report of its findings to the Supreme Court (full bench) so that the appropriate form of discipline can be imposed by the Court.

134 In this case, the Tribunal is not satisfied that any of the disciplinary measures available to it under s 187 is appropriate. It believes that a stronger form of discipline is required.

135 Indeed in all the circumstances the Tribunal believes that consideration must be given either to the striking off of the practitioner's name from the Roll of Practitioners or a suspension for a much longer period than the two years available to the Tribunal under s 187.

Findings and Orders

136 The Tribunal makes the following findings and orders:

1. The Tribunal finds Michael Murray Tomlinson (the practitioner) guilty of unsatisfactory conduct under the *Legal Practice Act (2003)* WA, in terms of par [1] of the amended reference.
2. The Tribunal makes and transmits a report on the finding that is made to the Supreme Court (full bench) which, for the purposes of the *Legal Practice Act 2003* s 185(2)(a) is constituted by these reasons for decision.
3. Pending the determination of the Supreme Court (full bench) in relation to the report transmitted to it by the Tribunal, the practitioner is suspended from legal practice.
4. The Complaints Committee has liberty to apply in respect of the costs of the proceedings.
5. The decisions and reasons of the Tribunal may be published.

I certify that this and the preceding [136] paragraphs comprise the reasons for decision of the State Administrative Tribunal.

JUSTICE M L BARKER, PRESIDENT

Annexure A

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THE COURT OF PETTY SESSIONS OF

WESTERN AUSTRALIA

PE23301/04

B E T W E E N :

THE POLICE

- and -

MICHAEL MURRAY TOMLINSON

BEFORE : MR MALLEY, S.M.

TRANSCRIPT OF PROCEEDINGS

AT CARNARVON, ON THE 9TH DAY OF JULY, 2004

SGT A. BEAN appeared for the complainant.

The defendant appeared in person.

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(KR)

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HIS WORSHIP: Yes, good morning.

MR TOMLINSON: Morning, your Worship. Unfortunately, I appear before you as the defendant this morning, rather than the practitioner that I usually do.

HIS WORSHIP: Mm.

MR TOMLINSON: I'm in a position to plead guilty this morning to this charge, your Worship.

HIS WORSHIP: It's a charge of pursue with intent to intimidate - -

MR TOMLINSON: Yes, sir.

HIS WORSHIP: - - [Ms A] - -

MR TOMLINSON: Yes, sir.

HIS WORSHIP: - - on the 16th of February and the 7th of May. And there's a plea of guilty to the charge.

MR TOMLINSON: There is, sir.

HIS WORSHIP: Okay. Take a seat then - -

MR TOMLINSON: Sir.

HIS WORSHIP: - - please, Mr Tomlinson.

PROSECUTOR: Yes, sir, 16th of January 2004 the defendant ended⁷ an 18-month-long relationship with the complainant. On that day the complainant provided the defendant with keys to her home address at Bishopsgate Street in Carlisle to recover some of his property. Later that day when the complainant returned home she found the house was secure, however several items of her clothing had been damaged, two tops slashed, a dress burnt and a matching bag cut. One shoe from each pair of four pairs of shoes had been stolen. The complainant went outside to her Suzuki Vitara soft top that was parked in her driveway and noticed that the left-hand indicator was on and the indicator stick was snapped off.

On Saturday the 17th of January 2004 the complainant returned home noticing a strong smell of petrol coming from her vehicle. A later inspection of the fuel tank found the fuel cap loose and a quantity of green jelly-like material in the bottom of the tank.

On Monday the 19th of January 2004 the complainant left her premises at about 6 am to take her dogs for a walk to a nearby park. This is a usual occurrence for the complainant. Upon

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returning from her walk the complainant found a liquid material over every panel of her vehicle that was parked in the carport. Upon cleaning the fluid off the vehicle it became clear that the liquid had in fact damaged the paint on the vehicle.

On Wednesday the 21st of January 2004 at about 2 pm, the complainant received a video cassette tape addressed to her at work. The tape was found to be an edited copy of a video recording that the complainant and the defendant made while still in their relationship. The tape showed the complainant performing various sexual acts with the defendant.

On the 25th of January 2004 the complainant returned home at 9.30 pm, the complainant noticed that her two dogs were inside. Upon entering a room she noticed that a door that led from her bedroom to the back yard had been damaged and left unsecured. She noticed that several items of her clothing and property were missing, including one shoe off each property - - three pairs of shoes similar to 16th of January, and when the defendant attended the address to pick up his - - when - - to pick up his property.

On the 3rd of - - February 2004, the complainant was at her work address when she was approached by a supervisor advising her that a video cassette had been sent to the office and had been viewed by several staff members. The tape was an identical copy of the tape received on the 21st of January showing the complainant performing sexual acts with the defendant.

On the 24th of February 2004, the complainant's vehicle was parked in her driveway. She noticed that each of the panels on the driver's side was deeply scratched by an unknown implement.

On the morning of Tuesday the 13th of April 2004 the complainant went to the carport where her vehicle was parked, and found her vehicle had been spray painted. A closer inspection revealed that every panel of the vehicle had been covered in a blue spray paint. Further to this the complainant found the top soft - - soft top canopy had been slashed. Two slashes were found in the driver's canopy window, and three in the rear window.

On the 24th of April the complainant again went to the carport where her vehicle was parked and noticed new slash marks on the windows of the vehicle canopy. New slash marks were found on the roof and the passenger side window. Further to this the existing slash marks had been made bigger.

In response to these events a covert police surveillance camera was installed at the complainant's premises. On the

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29th of April 2004 at 6.48 pm, the defendant was recorded on surveillance attending the complainant's residence. Whilst at the premises the complainant returned home and entered the premises not being aware of the defendant's presence. Upon the complainant gaining entry to the house the defendant left the premises without declaring himself to the complainant.

On the 7th of May this year at about 3.48 pm, the defendant again attended the complainant's address. The defendant entered the premises carrying an empty bag and left carrying a full bag, contents unknown. Later the same afternoon, the defendant removed the complainant's pet dog from behind a fenced off area. The defendant led the dog from the premises without authority from the complainant. The incident was also recorded by way of covert police surveillance camera.

On the 10th of May this year, police executed a search warrant under section 11 at the defendant's address at number 7, 146 Carr Street in West Perth. On completion of the search warrant the defendant was arrested and conveyed to the Kensington Police Station. Police invited the defendant to take part in a video record of interview, however he declined to make any comment. The defendant denied knowledge of removing the dog until confronted by the video tape evidence.

The defendant was processed and released on bail condition from the Kensington Police Station, and the complainant at the time was seeking a violence restraining order against the defendant. Sir, there's no record. Seeking costs of \$159 being for the complaint and the search warrant, sir.

HIS WORSHIP: Yes, Mr Tomlinson, what did you want to say?

MR TOMLINSON: Sir, unfortunately, I would have to admit those facts. Sir, I'd been in a relationship with the complainant for approximately 18 months and we had been effectively living together. On 16th of January I discovered that my partner had been having an affair - - or engaged in another relationship for - - approximately 6 months. I ended the relationship that day and informed her that obviously everything was over.

Sir, I can only say that this discovery absolutely devastated me. I was under the impression that we were soon to be engaged and she'd led me to - - to believe that. Sir, I became angry, depressed, clinically depressed as it turns out. Unfortunately at that particular time, it's the nature of this condition, I just didn't realise it. Sir, for the last couple of months I've just been in a very dark place.

The initial damage outlined in the statement of material facts was done to items that I'd bought the complainant as part of gifts in our relationship. Initially, obviously I was angry, and I thought that that would be the end of it, and - - and I could move on.

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In the week subsequent to that, I was unable to complete my duties as a solicitor at the Youth Legal Service. I was becoming more depressed. I was absolutely no use to my clients or my colleagues and unfortunately I - - I was forced to resign my position because of this situation. I took 2 weeks off, sir, and basically wasn't able to resolve anything and just became more and more depressed.

I then had to take another position because I have a mortgage and debts to pay, with another firm. I was hoping sir, the new environment in Fremantle far away from town, I might be able to get over this. Unfortunately, it simply exacerbated the situation. The position I - - took was more senior than the one I left, coupled with the fact that I was still depressed, it - - I just became more and more depressed. The stress of the new position, as I said, exacerbated it.

Sir, for the last several weeks, I've been seeing Mr Bruce Beaton, who's a clinical psychologist, once a week. He has been seen - - as I said, once a week. He's compiled a - - a report for court this morning, sir, and he's also available on the phone. He actually will be in Carnarvon in about 2 hours time, sir, but, he's actually on holiday.

HIS WORSHIP: Have you got the report have you?

MR TOMLINSON: Sir, most definitely, sir. Sir, at this stage, perhaps, given that I'm - - appear to be last on the list, sir, perhaps we could stand the matter down to give you the opportunity to read the report. It outlines many, many areas that at this point in time, I don't - - I feel are extremely relevant and I don't - - I would have - - great difficulty at this point in time running through verbally, sir.

I also have a letter from my employer. Of course when I was arrested the first thing I did was give the material facts to my senior partner. He has a letter that he asked me to submit to court as well, sir.

HIS WORSHIP: Thank you. Well, okay, in relation to these matters I will stand them down - -

MR TOMLINSON: Sir.

HIS WORSHIP: - - and read the documents. I have one other matter which I think I can deal with before then so - -

MR TOMLINSON: Sir.

HIS WORSHIP: - - you just take a seat.

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UPON RESUMPTION:

HIS WORSHIP: Yes, I give my reasons for sentence in relation to this matter. The defendant is charged with one count of pursuing another to intimidate, section 338B(2)⁷ of the Code, and he's pleaded guilty to that charge, on the material supplied. The defendant is 37 years of age, a legal practitioner by profession. It's fair to say the report indicates that he's highly educated, masters degrees in law and in psychology. The psychologist report suggests a strong sense of social justice which I appreciate given the nature of his prior employment, it's not - - it's not an easy one that one would take on, certainly to - - to say create a fortune. He comes before the court without record and has pleaded guilty. Not at the earliest opportunity, but certainly without requiring the prosecution to require trial, and in that regard in my view, gets the benefit of early plea.

I have to say, reading the psych - - psychologist's report there is nothing unusual in the defendant's upbringing and in the later years. Nothing we'll say - - shall we say, it was a - - appears to be a normal upbringing.

He met the complainant as I understand in June of 2002 and the relationship can be described as what I would describe as a relatively new relationship. It was fair to say that it was not of such a long-standing nature in the terms of - - time together that its demise would cause the - - shall we say, the consequences that in fact happened to the defendant's mental and physical state. We're all different, you have to say just looking at it, it doesn't seem to me that the relationship had been of such, shall we say, a long standing state that the reaction that was⁷ caused⁷ is frankly understandable. It's fair to say the defendant's reaction to the breakdown caused by the - - what he perceived to be the infidelity and taken on face value, that that's what precipitated events, I have to say, is - - is extreme, and frankly in any sense of the way, way out of proportion to - - to anything he felt wronged by her actions.

Whilst I accept the report's conclusion that the defendant was traumatised that in itself, frankly, is an everyday life experience that all of us in our life from time to time suffer. Whether it be in the form of a rejection, or whatever, we all suffer those life experiences. And certainly - - fair to say that, I think your reaction to it, Mr Tomlinson, is as I say is one of the more extreme that I've come across. As a consequence of that relationship breakdown I accept the defendant became depressed and his behaviour irrational and it was clear this was, I have to say not a one-off action.

As I understand from the facts of the 16th of January, there was damage to belongings, and a car at a time he was meant to be picking up items in the house, 17th of January, damage to the motor vehicle; 19th of January damage to the motor

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vehicle; 21st of January the forwarding of a video of a sexual nature to the complainant; 25th of January, damage to the home. I have to say that matter could well, I would've thought, been on the face of it, deemed to be a burglary, frankly, but, anyway, 3rd of February, a video sent to the office and witnessed by office staff or seen by office staff; 24th of February, damage to the motor vehicle again; 13th of - - April damage to the vehicle and it's of a certainly substantial nature; 24th of April, more damage; 29th of April, on premises, and 7th of May again, once again on premises without consent.

What we have is over a period of months, what I'd call a concerted campaign. This is not a case of gone in once. One can understand maybe chopped up a few clothes, not that it's desirable or - - or justified, but this is a - - this is a concerted, one would call, attack.

I'm conscious of the defendant's antecedents, the psych report and the reference from the defendant's employer. They speak of him highly and the fact that he's a - - it's out of character. Having said - - said that, in sentencing is a balancing act. I have no victim impact statement, but reasonable to conclude that an ordinary person, in particular a female in these circumstances would be traumatised by the defendant's actions, continual damage, entering on the property, a clear intent to humiliate by posting the video as I say which was seen by co-workers.

The charge carries a maximum penalty on the summary conviction - the matter is being dealt with summarily - no - - no request that the matter be dealt otherwise, with conviction a fine of up to \$6000 or 18 months imprisonment. On indictment there carries a gaol term of 3 years. In this case the defendant is receiving medical assistance - - in relation to ongoing psychological counselling, as I understand it. And even if it was an appropriate sentence, it's certainly in my view in this case that community supervision is not appropriate or warranted.

On balance the needs - - the need to be conscious of the defendant's background, the personal circumstances including the psychological issues with the serious circumstance of creating a substantial harm to the complainant's property and no doubt to her mental wellbeing. Those are considerations I have to have. I see the behaviour to be at the higher end of the scale for this type of - - charge. It involved considerable damage, planned - - it would have to be planned actions over a period of months, it wasn't an isolated incident. The defendant had ample time to consider the consequences. No doubt, as a result of his mental state continued what I consider to be a - - almost an assault of a - - on her property.

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I've reached the unfortunate conclusion that a fine in all circumstances is not - - does not reflect the seriousness, nor provide the degree of personal general deterrence required. The starting point in allowing for the defendant's prior⁷ behaviour has to be imprisonment. Having reached that conclusion I have to decide if the sentence should be suspended. The term I impose is 9 months imprisonment that being 18 months less 6 months for the absence⁷ of remission⁷ for 3 months for a plea of guilty. I've imposed the 18 months on the basis that that is the limit of my jurisdiction, not the maximum which is in fact 3 years on indictment.

Having considered all those matters as relevant to the defendant, namely the plea of guilty, his contribution to the community, his remorse and psychological issues and the likelihood of rehabilitation, I'm of the view that a suspension of the term in all the circumstances is appropriate. The order that the defendant serve 9 months imprisonment, that term of imprisonment will be suspended for a period of 18 months. In relation to that charge you well understand the system, Mr Tomlinson.

MR TOMLINSON: Sir.

HIS WORSHIP: Any breach that carries with it a potential gaol term and certainly anything involving the complainant in these proceedings would inevitably result in a custodial term. You understand that?

MR TOMLINSON: Sir, I do.

HIS WORSHIP: And no orders to costs on the matter, so there's 9 months suspended imprisonment, suspended 18 months. In my view, given the serious nature of - - of the charge the penalty of a conviction inevitably follows.

Yes thank you very much, just take a seat in the back.

Certification of Transcript

I, Katrice Rawlings, Transcript Checker of 10 Victoria Avenue
Perth certify that on this day 10th August 2004, the
transcript of proceedings produced from the audio recordings
of the matter:

Case Number: PE23301/04

Parties: THE POLICE

- and -

MICHAEL MURRAY TOMLINSON

1. has been made in good faith and, unless specified otherwise within the transcript itself, is an accurate and complete transcription of the recording.
2. the condition of the recording was suitable for making an accurate and complete transcription of the contents of the recording subject to item 1.

Signature

Verbatim Reporters (1980)