QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*Legal Services Commissioner v Ferguson* [2021] QCAT 205
PARTIES:	**LEGAL SERVICES COMMISSIONER** (applicant) **V** **KENNETH IAN FERGUSON** (respondent)
APPLICATION NO/S:	OCR102-20
MATTER TYPE:	Occupational regulation matters
DELIVERED ON:	8 July 2021
HEARING DATE:	12 February 2021
HEARD AT:	Brisbane
DECISION OF:	Justice Daubney, President Assisted by: Mr Geoffrey Sinclair Ms Patrice McKay

ORDERS:

1. **There is a finding that the Respondent engaged in professional misconduct.**
2. **The Respondent is publicly reprimanded.**
3. **The Respondent not be granted a practising certificate for a period of three years from 5 November 2019.**
4. **During the balance of that three year period, the Respondent shall continue to attend psychiatric consultations at least once every six months.**
5. **Following the expiration of the said three year period, any application by the Respondent for a practising certificate must be accompanied by:**
   - **(a) a copy of these reasons; and**
   - **(b) a report on his mental condition and its effect on his ability to engage in legal practice, prepared by an independent practising psychiatrist who has been provided with a copy of these reasons, with such report to be prepared not earlier than six months prior to**

the date upon which the Respondent makes any such application.

6. **The Respondent's second application for a practising certificate after the expiration of the said three year period must be accompanied by a report on his mental condition and its effect on his ability to engage in legal practice, prepared by an independent practising psychiatrist who has been provided with a copy of these reasons, with such report to be prepared not earlier than six months before the date upon which the Respondent makes that application.**

7. **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 18 months' imprisonment, suspended – where applicant filed a discipline application in the Tribunal – where respondent has admitted to all allegations in that application – where respondent's practising certificate was cancelled – where respondent accepts there should be a finding of professional misconduct – where the Tribunal is required to make finding on sanction – where respondent has demonstrated insight and remorse for offending – where respondent has cooperated fully with the Tribunal – where respondent has engaged in rehabilitative treatment – whether the Tribunal should impose a public reprimand – whether any further orders are necessary or warranted

Legal Profession Act 2007 (Qld), s 9, s 68, s 419, s 420, s 456, s 462

Allinson v General Council of Medical Education & Registration [1894] 1 QB 750
Legal Services Board v McGrath (No 2) [2010] VSC 332
Legal Services Commissioner v CBD [2012] QCA 69
Legal Services Commissioner v Keliher [2021] QCAT 211
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 New South Wales v P [2003] NSWCA 320
Ziems v The Prothonotary of the Supreme Court of New South Wales (1957) 97 CLR 279

APPEARANCES & REPRESENTATION:

Applicant:	M Lester, instructed by Legal Services Commissioner
Respondent:	Self-represented

REASONS FOR DECISION

[1] On 5 November 2019, the Respondent, Kenneth Ian Ferguson, was convicted on his own plea of guilty in the District Court of Queensland of the following offences:

(a) the Commonwealth offence of using a carriage service to transmit, make available, publish, distribute, advertise or promote child pornography (on 15 September 2018); and

(b) the State offence of possessing child exploitation material (on 14 December 2018).

[2] Each of these is a "serious offence" for the purposes of the *Legal Profession Act 2007* (Qld) ("LPA").

[3] The effective head sentence imposed was a term of 18 months' imprisonment, suspended immediately. The Respondent was also required to give a good behaviour recognisance.

[4] These convictions were a "show cause event" for the purposes of the LPA. The Respondent complied with his obligations under s 68 of the LPA to give the requisite notice of these show cause events to the Queensland Law Society ("QLS").

[5] On about 4 December 2019, the QLS provided a copy of the "show cause" material to the Applicant, the Legal Services Commissioner.

[6] On 24 April 2020, the Applicant filed the present discipline application under the LPA, bringing one charge against the Respondent, namely that his convictions in the District Court for the serious offences constituted professional misconduct or unsatisfactory professional conduct.

[7] By his response filed in the Tribunal on 15 June 2020, the Respondent expressly admitted all of the allegations in the discipline application.

[8] In the meantime, on 21 May 2020, the QLS resolved to immediately cancel the Respondent's practising certificate, with a further direction that he not be entitled to apply for a practising certificate for two years.

The offending conduct

[9] On 15 September 2018, the Respondent came to the attention of the Queensland Police Task Force Argos officers when he was downloading a child pornography video via a "peer to peer" network. The Respondent's download via that network also made the

video available to other internet users. Hence, the Commonwealth charge of using a carriage service to transmit, etc, child pornography on that date.

[10] On 14 December 2018, police executed a search warrant on the Respondent's home and located a number of computers and storage devices. A preliminary analysis of the computers yielded a number of images and videos which comprised child exploitation material ("CEM"). A subsequent analysis of the computers and hard drives yielded further CEM. The computer and hard drives contained large amounts of pornographic material, but only a small percentage of that was CEM. Between 95% and 99% of the material was adult pornography or other unobjectionable material.

[11] The Respondent was sentenced on the basis of his acceptance of the number of images confirmed by the police as CEM during their triage of the material.

Characterisation of the conduct

[12] The Applicant submits, and the Respondent has expressly accepted, that the Tribunal should find that the Respondent's conduct should be characterised as professional misconduct.

[13] By s 419(1)(b) of the LPA, the term "professional misconduct" relevantly includes conduct by a legal practitioner 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. In making that finding, regard may be had to the "suitability matters" considered for a person's admission to the profession. That includes whether a person has been convicted of an offence.[1]

[14] Moreover, s 420(1)(c) relevantly provides that conduct for which there is a conviction for a serious offence is conduct which is capable of constituting unsatisfactory professional conduct or professional misconduct.

[15] Applying the longstanding *Allinson* test,[2] there can be no doubt 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.

[16] It was, therefore, conduct which would justify a finding that, at the time of the conduct, the Respondent was not a fit and proper person to engage in legal practice.

[17] The Tribunal finds that the Respondent engaged in professional misconduct.

Sanction

[18] Having made that finding, the Tribunal has the discretion to "make any order it thinks fit".[3] That discretion, however, must be exercised for the proper purpose of these disciplinary proceedings. It is well established that these proceedings are not punitive of the practitioner, but protective of the public. The Respondent has already been punished in the District Court for having engaged in this offending activity. The proper approach for this Tribunal is to make orders by which "regard should primarily

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1 LPA, s 9(1)(e).
2 *Allinson v General Council of Medical Education & Registration* [1894] 1 QB 750.
3 LPA, s 456(1).

be had to the protection of the public and the maintenance of proper professional standards".[4] It is also well established that:

(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 practice; and

(b) the determination is as to present fitness, not fitness at the time of the offending conduct.[5]

[19] The offending conduct occurred in the Respondent's private life, not as an incident of his legal practice. It is trite to observe that no legal practitioner should be engaged in any criminal conduct, let alone such serious offending as that involving CEM. But, as the Court of Appeal in this State noted in an appeal in a disciplinary proceeding concerning a legal practitioner who was serving a suspended sentence for child pornography offences, there is no inflexible principle that a person serving a suspended sentence was necessarily, by that fact alone, not of good fame and character and thus, not a fit and proper person to engage in legal practice.[6]

[20] In *Legal Services Board v McGrath (No 2),*[7] Warren CJ said:[8]

> 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.

[21] Chief Justice Warren, however, went on to make three further points:[9]

(a) 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;

(b) the legal profession demands both empathy and insight into the victims of criminal behaviour, and any conviction which appears to show a disdain for victims will raise a serious concern about a practitioner's professional and moral fitness to remain an officer of the court; and

(c) any suggestion that crimes committed at arm's length, such as those involving 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.

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4 *Legal Services Commissioner v Madden* [2009] 1 Qd R 149, [122].
5 See the authorities collated in *Legal Services Commissioner v Munt* [2019] QCAT 160, [43].
6 *Legal Services Commissioner v CBD* [2012] QCA 69, [23].
7 [2010] VSC 332.
8 Ibid, [12] (and omitting footnotes and citations).
9 Ibid, [13]-[16].

[22] The distinction between misconduct which occurs in connection with legal practice and misconduct in the practitioner's private life has long been recognised.[10] *Prothonotary of the Supreme Court of New South Wales v P*[11] was a case in which the practitioner had engaged in conduct characterised as professional misconduct outside the course of legal practice. While practising, a solicitor had been using cocaine for many years and was a heroin addict. She was convicted of the serious drug offence of importing into Australia a large quantity of cocaine. She was sentenced to six months' imprisonment, to be released after three months upon entering into a recognisance to be of good behaviour for three months after her release. By the time of the decision of the Court of Appeal of New South Wales on an application for her to be struck off, she had not practised as a solicitor or used illicit drugs or alcohol for some three years. There was evidence, in that case, of clear and convincing rehabilitation, and that evidence was not challenged. The Court did not order her to be struck off, but accepted an undertaking that she would not apply for a practising certificate until five years had passed since the commission of the offence.

[23] In the course of giving judgment, Young CJ in Eq, who delivered the judgment of the Court, recounted a number of established propositions, including:[12]

(a) the fact that a practitioner is convicted of a serious offence is not necessarily sufficient reason for a striking off order;

(b) the fact of conviction and imprisonment is, however, far from irrelevant and may be regarded as carrying a degree of disgrace itself;

(c) the conduct in question must be examined to see whether it is of such personally disgraceful character that the practitioner should not remain a member of the profession;

(d) the fact that the practitioner pleaded guilty will usually be counted in their favour; and

(e) 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 the practice.

[24] In that case, Young CJ in Eq also accepted and applied ten propositions, derived from American authorities, which he considered could point to compelling mitigating circumstances in cases such as the present:[13]

1. absence of a prior disciplinary record or criminal record;

2. absence of motive for personal enrichment;

3. honesty and cooperation with the authorities after detection;

4. the offences being unrelated to the practice of law;

5. the ignominy of having suffered a criminal conviction and the deterrent element;

6. the absence of premeditation with respect to the commission of the crime;

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10 *Ziems v The Prothonotary of the Supreme Court of New South Wales* (1957) 97 CLR 279, 290.
11 [2003] NSWCA 320.
12 Ibid, [17].
13 Ibid, [24].

7. evidence of good character;

8. any voluntary self-imposed suspension or court imposed temporary suspension from practice;

9. delay in commencing disciplinary proceedings; and

10. most importantly, clear and convincing evidence of rehabilitation.

[25] This Tribunal has adopted and applied those propositions in previous matters, noting that the list is neither closed nor determinative, but provides a useful catalogue of matters which commonly arise for consideration in cases like this.[14]

[26] It is, therefore, appropriate to have regard to the Respondent's circumstances before, at the time of, and since the offending conduct.

[27] The Respondent is in his early sixties. He was admitted to practice in 1984 and worked as both an employed solicitor and as a principal at various times until the QLS cancelled his practising certificate in May 2020. In 2006, he was the subject of a finding of unsatisfactory professional conduct by the Legal Practice Tribunal. That arose from a mistake concerning dealing in trust account moneys. Notably, the Tribunal, in that case, expressly held that it was not a case of dishonesty, but one of misapprehension. He otherwise has no disciplinary history. At the time he was dealt with for this offending in the District Court, he had what the learned sentencing Judge described as "a very minor and irrelevant Australian Federal Police history". That was for a failure to lodge BAS returns in the 1990s. Otherwise, he has no Queensland criminal history.

[28] The Respondent fully disclosed his personal and professional antecedents in a statutory declaration dated 29 November 2019 which he provided to the QLS.

[29] That statutory declaration also addressed at some length the circumstances of his offending conduct, the matters which led to him engaging in that conduct, details of the psychological and psychiatric assistance he had accessed since his arrest, the impact on him and his family, and expressions of his insight, contrition and remorse. That statutory declaration was also put before this Tribunal, together with a statement of submissions by the Respondent which updated matters such as the ongoing psychiatric and psychological treatment being undertaken.

[30] The Respondent's material also included a copy of the sentencing remarks, copies of reports by his treating psychiatrist and treating psychologist, correspondence from his counsel in connection with the sentencing hearing, copies of the Respondent's responses to notices received from the QLS and the Applicant, and copies of references from his wife, other family members and friends, and a number of professional colleagues, including the principal of the law practice at which the Respondent was last engaged.

[31] The Respondent also appeared in person before this Tribunal for the hearing of the discipline application.

[32] It is not necessary to recount the details of his personal antecedents. It is sufficient to note that, before he engaged in the offending conduct, the Respondent had

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[14] See *Legal Services Commissioner v Meehan* [2019] QCAT 17; *Legal Services Commissioner v Munt* [2019] QCAT 160.

encountered and dealt with some significant family issues. Unfortunately, the Respondent's professional life had also presented a number of significant financial challenges resulting from factors outside his control. The combination of stresses led to a deterioration in the Respondent's personal life and a growing dependence on accessing online pornography.

[33] The Respondent's treating psychiatrist expressed the opinion that, at the time of the offending, the Respondent was suffering from an Adjustment Disorder with depressed mood and anxiety, and alcohol abuse.

[34] It is clear from the material that the Respondent has demonstrated insight and remorse for his offending. He cooperated fully with the authorities, both in the criminal and in the professional disciplinary hearings. He entered an early plea of guilty to the criminal charges, and admitted the professional misconduct. He provided full and frank statements.

[35] Importantly, he did not seek to excuse his behaviour. On the contrary, he recognised the need for reform, and immediately embarked on a program of rehabilitation. That included extended psychiatric and psychological assistance, details of which are set out in the material before the Tribunal.

[36] The Respondent has the ongoing support of his close family and friends. References from professional colleagues are complimentary and supportive.

[37] His prior professional career was satisfactory, with only one minor blemish which arose from his reliance on another person. The convictions for a failure in the 1990s to lodge BAS returns on time are not relevant for present purposes.

[38] The Respondent has not practiced since the QLS cancelled his practising certificate. More recently, he has been engaged in labouring jobs to support his family.

[39] The Respondent scores well in respect of the list of mitigating factors identified by Young CJ in Eq. Most importantly, there is in this case clear and convincing evidence of insight, remorse and rehabilitation. In that regard, this case can be distinguished from the Tribunal's recent decision in *Legal Services Commissioner v Keliher*,[15] in which there were serious doubts about the nature and extent of that Respondent's insight and remorse. A much more comparable case to the present was that considered by the Tribunal in *Legal Services Commissioner v Woodman* ("*Woodman"*).[16]

[40] The Tribunal is persuaded that, in the circumstances, it should accept the following submission made by the Applicant:[17]

> It can be adduced from the evidence filed that the respondent is remorseful for his actions and feels deep shame for his offending. He has demonstrated insight into the nature of his conduct and has strong remorse. Similar to the solicitor in *P's case*, it can be said about the respondent that there is little utility in his name being struck from the roll for the purpose of protecting the public, and nor is any worthwhile deterrent element in this case.

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15 [2021] QCAT 211.
16 [2017] QCAT 385.
17 Applicant's submissions filed 15 January 2021.

[41] That being said, the gravity of the Respondent's offending should be reflected in an appropriate sanction. As was said in *Woodman*:[18]

> The respondent's offences were serious and distasteful enough to require a significant period of disqualification or suspension from practice. It is desirable to signify the seriousness with which such conduct is regarded, and to enable rehabilitation to take place, and to maintain public confidence in the profession.

[42] Having regard to the circumstances of this case, the time which has elapsed since the offending, and the demonstrated efforts to undergo rehabilitation, the Tribunal considers that the appropriate sanction is a suspension for three years from the date of the Respondent's conviction for the subject offences.

[43] It is also appropriate for there to be a public reprimand, which in itself is a serious matter.

[44] In the course of argument, the Respondent affirmed that he would accept orders which went to ensuring his ongoing rehabilitation treatment and to requiring him to produce psychiatric evaluations when he applies for a practising certificate in the future. The Tribunal considers these to be appropriate, noting also that these concessions are further demonstrations of the Respondent's commitment to rehabilitation.

[45] The Respondent also accepted that he could not avoid the costs order prescribed by s 462 of the LPA.

Orders

[46] For the reasons set out above, there will be the following orders:

1. There is a finding that the Respondent engaged in professional misconduct.
2. The Respondent is publicly reprimanded.
3. The Respondent not be granted a practising certificate for a period of three years from 5 November 2019.
4. During the balance of that three year period, the Respondent shall continue to attend psychiatric consultations at least once every six months.
5. Following the expiration of the said three year period, any application by the Respondent for a practising certificate must be accompanied by:
   (a) a copy of these reasons; and
   (b) a report on his mental condition and its effect on his ability to engage in legal practice, prepared by an independent practising psychiatrist who has been provided with a copy of these reasons, with such report to be prepared not earlier than six months prior to the date upon which the Respondent makes any such application.
6. The Respondent's second application for a practising certificate after the expiration of the said three year period must be accompanied by a report on his mental condition and its effect on his ability to engage in legal practice, prepared by an independent practising psychiatrist who has been provided with a copy of

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18 [2017] QCAT 385, [49].

these reasons, with such report to be prepared not earlier than six months before the date upon which the Respondent makes that application.

7. 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.