[2021] WASAT 80

JURISDICTION	**:**	STATE ADMINISTRATIVE TRIBUNAL
CITATION	**:**	LEGAL PROFESSION COMPLAINTS COMMITTEE and MIZEN [2021] WASAT 80
MEMBER	**:**	PRESIDENT PRITCHARD MR D AITKEN, SENIOR MEMBER DR E MARILLIER, MEMBER
HEARD	**:**	26 MAY 2021
DELIVERED	**:**	Ex tempore
PUBLISHED	**:**	2 JUNE 2021
FILE NO/S	**:**	VR 15 of 2021
BETWEEN	**:**	LEGAL PROFESSION COMPLAINTS COMMITTEE Applicant AND DAVID CHARLES MIZEN Respondent

Catchwords:

Legal practitioners - Disciplinary proceedings - Whether practitioner engaged in professional misconduct - Whether practitioner fit and proper person to remain a member of the legal profession - Possession and distribution of child exploitation materials - Report to the Supreme Court (full bench) - Recommendation to remove practitioner from roll of practitioners

Legislation:

Criminal Code (WA), s 219(2), s 220
Legal Profession Act 2008 (WA), s 3, s 4, s 5, s 403, s 404(c)(i), s 438

Result:

Application allowed

Category: B

Representation:

Counsel:

Applicant : Mr S Merrick
Respondent : In Person

Solicitors:

Applicant : N/A
Respondent : N/A

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

Craig v Medical Board of South Australia [2001] SASC 169; (2001) 79 SASR 545
Khosa v Legal Profession Complaints Committee [2017] WASCA 192
Legal Profession Complaints Committee v Brickhill [2013] WASC 369
Legal Practitioners Complaints Committee v McKerlie [2007] WASC 119
Singh v Medical Board of Australia [2019] WASCA 51
Ziems v Prothonotary of the Supreme Court of New South Wales [1957] HCA 46; (1957) 97 CLR 279

REASONS FOR DECISION OF THE TRIBUNAL:

(These reasons were delivered orally at the conclusion of the hearing. They have been edited to correct matters of grammar and infelicity of expression.)

The application

1 The Legal Profession Complaints Committee (**Committee**) has made an application to the Tribunal in which it seeks a finding pursuant to s 438(1) of the *Legal Profession Act 2008* (WA) (**LP Act**) that David Charles Mizen (**Practitioner**) has engaged in professional misconduct (**Application**). Consequent on that finding, the Committee seeks that the Tribunal make orders pursuant to s 438(2) of the LP Act, namely that Tribunal should make and transmit a report on its finding of professional misconduct to the Supreme Court (full bench) in order for the Court to consider removal of the Practitioner's name from the roll of practitioners.

2 In its application, the Committee initially sought an order for its costs, but as the Practitioner did not oppose the Application, the Committee applied for and was granted leave to withdraw its application for costs.

3 The finding of professional misconduct sought by the Committee follows the conviction of the Practitioner in the District Court of Western Australia on 22 December 2020, of one count of the distribution of child exploitation material and two counts of possession of child exploitation material, contrary to s 219(2) and s 220 of the *Criminal Code* (WA) respectively. He was sentenced to a total effective sentence of 3 years' immediate imprisonment in respect of those offences.

4 For the reasons which follow, we find that the Practitioner has engaged in professional misconduct, and we will make an order that the Tribunal make and transmit a report on its finding to the Supreme Court (full bench) for the Court to consider the removal of the Practitioner from the roll of practitioners.

The material relied upon in support of the Application

5 The Committee filed the Application on 4 March 2021.

6 Following service of the Application, the Practitioner (who is incarcerated) wrote to the Committee to advise that he had no intention

of making any submissions or appearing at the hearing, and that orders could be entered by consent.

7 At a directions hearing on 1 April 2021, the Practitioner appeared via video link from prison. Although he indicated that he did not wish to make any response to the Application, the Tribunal gave him the opportunity to file any documents and written submissions on which he wished to rely in response to the Application. He has not filed any documents.

8 At the hearing today, the Practitioner confirmed that he did not oppose the Application.

9 In support of the Application, the Committee filed a book of documents on which it wished to rely (Exhibit 1 in the Application), which included an amended statement of material facts relied upon by the State at the Practitioner's sentencing hearing in the District Court (together with an attachment thereto); the transcript of the sentencing hearing in the District Court on 22 December 2020; and copies of correspondence passing between the Legal Practice Board or the Committee and the Practitioner prior to the filing of the Application. The Committee also filed an outline of written submissions in relation both to the finding of misconduct which it seeks, and to the penalty which should be imposed.

Factual findings in relation to the conduct of the Practitioner

10 Having regard to the documentary evidence on which the Committee relies, and which is not contradicted by the Practitioner, we make the following findings.

11 On 22 December 2020, the Practitioner was convicted on his plea of guilty, to one count of distributing child exploitation material, contrary to s 219(2) of the *Criminal Code*, and to two counts of possession of child exploitation material (counts 2 and 3), contrary to s 220 of the *Criminal Code*. The two counts of possession of child exploitation material related to images and video stored on a USB drive and an external hard drive connected to the Practitioner's laptop.

12 Those offences carried a maximum penalty of 10 years' imprisonment and 7 years' imprisonment respectively. The Practitioner was sentenced to 12 months' immediate imprisonment on count 1, to 14 months' immediate imprisonment on count 2, and to 2 years' immediate imprisonment on count 3. The sentence imposed for count 1

was made cumulative on the sentence imposed on count 3, with the result that the Practitioner was sentenced to a total effective sentence of 3 years' immediate imprisonment. He was made eligible for parole.

13 The Practitioner did not dispute the facts relied upon by the State at the sentencing hearing. In summary, the findings by the learned sentencing judge in respect of those facts were as follows.

14 Following an investigation, police identified that between 30 January 2019 and 31 January 2019, an IP address allocated to the Practitioner's computer by his internet service provider was part of a 'Peer 2 Peer' (**P2P**) network which allowed files containing child exploitation material to be requested and made available via the Practitioner's IP address. The child exploitation material which was made available was from a collection of child exploitation material which the Practitioner had in his possession. Participation in the P2P network permitted the Practitioner to download material, and relevantly meant that other users on the network were able to upload child exploitation material which the Practitioner had stored on those of his devices that were connected to the internet during that period. That was the conduct which constituted the distribution of child exploitation material in count 1.

15 In relation to counts 2 and 3, the police executed a search warrant at the Practitioner's workplace and home. They located a laptop in his office, together with a USB thumb drive. They found an external hard drive connected to a laptop at his home. The thumb drive and the external hard drive contained images and videos of child exploitation material.

16 The images and videos of child exploitation material which were the subject of counts 2 and 3 were counted and categorised according to the Child Exploitation Material Sentencing Classification Scheme. Under that Scheme, images and videos are categorised by reference to five categories of an increasingly serious sexual nature. By way of example, category 1 involves depictions of children involving nudity, underwear, sexually suggestive poses, genital areas, and solo urination, but no sexual activity. Category 3 involves non-penetrative sexual activity between children and adults. Category 5 concern depictions involving sadism, bestiality and child abuse.

17 In relation to count 2, the thumb drive contained 35 images and 90 videos categorised as falling within categories 1 through to 5. The

images and videos falling within categories 1 to 4 involved children ranging from 5 to 12 years of age. Eight videos were categorised as falling within category 5 and involved children ranging from 6 to 9 years of age depicted in acts of bondage and bestiality.

18 In relation to count 3, the external hard drive contained 1,413 images and 230 videos, depicting children between the ages of 1 and 14 years. Those images and videos spanned categories 1 to 5. Those in category 5 comprised 261 images and 7 videos depicting children in acts of sadism, bestiality and bondage.

19 It is unnecessary to set out further detail of the nature of the images and videos found on the thumb drive and the external hard drive. It suffices to say that the learned sentencing judge described the category 5 images as being:

> particularly significant … both in terms of their level of depravity but also in terms of the pain that can be seen on the children who are depicted. … [T]hese are not fake images, these are real children. … [T]he category 5 images were both significant, highly perverse, depraved and showed images which depicted real punishment and pain suffered by these children.[1]

20 Some of the images also contained text which the learned sentencing judge characterised as 'providing information and encouragement to people as to how to engage in the actual sexual abuse of children'.[2]

21 Having regard to a psychological report in relation to the Practitioner, the learned sentencing judge found that the Practitioner had a sexual interest in children.[3] The learned sentencing judge found that while the Practitioner had not engaged in the physical abuse of any of the children, his conduct had enabled that physical abuse to receive a market, and fuelled the demand for the production of that type of material.[4]

22 It was not disputed by the Practitioner that in their search of the Practitioner's office and home, the police seized 27 devices. Across all of those devices there were 17,554 images and 1,391 videos, of child exploitation material, across the full range of categories for such material. The possession of all of that material was not the subject of

[1] Ts 22 December 2020 p65 - 66.
[2] Ts 22 December 2020 p67.
[3] Ts 22 December 2020 p69, 70.
[4] Ts 22 December 2020 p68.

counts 2 and 3. Rather, those counts were confined to the child exploitation material found on the thumb drive and the external hard drive. The State relied on the fact that the police found more child exploitation material on those other devices to demonstrate that whatever was found on the two devices the subject of counts 2 and 3 was not the totality of the Practitioner's collection of child exploitation material, and indicated the magnitude of the collection of child exploitation material that the Practitioner had. The learned sentencing judge proceeded on that basis.

23 The Practitioner was 52 years of age at the time he committed the offences. However, he had admitted that he had been engaged in the possession of child exploitation material for at least 10 years.

24 The learned sentencing judge found that there had been no significant indication of remorse on the part of the Practitioner in respect of his conduct.[5]

25 There was no direct evidence before the Tribunal of if, and when, the Practitioner was admitted to practice in Western Australia. Counsel for the Practitioner who appeared at the sentencing hearing submitted that the Practitioner graduated with a Bachelor of Laws degree from Notre Dame University in 2003, and then undertook articles of clerkship. Thereafter he practiced as a restricted practitioner, and was an employed solicitor until 2012. In 2013, he commenced legal practice in his own firm. The learned sentencing judge accepted that the Practitioner had a law degree and had been practising as a lawyer prior to his convictions. At the hearing today, the Practitioner confirmed that he was admitted to practice in Western Australia and he recollected that that was in about 2005.

26 The submissions of defence counsel at the sentencing hearing, and the correspondence in Exhibit 1, indicate that the Practitioner applied for the cancellation of his practising certificate, and that the Legal Practice Board accepted that application on 11 June 2020.

The Practitioner's conduct constituted professional misconduct

27 Professional misconduct for the purposes of the LP Act includes conduct of an Australian legal practitioner whether occurring in connection with the practice of law or occurring otherwise than in connection with the practice of law that would, if established, justify a

[5] Ts 22 December 2020 p74.

finding that the practitioner is not a fit and proper person to engage in legal practice.[6]

28 Conduct in respect of which there is a conviction for a serious offence is capable of constituting unsatisfactory professional conduct or professional misconduct.[7] A serious offence is defined in the LP Act to mean, amongst other things, an indictable offence against a law of the Commonwealth or any jurisdiction.[8]

29 An 'Australian legal practitioner' includes an Australian lawyer (that is, a person who is admitted to the legal profession under the LP Act)[9] who holds a current local practising certificate or a current interstate practising certificate.[10] However, Part 13 of the LP Act, from which the Tribunal's jurisdiction derives, applies to an Australian legal practitioner in respect of conduct to which Part 13 applies, whether or not the practitioner holds a 'local practising certificate'[11] (which is defined to mean a practising certificate granted under the LP Act)[12].

30 Having regard to the documentary evidence to which we have referred in relation to the Practitioner, and to the Practitioner's admission that he was admitted to practice in this State, we find that the Practitioner had been admitted to the legal profession in this State, and that at the time of his conviction for these offences, the Practitioner was an Australian legal practitioner within the meaning of the LP Act. For the purposes of the present Application, the Practitioner remains an Australian legal practitioner for the purposes of the LP Act, notwithstanding that his local practising certificate has since been cancelled by the Legal Practice Board.

31 The three offences for which the Practitioner has been convicted are serious offences as defined in the LP Act. There is no doubt that the conduct which constituted those offences constituted professional misconduct, in that while it was conduct which occurred otherwise than in connection with the practice of law, it was conduct which undoubtedly justifies a finding that the practitioner is not a fit and proper person to engage in legal practice.

[6] LP Act, s 403.
[7] LP Act, s 404(c)(i).
[8] LP Act, s 3.
[9] LP Act, s 4.
[10] LP Act, s 3, 5(a).
[11] LP Act, s 405(b).
[12] LP Act, s 3.

32 Integrity is an essential prerequisite to the right to practice law. The heinous conduct which constituted the offences of which the Practitioner was convicted not only manifested a complete disregard for compliance with the law itself, but was criminal conduct of a most serious kind. That conduct demonstrates that the Practitioner has a complete lack of integrity, had engaged in conduct of that kind over an extended period, and is a person who clearly could not command the personal confidence of his clients, fellow practitioners or judges.[13] Put another way, this is a case where the conduct of the Practitioner showed a defect of character incompatible with membership of the profession.[14] The sentencing judge found that there was no significant indication of remorse for the Practitioner's conduct. There could hardly be a clearer case of a practitioner demonstrating that he is not a fit and proper person to be an Australian legal practitioner.

33 We are satisfied that the Committee has established that the practitioner is an Australian legal practitioner and that he engaged in professional misconduct, and we so find.

Penalty

34 We turn to penalty.

35 Section 438(2) of the LP Act provides:

> If, after it has completed a hearing in relation to a referral under this Part in respect of an Australian legal practitioner, the State Administrative Tribunal is satisfied that the practitioner is guilty of unsatisfactory professional conduct or professional misconduct, the Tribunal may
>
> (a) make and transmit a report on the finding to the Supreme Court (full bench); or
>
> (b) make any one or more of the orders specified in sections 439, 440 and 441.

36 It is well established that the purpose of disciplinary proceedings is to protect the public and not to punish the practitioner concerned.[15]

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[13] Cf ***Legal Practitioners Complaints Committee v McKerlie*** [2007] WASC 119 [8]; ***Legal Profession Complaints Committee v Brickhill*** [2013] WASC 369 (***Brickhill***) [19].
[14] Cf ***Ziems v Prothonotary of the Supreme Court of New South Wales*** [1957] HCA 46; (1957) 97 CLR 279, p298, cited in ***Brickhill*** [22].
[15] ***Khosa v Legal Profession Complaints Committee*** [2017] WASCA 192 [37], [188].

37 The protection of the public has various aspects. The public may be protected by preventing a person from practising a profession, by limiting the right of practice or by making it clear that certain conduct is not acceptable.[16]

38 For the reasons we have already given, the only penalty which is capable of adequately protecting the public, and maintaining the confidence of the public in the legal profession, in this case, is for the Tribunal to transmit a report on its findings to the Supreme Court (full bench) for it to consider striking the Practitioner off the roll.

39 We do not understand the Practitioner to oppose that course.

40 These reasons constitute that report. It is our recommendation that the name of the Practitioner be removed from the roll of practitioners.

Orders

1. Pursuant to s 438(1) of the *Legal Profession Act 2008* (WA) David Charles Mizen (Practitioner) has engaged in professional misconduct, in that:

   (a) between 29 January 2019 and 1 February 2019 he made child exploitation material available for access by electronic or other means by other persons using a file sharing network, for which he pleaded guilty to, and was convicted of, one count of the indictable offence of distributing child exploitation material under s 219(2) of the *Criminal Code* (WA); and

   (b) on 19 March 2019 he had in his possession child exploitation material, for which he pleaded guilty to, and was convicted of, two counts of the indictable offence of possessing child exploitation material under s 220 of the *Criminal Code* (WA);

   which conduct establishes that the Practitioner is not a fit and proper person to engage in legal practice.

2. Pursuant to s 438(2)(a) of the *Legal Profession Act 2008* (WA), the Tribunal is to make and transmit a

[16] Cf ***Craig v Medical Board of South Australia*** [2001] SASC 169; (2001) 79 SASR 545 [48]; See also ***Singh v Medical Board of Australia*** [2019] WASCA 51 [32].

report in the form of its reasons delivered on 26 May 2021, to the Supreme Court (full bench).

3. The Tribunal recommends that the name of the Practitioner be removed from the roll of practitioners.

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

GD
Associate to the Honourable Justice Pritchard

2 JUNE 2021