QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*LSC v WN* [2018] QCAT 332
PARTIES:	**LEGAL SERVICES COMMISSIONER** (applicant) **v** **WN** (respondent)
APPLICATION NO/S:	OCR 138-17
MATTER TYPE:	Occupational regulation matters
DELIVERED ON:	18 October 2018
HEARING DATE:	6 August 2018
HEARD AT:	Brisbane
DECISION OF:	Member Peter Lyons QC Assisted by: Thomas Bradley QC Dr Margaret Steinberg AM

ORDERS:

1. **The Tribunal is satisfied that the respondent engaged in unsatisfactory professional conduct in respect of the matters in charges 1, 2 and 3.**
2. **The respondent is reprimanded for his conduct the subject of charges 1, 2 and 3.**
3. **For a period of two years, the respondent is to engage in legal practice under the following supervision:**
   - **(a) The respondent will be mentored by a Queen's Counsel nominated by the President of the Bar Association of Queensland (the Mentor);**
   - **(b) In four of the next six court or tribunal matters in which the respondent is briefed, the respondent will submit to the Mentor for review any written outline of argument or submissions the respondent intends to provide to instructing solicitors or the client to file or deliver or to hand to a presiding officer or upon which the respondent intends to rely, in advance of providing or otherwise using or relying upon the outline or submissions;**

(c) In the first twelve months after the respondent resumes legal practice, the respondent will attend upon the Mentor for at least four meetings, each of one hour or more, in which the respondent will discuss with the Mentor, subject to any relevant conflict of interest, the substance of the work in which the respondent is involved and any difficulties encountered; and

(d) In the second twelve months after the respondent resumes legal practice, the respondent will attend upon the Mentor for such further meetings as the Mentor schedules with the respondent, being not more than four in number and each being no longer than one hour.

4. The Tribunal's full reasons for decision are to be published only to the parties.

5. A copy of the Tribunal's full reasons for decision is to be placed in a sealed envelope on the Tribunal file, which is not to be opened, except by an Order of a Supreme Court Judge or a judicial member of the Tribunal, and a statement to that effect is to be placed on the outside of the envelope.

6. A modified version of the Tribunal's reasons for decision is to be published, without restriction.

7. The application and response, affidavits and written submissions filed in these proceedings and the transcript of the hearing are not to be published or made available to any person other than the Legal Services Commission and the respondent. The publication of any of those documents and of information extracted from them to any person other than the Legal Services Commission or the respondent is prohibited.

8. There is no order as to the costs of these proceedings.

CATCHWORDS: PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – PROFESSIONAL MISCONDUCT AND UNSATISFACTORY PROFESSIONAL CONDUCT – OTHER MATTERS – where respondent in written submissions and in opening case made statements as to facts contrary to material in his brief – where respondent failed to appreciate that costs assessor's certificate did not operate as a court order, and in any event did not bind solicitor employed by firm whose costs were assessed – whether professional misconduct –

whether unsatisfactory professional conduct – whether the respondent should be publicly reprimanded – whether a fine should be imposed – whether the respondent should be required to undergo mentoring

ADMINISTRATIVE LAW – ADMINISTRATIVE TRIBUNALS – QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL – where respondent suffering from major depressive disorder – application for non-publication order – whether relevant power is found in *Legal Profession Act* 2008 (Qld) or in *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) – whether non-publication order appropriate

PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – PROFESSIONAL MISCONDUCT AND UNSATISFACTORY PROFESSIONAL CONDUCT – OTHER MATTERS – where respondent found to have engaged in unsatisfactory professional conduct – where applicant applied for a costs order – whether exceptional circumstances exist for purposes of s 462(1) of *Legal Profession Act* 2008 (Qld)

2011 Barristers' Rule, as amended (Qld), r 63
Federal Court of Australia Act 1976 (Cth), s 50
Legal Profession Act 2004 (Qld) (repealed), s 429, s 474, s 480
Legal Profession Act 2008 (Qld), s 418, s 419, s 420, s 462, s 471, s 472, s 650, s 656D
Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 6, s 7, s 66, s 90
Queensland Civil and Administrative Tribunal (Jurisdiction Provisions) Amendment Act 2009 (Qld), s 1544
Supreme Court Act 1970 (NSW), s 80
Uniform Civil Procedure Rules 1997 (Qld), rule 743H

J v L&A Services Pty Ltd (No 2) [1995] 2 Qd R 10
John Fairfax Group Pty Ltd (Receivers and Managers Appointed) v Local Court of New South Wales (1991) 26 NSWLR 131
Legal Services Commissioner v Bone [2013] QCAT 550
Legal Service Commissioner v Bone [2014] QCA 179*Legal Services Commissioner v CBD* [2011] QCAT 401
Legal Services Commissioner v Laylee [2016] QCAT 237
Legal Services Commissioner v McClelland [2006] LPT 13
Legal Services Commissioner v XBN [2016] QCAT 471
Legal Services Commissioner v XBY [2016] QCAT 102

R v Kelly (Edward) [2001] 1 QB 198

APPEARANCES & REPRESENTATION:	
Applicant:	G R Rice QC, instructed by the Legal Services Commission
Respondent:	J C Bell QC, with Ms N Pearce of Counsel, instructed by Carter Newell, Solicitors

REASONS FOR DECISION

[1] Charges 1 and 2 of the present application allege, in each case, that the respondent breached rule 63 of the *2011 Barristers' Rule*, as amended, as the respondent made statements without reasonable grounds for believing that the factual material available to the respondent provided a proper basis for them. The present application also alleges, as Charge 3, that the respondent failed to act with competence and diligence because he failed to appreciate a legal issue which was fundamental to his client's case.

[2] The respondent has admitted making the statements alleged in the discipline application.

Characterisation of conduct

[3] In view of the allegations made in the course of the proceedings in which the statements were made, it should be said that the material does not provide any basis for finding that the respondent's conduct was dishonest.

[4] Both parties submit that the respondent's conduct should be characterised as unsatisfactory professional conduct. The *Legal Profession Act* 2007 ('LP Act') contains statutory definitions relevant to their submissions. Thus s 418 of the Act provides:

> ***Unsatisfactory professional conduct*** includes conduct of an Australian legal practitioner happening in connection with the practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner.

[5] Section 419 of the same Act provides that professional misconduct includes:[1]

> (a) unsatisfactory professional conduct of an Australian legal practitioner, if the conduct involves a substantial or consistent failure to reach or keep a reasonable standard of competence and diligence…

[6] The applicant referred to *Legal Services Commissioner v Laylee*,[2] which discusses cases dealing with s 419 and provisions in similar terms,[3] for the proposition that not every professional failing constitutes unsatisfactory professional conduct. There is no

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1 Other provisions of the *Legal Profession Act* 2007 ('LP Act') deal with misconduct, e.g. ss 419(1), 420, but they have not been relied on in this matter.

2 [2016] QCAT 237.

3 See *Legal Services Commissioner v McClelland* [2006] LPT 13; *Legal Services Commissioner v Bone* [2013] QCAT 550.

doubt in the present case that the respondent's conduct meets any threshold for characterisation as unsatisfactory professional conduct.

[7] Charges 1 and 2 are the result of the respondent's failure to read with sufficient care all the material briefed to him, on more than one occasion when he was required to do so. Charge 3 is the result of the respondent's failure to come to grips with a legal issue, when he was called on to do so on more than one occasion; and when material briefed to him drew attention to the relevant provision dealing with the issue. These could be considered fundamental failures on the part of a barrister to perform competently the professional tasks which the barrister undertook.

[8] There is no doubt that a barrister has a duty both to master the brief, and to exercise independent judgment in relation to the matter. In each case the respondent had instructions for making the statements which are the subject of Charges 1 and 2; but by the exercise of reasonable competence and diligence, he would have realised that the instructions were in error, and accordingly it cannot be said that he had reasonable grounds for making the statements.

[9] Looked at in the abstract, a barrister's failure to detect in the brief a fundamental document which demonstrates that the instructions on a critical point are wrong, when the existence and effect of the document is pointed out in the opponent's material, would seem to be a substantial failure to maintain a reasonable standard of competence and diligence. It would thus meet the test for professional misconduct.

[10] However, the present case is complicated by the role played by the instructing solicitor. The parties have adopted a common position on the characterisation of the respondent's conduct. Since the application of the test involves a matter of judgment, and the Tribunal is not satisfied that the parties are plainly wrong, the Tribunal is prepared to adopt the position taken by the parties, and, not without hesitation, characterise the conduct of the respondent which is the subject of Charges 1 and 2 as unsatisfactory professional conduct.

[11] The circumstances are somewhat different in relation to Charge 3. The charge seems primarily directed to the respondent's failure to appreciate the legal issue.

[12] Again, the common position taken by the parties is that this failure should be categorised as unsatisfactory professional conduct. Again with some reservation, the Tribunal is not satisfied this position is erroneous, and accordingly is not prepared to conclude that the conduct should be characterised as professional misconduct.

[13] The conduct the subject of each of the three charges in the present proceedings is accordingly found to amount to unsatisfactory professional conduct.

Non-publication order: contentions and evidence

[14] The respondent has sought a non-publication order on the basis that publicity resulting from the order would result in a worsening of his depressive condition and in his being a reasonably high suicide risk. For the applicant, it was submitted that a non-publication order would be made only in exceptional circumstances; and that the respondent had not made a sufficiently strong case of a sufficient prospect of a deterioration in his health should the outcome of these proceedings be made public, to outweigh the considerations on which the 'open justice' principle is founded.

[15] The respondent has been receiving treatment from Ms Hill, a clinical and organisational psychologist, and Dr McDarmont, a psychiatrist. Both diagnosed the respondent as suffering from a major depressive disorder.

[16] Ms Hill in her report recorded that the respondent 'had strong suicidal ideations with no concrete plans'. This was expressed at his first treatment session. The symptoms had improved in intensity and frequency with therapy; but would be retriggered by a public reprimand. The respondent would be a reasonably high suicide risk if the findings of this Tribunal became public. A public reprimand, and a public noting of the reprimand, would most likely lead to a worsening of his depressive symptoms. He would have fewer protective factors than he currently has, which would increase his risk of suicide.

[17] It emerged in the cross-examination of Ms Hill that the respondent had not himself made reference to suicide, but that the term was used by Ms Hill in the course of a consultation. Nevertheless, there is no reason to think that she misinterpreted the respondent's state of mind. She accepted that, if the respondent had prospects of imminent secure employment in a responsible legal position, that would alleviate suicidal thoughts, and enable him to cope more robustly with publication of the outcome of these proceedings, providing that the publication did not interfere with prospect of employment.

[18] Dr McDarmont recorded that the respondent's depressive symptoms predated the current complaint; but had worsened as a result of it. There was also a developmental component to the respondent's condition. He displayed symptoms of Post-Traumatic Stress as a consequence of a prejudicial childhood. He had used his professional development to gain distance psychologically from his developmental history. The issue of a public reprimand, or open publication of the Tribunal's reasons, would lead to a worsening of the respondent's depressive symptoms.

[19] Dr McDarmont's report did not refer to a risk of suicide. In his oral evidence, he said that when he interviewed the respondent on 30 October 2017, the respondent disclosed past suicidal ideation which he had not acted on, and which was not current at the time of the interview. He considered that the publication of orders would potentially increase the risk of suicide. He acknowledged that the worsening of depressive symptoms which he anticipated from publicity related the current hearing was an elastic concept; and its extent could not be precisely estimated.

[20] Dr McDarmont appeared to consider that, if the respondent were able to secure responsible employment in the near term, that would address his concern about his acceptability in the professional market; but adverse orders (presumably if made public) would affect him in a similar way to his prejudicial developmental experiences.

[21] Dr McDarmont also accepted that there had been some improvement of the respondent's mental condition under treatment; but that had reversed as the hearing approached. Ms Hill also considered that his condition had improved under treatment.

[22] The reference in the cross-examination of Ms Hill to the prospect that the respondent would obtain secure employment in a legal position was a reference to the respondent's evidence that he remains in contention for a position. There is no certainty that he will be appointed to it. Save by reference to this prospect, Ms Hill's

opinion about the consequences of a public reprimand, and, it would seem by implication, the publication of adverse findings in these proceedings, was not affected by her cross-examination. While Dr McDarmont did not provide strong support for Ms Hill's opinion, he did not contradict it.

[23] The evidence reveals that the respondent has experienced an unusually deep sense of shame as a result of his conduct and the subsequent complaint. When it became clear that disciplinary proceedings were a possibility, he withdrew from his chambers, and has substantially remained out of practice since then. Senior Counsel for the applicant pointed out that there has been no suggestion from the applicant that the case warranted the suspension of the respondent. The respondent has been attempting to deal with problems with his mental state for some years, including taking anti-depressant medication and seeing another psychologist before Ms Hill. Yet, when seeking treatment from them, he did not tell Ms Hill or Dr McDarmont of the complaint and these proceedings, notwithstanding their likely significance for his treatment. Dr McDarmont linked the respondent's sense of personal identity to his professional position, which he used to distance himself from his prejudicial history. His evidence indicates that publicity of a finding of a professional failure is likely to have a greater adverse effect on the respondent than it would on other people. Reference has already been made to a worsening of the respondent's condition as this hearing approached. These considerations, taken together, tend to support the views expressed by the professionals about the consequences of publication of the findings of the Tribunal.

[24] Risks of the kind under consideration are not capable of precise quantification. Nevertheless, the evidence establishes a real risk that publication of the findings would result in the respondent's taking his own life. The evidence does not permit the Tribunal to disregard Ms Hill's assessment of that risk as 'high', notwithstanding the uncertainties associated with such an assessment. Likewise, the evidence establishes a real prospect of a worsening of the respondent's depressive symptoms. While there is some benefit associated with the prospect of employment, it, and its extent, are uncertain.

Tribunal's power to make non-publication orders

[25] In support of his application for non-publication orders, the respondent initially relied on s 66 of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) ('QCAT Act'). That section authorises the Tribunal to make an order prohibiting the publication of, amongst other things, evidence given before the Tribunal, or information that may enable a person who has appeared before the Tribunal to be identified. However, such an order may only be made in a range of specified circumstances, some of which are broadly expressed. One is that the Tribunal considers it necessary to make the order 'to avoid endangering the physical or mental health or safety of a person'.[4]

[26] Section 66 should be read with s 90 of the same Act. That section commences by identifying, as the primary rule, a requirement that a hearing of a proceeding be held in public. It then provides that the Tribunal may direct a hearing or part of a hearing be held in private, but only in circumstances similar to those specified in s 66, including where the Tribunal considers it necessary to make the order to avoid

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4 *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) ('QCAT Act'), s 66(2)(a).

endangering the physical or mental health or safety of a person. As will become apparent, both sections give the Tribunal a broader power to constrain the operation of the open court principle than is available to courts generally by virtue of their inherent (or implied) jurisdiction.

[27] Reference was also made to s 656D of the LP Act. This section authorises the Tribunal to make an order prohibiting the publication of information stated in the order that relates to the discipline application, the hearing, or an order of the Tribunal. The section does not specify circumstances in which such an order may be made; nor does it otherwise identify criteria for the exercise of the power.

[28] Senior Counsel for the respondent referred to s 7 of the QCAT Act as relevant to the interaction between s 66 of the QCAT Act and s 656D of the LP Act. Both parties appeared to take the position that if s 656D was the operative provision, then the circumstances in which an order could be made under it included the circumstance relating to health and safety specified in s 66 of the QCAT Act; though regard would be had to the open court principle, discussed in *J v L&A Services Pty Ltd (No 2)* ('L&A Services').[5]

[29] Section 7 of the QCAT Act identifies when a provision of an enabling Act, such as the LP, prevails over a provision of the QCAT Act. One is where a provision of an enabling Act includes a provision about proceedings for jurisdiction conferred by the enabling Act, including the Tribunal's powers for the proceedings;[6] and that provision is inconsistent with a provision of the QCAT Act. In such a case, the provision of the enabling Act prevails, to the extent of any inconsistency. It seems clear, both from the language of s 6(7)(b) of the QCAT Act, and one of the examples for that provision, that s 656D is the type of provision to which s 7 might apply. If the power conferred by s 656D of the LP Act is broader, or for that matter, narrower, than s 66, then the provisions are inconsistent. The same conclusion might be reached by noting that the power in s 66 may only be exercised in specified circumstances; but that is not true of s 656D. It follows that the relevant power is that found in s 656D. A question arises, however, whether the legislature should be taken to have intended that it only be exercised in the same way as the inherent jurisdiction of courts at common law.

[30] It is at this point convenient to make some observations based on *L&A Services*. In relation to the exercise of the inherent jurisdiction to restrict the operation of the open court principle, that principle appears to be given paramountcy over the public interest in avoiding or minimising disadvantages to private citizens from public activities, apparently a reference to the conduct of proceedings in open court.[7] Earlier, the Court cited statements from other cases to the effect that orders restraining the operation of the principle are not made because the order would save a party or a witness 'from suffering a collateral disadvantage'; or because damaging and even dangerous facts would come to light, or there is a risk of "copycat" offending.[8] Nevertheless, the Court recognised that '(a)n incidental, procedural restriction is permissible if necessary in

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5 [1995] 2 Qd R 10.

6 See s 6(7)(b) of the QCAT Act.

7 *J v L&A Services Pty Ltd (No 2)* [1995] 2 Qd R 10, 44, principle 1.

8 Ibid 21, 34, 35-36; but see the passages from the judgment of Mahoney JA, with whom Hope JA agreed, in *John Fairfax Group Pty Ltd (Receivers and Managers Appointed) v Local Court of New South Wales* (1991) 26 NSWLR 131, set out in *L&A Services* 37-8, 40-41.

the interests of a party or a witness in a particular proceeding'.[9] This category of exception was said to give rise to the most difficulty because of unresolved difficulties concerning the nature and ambit of the power. However, 'information may not be withheld from the public merely to save a party or witness from loss of privacy, embarrassment, distress, financial harm, or "other collateral disadvantage"'.[10]

[31] The judgment in *L&A Services* also noted statutory provisions which authorised the prohibition of the publication of certain material, in circumstances described in terms reflective of recognised common law exceptions to the general principle.[11]

[32] An examination of the legislative history of s 656D is of limited assistance. The present provision was enacted in 2009.[12] The Explanatory Note confirms an intention for the provision to prevail over the provision of the QCAT Act enabling the Tribunal to make a non-publication order.[13] It also records that until the introduction of s 656D a power in relevantly identical terms was conferred by s 650 of the LP Act. The Explanatory Note preceding the enactment of s 650 is of no present assistance.

[33] The LP Act had been preceded by the *Legal Profession Act* 2004 (Qld) ('2004 Act'). The 2004 Act established the Legal Practice Tribunal, whose members were Supreme Court Judges.[14] Somewhat similarly to the present Tribunal, that Tribunal was helped by panel members. Section 480 gave it a power to make an order prohibiting publication of information in terms relevantly identical to s 650 and s 656D of the LP Act. Section 474 of the 2004 Act required a hearing of the Tribunal to be open to the public; but gave the Tribunal the power to direct that a hearing be closed, if 'it was desirable to do so in the public interest' for reasons connected with the subject matter of the hearing or the nature of the evidence. Thus there was some expressed constraint on the power to conduct a closed hearing; but none on the power to make a non-publication order.

[34] When determining whether, and if so in what terms, to confer on the Tribunal, in a discipline application under the LP Act, a power to make a non-publication order, the legislature had a range of options. It could have left the matter to the implied powers conferred on a body such as the Tribunal, subject to common law principles as set out in *L&A Services.* It could have conferred an express power, stated to be exercised in accordance with common law principles. It could have used formulations adopted in other jurisdictions, reflective of the common law. It did not follow any of those courses, but conferred a power without any express restraint. This is particularly noteworthy in the 2004 Act, where s 474 identified the circumstances in which a Tribunal might direct that a hearing be closed, but did not expressly fetter the power to make a non-publication order.

[35] Notwithstanding s 656D of the LP Act, the provisions of s 90 of the QCAT Act do not appear to have been modified by the LP Act. Accordingly, it provides the requirement for proceedings to be held in public; and confers a power to order

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9 *J v L&A Services Pty Ltd (No 2)* [1995] 2 Qd R 10, 45.

10 Ibid.

11 Ibid 22 (s 50 of the *Federal Court of Australia Act* 1976 (Cth)); 24 (s 80(b) of the *Supreme Court Act* 1970 (NSW)).

12 See *Queensland Civil and Administrative Tribunal (Jurisdiction Provisions) Amendment Act* 2009 (Qld), s 1544.

13 See p 299.

14 See s 429 of the 2004 Act.

otherwise, in the circumstances specified. They go well beyond the circumstances in which such an order might be made in the exercise of a court's inherent jurisdiction. It would be a curious result if the Tribunal's power to make a non-publication order, granted in unrestricted terms by the legislature, were more restricted than the constrained power found in s 90 of the QCAT Act. But that would be the consequence of a conclusion that the power conferred by s 656D were subject to the same constraints as a court's inherent jurisdiction. The legislative history relevant to this provision also provides some support for the contrary conclusion.

[36] The Tribunal therefore considers that the power conferred by s 656D is not subject to the same constraints as a court's inherent jurisdiction to make a non-publication order at common law. Inevitably, the exercise of that power will be informed by the considerations which lie behind the open court principle; though they will not have the same paramountcy as they are given at common law. It is difficult to think that, at least in most cases, an order would be refused under s 656D where the circumstances would justify (and on one view of s 90, would require) the making of an order for a closed hearing.

[37] Section 472 of the LP Act requires the inclusion in the discipline register of certain information about 'disciplinary action' taken under the Act against an Australian legal practitioner. As Senior Counsel for the respondent correctly pointed out, the findings and orders under contemplation in the present proceeding do not constitute disciplinary action, as defined in s 471. Accordingly, it is unnecessary to consider whether s 472 presents an obstacle to the making of a non-publication order in the present case.

[38] The parties referred to *Legal Services Commissioner v CBD*,[15] *Legal Services Commissioner v XBY*[16] and *Legal Services Commissioner v XBN*,[17] as examples of the exercise of the power to make such an order. They provide some general support for the making of an order in the present case.

[39] It is therefore proposed to make some form of order under s 656D, to the extent reasonably necessary to avoid the risk of a worsening of the respondent's depressive symptoms, or other, more significant consequences. It is nevertheless necessary to consider the scope of any such order.

[40] Not all of these reasons need to be the subject of the order. For example, it is not obvious that an order should be made which prohibits publication of the discussion of the Tribunal's power to make such an order.

[41] A draft of these reasons was provided to the parties on a confidential basis, and both parties made written submissions on the precise form of the non-publication order to be made. Neither party required an oral hearing in respect of the non-publication order. The form in which these reasons have been published reflects the Tribunal's consideration of those submissions.

Consideration of other orders

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15 [2011] QCAT 401.
16 [2016] QCAT 102.
17 [2016] QCAT 471.

[42] The respondent's deep shame and obvious regret, the worsening of his mental health, and his virtual withdrawal from practice for over twelve months are plainly relevant considerations. So are his previous blameless record and his long period in practice. He has co-operated with the investigation. His mental health has already been discussed. Senior Counsel for the applicant acknowledged the complex nature of the underlying matter, and the acrimonious manner in which it was conducted.

[43] On the other hand, as will be apparent from these reasons, and notwithstanding the Tribunal's acceptance of the position of the parties that the conduct was unsatisfactory professional conduct, the Tribunal considers the respondent's failures to be at the upper end of the range of such conduct. That is so notwithstanding the circumstances discussed previously, which might be regarded as somewhat reducing his fault.

[44] There has been no suggestion that the respondent should be prevented from practising. Nor has it been submitted that a substantial fine should be imposed. A modest fine would appear to be a token gesture, when one considers the financial loss (and other consequences) which the respondent has experienced. Accordingly, it is not intended to impose a fine. The applicant accepted that this was not a case for a private reprimand.

[45] The applicant however contended that the respondent should be publicly reprimanded because of the need for general deterrence, which would be protective of the public; and because that would be consistent with other cases; and that a decision should be made on the question whether a public reprimand is to be imposed, before the Tribunal determines the non-publication application.

[46] The last submission should be rejected. An order for a public reprimand for the purpose of general deterrence cannot be justified if the order is not to be published.

[47] Otherwise, there is some force in the submission that this case would ordinarily warrant a public reprimand, to mark the seriousness of the respondent's conduct and to deter others from similar failures, thus contributing to the protection of the public.

[48] Accordingly, it is appropriate in the present case to make an order that the respondent be reprimanded. As a result of the non-publication orders and the form of these reasons, the identity of the respondent should not become a matter of public knowledge. In those circumstances, the order for a reprimand should pose no greater risk to the respondent's mental health than the publication of this set of reasons, including findings adverse to the respondent. The published reasons, by and large, reflect the submissions of the respondent's Senior Counsel as to the form which those reasons should take. The order might not squarely fit the descriptions of an order publicly reprimanding a practitioner or an order privately reprimanding a practitioner, for the purposes of s 456(2)(e) of the LP Act. However, s 456(1) gives the Tribunal the power to make "any order as it thinks fit".

[49] Because of the very unusual circumstances of this case, other decisions referred to by the parties do not provide any real guidance in determining the orders to be made. However the nature of the respondent's failures is a matter of some concern. For that reason it is intended to make an order requiring the respondent to undergo some 'mentoring', as discussed at the hearing.

Costs

[50] The respondent submitted that no order for costs should be made in the applicant's favour, there being exceptional circumstances, so that the Tribunal is not bound by s 462 of the LP Act to make such an order. The circumstances are, in essence, the failure by the applicant's agent to appreciate the significance of the reference to certain documents, which , it was submitted, played a key role in the circumstances which led to the respondent's errors

[51] For the applicant, it was submitted that these matters did not constitute exceptional circumstances for the purpose of s 462. Conduct by the applicant or an agent of the applicant could only be an exceptional circumstance if it was causative of the respondent's error. The relevant material was in the respondent's brief, and he had a duty to exercise an independent judgment on the basis of it. The conduct of the applicant's agent was not causative of the respondent's errors.

[52] In the Tribunal's view, the conduct of the applicant's agent played a causative role in the respondent's errors which are the subject of Charges 1 and 2. No alternative submission was made on behalf of the applicant on the question of exceptional circumstances. The role played by the applicant's agent in the failure of the respondent is highly unusual, and qualifies as 'exceptional circumstances'.[18] Accordingly, the Tribunal is not bound by s 462(1) of the LP Act to make an order that the respondent pay costs of the applicant. There was no submission that an order for costs should nevertheless be made in favour of the applicant. Accordingly, there will be no order for costs.

Conclusion

[53] The following orders are made:

1. The Tribunal is satisfied that the respondent engaged in unsatisfactory professional conduct in respect of the matters in charges 1, 2 and 3.

2. The respondent is reprimanded for his conduct the subject of charges 1, 2 and 3.

3. For a period of two years, the respondent is to engage in legal practice under the following supervision:

   (a) The respondent will be mentored by a Queen's Counsel nominated by the President of the Bar Association of Queensland (the **Mentor**);

   (b) In four of the next six court or tribunal matters in which the respondent is briefed, the respondent will submit to the Mentor for review any written outline of argument or submissions the respondent intends to provide to instructing solicitors or the client to file or deliver or to hand to a presiding officer or upon which the respondent intends to rely, in advance of providing or otherwise using or relying upon the outline or submissions;

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[18] See the discussion of 'exceptional circumstances' in *Legal Services Commissioner v Bone* [2014] QCA 179, [55]-[66]; and note the passage quoted from the judgment of Lord Bingham of Cornhill CJ in *R v Kelly (Edward)* [1000] QB 198, 108.

(c) In the first twelve months after the respondent resumes legal practice, the respondent will attend upon the Mentor for at least four meetings, each of one hour or more, in which the respondent will discuss with the Mentor, subject to any relevant conflict of interest, the substance of the work in which the respondent is involved and any difficulties encountered; and

(d) In the second twelve months after the respondent resumes legal practice, the respondent will attend upon the Mentor for such further meetings as the Mentor schedules with the respondent, being not more than four in number and each being no longer than one hour.

4. The Tribunal's full reasons for decision are to be published only to the parties.

5. A copy of the Tribunal's full reasons for decision is to be placed in a sealed envelope on the Tribunal file, which is not to be opened except by an Order of a Supreme Court Judge or a judicial member of the Tribunal, and a statement to that effect is to be placed on the outside of the envelope.

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8. There is no order as to the costs of these proceedings.