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LEGAL PRACTITIONERS DISCIPLINARY TRIBUNAL

CITATION:	*Law Society of the Northern Territory v Geoffrey Robert Clift*
DECISION NUMBER:	[2020] LPDT 1
PARTIES:	Law Society of the Northern Territory Applicant Geoffrey Robert Clift Respondent
MATTER TYPE:	*Legal Profession Act 2006*
FILE NO:	No. 3 of 2018
HEARING DATE:	18 December 2019
DECISION OF:	Acting Judge Oliver, Chair Prof L McCrimmon, Member Ms H King, Member
DATE OF ORDERS:	18 June 2020

APPEARANCES and REPRESENTATION (if any):

APPLICANT:	Joshua Ingrames, Counsel
RESPONDENT:	Self Represented

REASONS FOR DECISION

1. The Applicant Northern Territory Law Society brought an application for disciplinary proceedings against Geoffrey Robert Clift on 3 October 2018. The matter however did not come before the Tribunal for a first mention until 13 March 2019, presumably because of the lack of appointment of a Chair of the Tribunal until then.

2. The application states two allegations against Mr Clift. First, that he engaged in professional misconduct pursuant to Section 466(1)(a) of the *Legal Profession Act* (the Act) by contravening a condition to which his practising certificate was subject, namely undertaking continuing professional development in accordance with the scheme

prescribed in schedule 2 of the Legal Profession Regulations 2007, which was contrary to section 78 of the Act.

3. Secondly, it was alleged that between 1 July 2014 and 31 December 2016 he engaged in professional misconduct pursuant to section 466(1)(a) of the Act, by engaging in legal practice in the Northern Territory without being an Australian Legal Practitioner contrary to section 18 of the Act.

4. There was some initial delay in the proceedings as there was difficulty in making personal service of the application on the Respondent. The Chair of the Tribunal made an order for substituted service by post to the Respondent's residential address on 13 March 2019. What was not known to the Chair of the Tribunal at the time, but was within the knowledge of Applicant, was that the Respondent had been living between Tasmania and Darwin due to caring for his mother and that he had corresponded promptly with the Applicant over the many years of their investigation of these complaints.[1] It would have been a simple matter for the Applicant to contact him via email, advising of the application and asking him to accept service. The circumstances in which the Respondent became aware of the proceedings is set out later in this decision.

5. The Respondent did not contest the allegations, and a statement of agreed facts was filed by the parties.

GROUND ONE

6. The first allegation in the Application was that the Respondent engaged in professional misconduct by contravening a condition to which his practising certificate was subject, namely, failing to undertake continuing professional development (CPD). However, this ground proceeded at hearing, by agreement between the parties, on the basis that the Respondent failed to provide by 31 March 2014 a CPD Certificate for the 2013/14 CPD year and that this conduct amounted to unsatisfactory professional conduct.

7. Schedule 2 of the Legal Profession Regulations 2007 prescribes the continuing professional development scheme for the purposes of section 70(3)(a)(i) of the Act. Practitioners were required to give a certificate in the approved form by 31 March 2014 for the 2013/14 continuing professional development year. The Respondent has never provided that certificate to the Applicant.

GROUND TWO

8. The further allegation is that the Respondent engaged in legal practice without being the holder of a practising certificate.

9. The Respondent did not renew his practising certificate for the 2014 to 2015 year. It was agreed that he was sent a number of reminders by the Applicant that his practising certificate was due and overdue for renewal. He was spoken to by phone by the then CEO of the Applicant on 7 August 2014 and reminded that he did not have a practising certificate and was not permitted to practice without one. The Respondent indicated to

[1] The issues regarding communication between the Applicant and the Respondent are further set out in detail in these reasons.

her that he would apply for a practising certificate in the near future. He did not do so. On 19 February 2015 correspondence was sent to the Respondent to his postal address reminding him that it was an offence to engage in legal practice without a practising certificate.

10. In summary, the further allegation is that the Respondent engaged in legal practice without being the holder of a practising certificate. There are three separate complaints that make up this ground. Each of these matters is said by the Applicant to amount to professional misconduct but have been rolled into a single complaint. The Respondent has not contested these matters and agrees that his conduct amounts to professional misconduct.

The MSP Legal Matters

11. The Respondent had practised as a Barrister and in that capacity had been instructed by the firm MSP Legal. The agreed facts state that after the expiry of his practising certificate he continued to act in a number of those matters between 1 July 2014 and 12 May 2015. It is not apparent from where the date of 12 May 2015 arises. According to the agreed facts and corresponding with invoices that are referred to later in these reasons, the last date on which the Respondent engaged in legal practice in the MSP Legal matters was 23 December 2014. In total, there were five separate cases in which he provided advice and/or appeared as Counsel in the Supreme Court and before a Judicial Registrar of the Local Court. He did not advise either the Court or the Registrar that he no longer held a practising certificate.

12. The application lists a number of payments said to have been received by the Respondent with respect to "some or all of his work". The agreed facts set out a summary of the nature of the work performed in each of the matters for MSP Legal. The statement also sets out the payments made to the Respondent, but these still include payment for work that was performed at a time when he still possessed a practising certificate. Each of the five cases were ones in which he had begun acting prior to the expiry of his practising certificate.

13. It is important in assessing the degree to which he practised without a practising certificate to consider when and what work was actually performed and the agreed facts were somewhat unhelpful in that regard because of the reliance on total invoice amounts giving an inaccurate figure as to the remuneration that he was not entitled to charge or receive. The accurate figures and the dates on which he undertook legal work without a practising certificate are set out below.

14. It is agreed between the parties that the Respondent appeared in five matters for MSP Legal at a time when he did not hold a current practicing certificate, namely:

    - *Theories Pty Ltd v Holt & Anor*
    - *Cagnetti v International Corrosion Control Australia*
    - *Kampourakis v DCT (NT) Pty Ltd*
    - *Fitzmaurice v De Silva Hebron*
    - *Avant Insurance Ltd v Abdeen*

15. In the matter of *Theories Pty Ltd v Holt & Anor* the relevant period during which the Respondent performed legal work and received remuneration for that work is between 9 July 2014 and 21 July 2014. There may have been some interaction between the Respondent and his "instructing solicitors" post this date but these were not ones for which he issued an invoice or received payment. In total the payment for work he was not entitled to perform as a legal practitioner amounted to $8285.00 plus GST not $13,761.00 (inc GST) represented by the three invoices mentioned in the facts.

16. In the matter of *Cagnetti v International Corrosion Control Australia* he performed work without a practising certificate between 9 July 2014 and 15 August 2014. The remuneration for work in this period amounted to $1061 plus GST rather than the $1843.05 mentioned in the agreed facts that included work in May and June of 2014.

17. In *Kampourakis v DCT (NT) Pty Ltd* the work he was not entitled to perform was confined to 20 and 21 July 2014 and involved preparation for and attendance at a cost argument before the Supreme Court. Although he received a total payment of $4226.75 in this case, the payment for the dates mentioned amounted to $1340.00 plus GST.

18. The work performed and remuneration received in the matter of *Fitzmaurice v De Silva Hebron* is somewhat difficult to untangle. The agreed facts are that he engaged in legal practice on 8 July 2014 by conferencing with his instructors and sending and receiving emails and that he issued an invoice for payment for this work and work performed prior to 30 June 2014 in the sum of $6,787.00. A consideration of the two invoices issued by him in this matter[2] shows that one of them is for the amount in the agreed facts but it includes an amount of $835.00 for work performed in January 2014. He does not appear to have been paid for any of the work performed in this case.

19. The matter of *Avant Insurance Ltd v Abdeen* represents the only matter for which he engaged in legal practice and received remuneration outside the period of July to mid-August 2014. Again, however it is a matter that commenced in March 2014 whilst he still had a practising certificate. The work he was not entitled to perform occurred between 24 October 2014 and 23 December 2014. It did not involve any appearances before a Court or Tribunal. Although he received payment for all of the work in the amount of $5005.28, the amount of $2,316.00 plus GST represents the legal work that he was not entitled to perform.

20. Of considerable concern is that two of these matters involved appearances before the Supreme Court[3] and another before a Judicial Registrar of the Local Court.[4] In none of these cases did the Respondent disclose to the Court that he no longer held a practising certificate.

The "Petherick" matter

21. The Respondent did not further engage in legal practice until April 2016. On 1, 6 and 7 April it is agreed that he acted in the matter of *Sonia Petherick & Others v Northern*

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[3] Appearing for Theories Pty Ltd and DCT (NT) Pty Ltd.

[4] Appearing for International Corrosion Control Australia Pty Ltd.

Territory Christian Schools[5]. In his written submissions and by reference to a Statutory Declaration made by him on 13 January 2017, the Respondent sets out the circumstances in which he came to provide advice and appear in that matter. In summary, having been told of the circumstances of the plaintiffs at a social lunch with Mr Colin Mc Donald QC he was asked by him to speak to another practitioner, Mr Robert Welfare, who was acting for the plaintiffs to see if he might be able to provide some assistance in what was described to him as a "justice case". The three met shortly thereafter and the Respondent offered to provide assistance by way of mentoring a junior solicitor on the case. He did not seek nor was offered remuneration. He did not inform his instructing solicitors or the Court that he was not the holder of a practising certificate.

22. On 1 April 2016 he contacted Counsel for the defendant organisation asking for an extension of the timetable from a previous order. On 5 April, when advised that an application for injunctive orders had been brought and was to be heard on 7 April 2016, he spoke to Mr Welfare who was unavailable to appear on that day. On 6 April 2016 the Respondent spent time preparing material for the hearing. On 7 April he appeared before the Supreme Court without informing the Court that he did not hold a practising certificate. In total, he describes in his Statutory Declaration his involvement as "assist[ing] in taking instructions; prepare arguments for 7 April 2016 and appear on the Application…". The Respondent's account is supported by a statutory declaration of Robert Welfare dated 16 January 2017.

23. The Applicant resolved on 28 April 2016 to add to the own motion complaint the 3rd ground relating to the Supreme Court matter of *Petherick* and to initiate a prosecution against him for his appearance in the matter, although wrongly identifying him as acting for the defendant NT Christian Schools[6].

24. Although no mention is made of this in either the Application to the Tribunal or in the agreed facts, the *Petherick* matter was the subject of a complaint under the *Local Court (Criminal Procedure) Act* laid in the Local Court on 4 October 2016 under section 18 of the *Legal Profession Act*. Section 18(1) creates an offence for a person who is not an Australian legal practitioner engaging in legal practice in this jurisdiction and carries a penalty of 500 penalty units. The criminal complaint was subsequently withdrawn following the Respondent providing the Applicant with the statutory declarations from himself and Mr Welfare to which we have referred, attesting that no remuneration had been paid or received by him for that work. Section 18(3) of the Act provides a defence to a prosecution for an offence against section 18(1) that the defendant did not engage in legal practice for fee, gain or reward.[7]

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[5] The Respondent appeared for the plaintiff Sonia Petherick. The original own motion complaint by the Applicant alleged that he had acted for NT Christian Schools.

[6] An error that was not corrected until 12 March 2018 when the Ethics Committee resolved to refer the matter to the Disciplinary Tribunal and notwithstanding that the Investigator said in a letter to the Respondent dated 16 May 2017 that he would recommend to the Applicant that they correct that error and amend the complaint. The Applicant of course must have been aware of the error prior to engaging the Investigator because it had withdrawn the criminal complaint on 3 March 2017 following receipt of the Statutory Declarations from the Respondent and Mr Welfare and the referral to the Investigator should have correctly stated the matter.

[7] There is no explanation in the material provided to the Tribunal that would explain why the MSP matters were not made part of the criminal complaint under s18 noting that as he had received remuneration for those matters a prosecution is likely to have been successful.

25. The withdrawn prosecution does not act as a bar to subsequent disciplinary proceedings, but it is relevant to the issue of the considerable delay between the own motion complaints and the disciplinary application and as to costs incurred.

26. The lack of remuneration does not excuse or act to downplay the seriousness of the matter. This matter was a serious breach as it involved an appearance before the Supreme Court without disclosing to the Court that he was not entitled to appear as a legal practitioner.

The Domestic Violence Application

27. Finally, in late 2016[8] the Respondent appeared for a personal friend on a domestic violence application before the Local Court. The circumstance of this appearance and his subsequent representations to the prosecutor were set out in his written submissions. In summary, the Respondent says that he received a phone call from his friend who was highly distressed following police attending and serving her with a summons to attend court at 9am the next day after an incident with her daughter.[9] The Respondent says that he tried to contact Mr Robert Welfare to have him appear for his friend but could not contact him. He spoke again to his friend and told her to represent herself and seek an adjournment to obtain legal advice. She was very distressed and "pleaded with me to attend court and obtain the adjournment"[10]. He attended court and obtained the adjournment and then assisted his friend by sending an email to the solicitors for Applicant[11] as a result of which the application was discontinued without any orders. The Respondent acknowledges that he should not have undertaken that appearance and representation and says his judgement was clouded by his personal friendship with the defendant (and her husband). He did not receive any fee, gain or reward with respect to the matter.

28. In the Respondent's favour, it appears from the material provided on direction to the Applicant, that the Society and the Investigator were unaware of this transgression. It came to light when the Respondent volunteered it in response to a written question posed by the Investigator[12] under the section 621 notice that required the Respondent to provide information and produce documents in the Schedule to the notice. The Respondent was, in summary, asked if he had performed any other legal work than that with MSP Legal and the *Petherick* matter. He made full disclosure that he has appeared for his friend (whom he named) and had made a submission by email to the prosecutor resulting in the

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[8] The agreed facts identify the time as "in the latter part of 2016". The Respondent has identified this as December 2016 in his submissions.

[9] It appears that this was a Police Domestic Violence Order which also acts as a summons to attend court to show cause why the Court should not confirm it as a Domestic Violence Order.

[10] Respondent's written submissions [20].

[11] As this was a Police Domestic Violence Order Applicant would have been a Police Officer not the protected person. The solicitors in question would therefore be those acting for Applicant police.

[12] The complaint investigator Mr Scotter was appointed on 11 April 2017 and tasked to investigate the own motion complaints notwithstanding that the complaint first in time, relating to the work performed for MSP Legal, had already been the subject of an internal investigation by an officer of the Applicant. It is unclear why this need to be reinvestigated and it did not result in any additional matters being added to the complaint with respect to the work undertaken for MSP Legal.

matter being dismissed without further appearance from him. He advised that he did not seek or receive any remuneration.

The Delay in the Disciplinary Actions

29. The delay that has occurred in this matter has not been explained. The own motion complaint by the Applicant of the first two grounds that the Respondent had engaged in legal practice without a practicing certificate and that there was non-compliance by him with reporting conditions was initiated on 27 August 2015. Nothing seems to have happened with the complaint until 19 November 2015 when the Society gave MSP Legal a section 621 notice from the then Manager of Regulatory Services who held appointment as an investigator ("the Applicant Investigator"). There was some small delay with MSP Legal asking for an extension of time to respond which was not unreasonable given the response had been required by 7 December 2015.

30. A further extension was granted on 14 December and, although delayed, MSP provided a detailed response and documents in reply to the section 621 notice on 10 February 2016. No further action appears to have then been taken with respect to those matters until they were referred to an external investigator in April 2017.

31. In the meantime, the Applicant was obviously made aware of the Respondent's appearance in the Supreme Court in the matter of *Petherick & Others v NT Christian Schools* and the Applicant Investigator wrote to the Respondent on 8 April 2016 informing him they would seek further information and notify him if a decision was made to take further action.

32. On 28 April 2016, the Applicant resolved to initiate a prosecution under s18 of the Act adding the matter of *Petherick* as a third ground and on 18 May 2016 the own motion complaint was modified to add that matter.[13] It is not known why the Applicant determined to commence a section 18 prosecution only for the *Petherick* matter[14] when they already had the information and invoices about the MSP Legal matters that showed that he had appeared in the Supreme Court without a practising certificate in some of those matters and had been remunerated for that work.

33. Still more delay attended this determination. The criminal complaint and summons were not filed in the Local Court until 4 October 2016, that is, 5 months after the decision to prosecute. It was hardly a difficult exercise to draft the simple criminal complaint and issue a summons to appear.

34. Once served, the Respondent appears to have promptly responded to these charges. The statutory declarations which resulted in the withdrawal of the charges were provided to the Applicant in mid-January. On 23 February 2017, the Applicant resolved to discontinue the prosecution and on 3 March 2017, as noted, the charges were withdrawn. The Respondent wrote to the Applicant 2 days later acknowledging that and asking what further disciplinary action the Applicant was contemplating.

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[13] As previously noted wrongly identifying the party for whom he appeared.

[14] The Complaint filed in the Local Court refers only to offences on 6 and 7 April which can only be the *Petherick* matter.

35. On 14 March 2017, the Applicant wrote to the Respondent informing him for the first time of the 2015 own motion complaint that they were now going to outsource, together with the *Petherick* matter that had been added to it, to an external investigator.[15] The Respondent replied the same day saying that he had not received a copy of the complaint as required by section 475(1)(a) and asking that it be sent to him at his email address. No response to that request appears in the materials provided to the Tribunal.

36. On 11 April 2017 Mr Scotter was formally appointed as Investigator pursuant to section 491(2) of the Act[16]. He wrote to the Respondent on 16 May 2017 providing the section 621 notice and requiring a response by 6 June 2017. He, at least, immediately realised the error on the complaint that the Respondent did not act and appear for NT Christian Schools but rather for Ms Petherick. Of course, this would have been obvious from the transcript of those proceedings which had been provided to him and should have been likewise obvious to the Applicant before referring the complaint to him[17].

37. On 1 June 2017 the Respondent asked for an extension of time to respond to the notice saying that he had only received it on 31 May 2017 by post and informing the Investigator that the email address that the Respondent had used was not and had never been that which the Applicant had provided to him. The Respondent gave the Investigator his correct address, which was the email address the Respondent had previously provided to the Applicant. An extension was granted for response to 30 June 2017.

38. On 4 July 2017, the Investigator again wrote to the Respondent reminding him that the time for compliance had now expired. The Respondent replied on the same day saying he had been "ill with the flu" and asking for an extension to 7 July 2017. There does not seem to have been a further response from the Investigator but in any event the Respondent answered the questions contained in the schedule by email dated 10 July 2017, saying that "technology issues" were the reason for his delay in responding by the requested extension date.

39. The response is very straightforward. The Respondent admitted each of the matters with respect to MSP Legal other than an allegation that he wrote to MSP Legal on 1 October and 2 December 2015 on letterhead which described him as a Barrister.[18] He also requested copies of that correspondence.

40. Question 7 in the Schedule stated:

> I am told by the Society that you have supplied two statutory declarations in respect of this complaint. Please provide me with copies of these or authorise the Applicant to do so.

Although it is not clear from this question to which of the complaints the Investigator was referring, the Respondent took it to be the ones that he had provided to the Applicant in

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[15] The *Petherick* matter had already been added to the own motion complaint.

[16] Hereafter referred to as "the Investigator".

[17] It remained unamended until 12 March 2018 when the Ethics Committee resolved to bring the disciplinary proceedings.

[18] It is noted that no complaints have been made with respect to those matters.

the context of the Local Court prosecution referred to at [24] above.[19] The Respondent answered question 7 as follows:

> At this stage I decline to do so. There must be some end to any investigation of the modified own motion complaint referred to at paragraph 2 on page two of your letter. The Applicant NT obviously investigated the matter and upon doing so determined that a breach of the Legal Profession Act (the "Act") had occurred. A decision was taken to file a complaint pursuant to section 18(1) of the Act based upon the outcome of that investigation. I raised the defence provided by section 18(3) of the Act in answer to that prosecution. The defence was evidenced by two statutory declarations. The statutory declarations were no doubt carefully considered by counsel engaged by the Applicant NT. The decision was obviously then taken by Applicant NT to accept as truthful the contents of those statutory declarations and the complaint vis a vis the prosecution was withdrawn and then dismissed. Otherwise the matter would have proceeded to a hearing. In those circumstances I am at a loss to understand what matters there are left to investigate in connection with this modified complaint. I of course stand by the contents of the statutory declaration attested by myself.

41. The Investigator responded the next day, repeating his request for the statutory declarations, pointing out that a refusal to comply with a request under section 621 of the Act is capable of constituting unsatisfactory professional conduct or professional misconduct.

42. No reply having been received from the Respondent, the Investigator wrote to the Applicant on 7 August. *Inter alia* he said:

> As you know, when the Society appointed me to investigate this complaint in April 2017 you did not provide me with statutory declaration (**the declarations)** the practitioner had supplied to the Society for the purposes of an earlier prosecution. This was because the practitioner had not consented to supplying an investigator with the declarations pending, *inter alia,* the provision of a copy of the amended complaint.

He advised that he had now completed his report subject to one minor matter and had completed all enquiries apart from taking into account the declarations. He set out options for addressing the issue which have been redacted from the records of correspondence provided to the Tribunal

43. The declarations were provided to the Applicant in order to evidence a defence in in a public prosecution. It does not appear that any privilege would have attached to those documents so that notwithstanding the Respondent's refusal to consent "at this time" they could and should have been provided to the Investigator from the outset.

[19] Further correspondence shows this view to have been correct.

44. The Investigator's letter to the Applicant seeking assistance to obtain the statutory declarations was not promptly acted upon. On 28 September 2017 the CEO wrote to the Respondent saying that, as the Investigator was an agent of the Applicant, the documents would be available to him in the same way as if there had been an internal investigator. The CEO informed the Respondent that they would release the declarations within 7 days unless "ordered not to do so". There does not appear to have been a response to this letter, which is not surprising given it was sent only by email to the incorrect email address. It may be assumed that after 7 days the statutory declarations were provided to the Investigator.

45. Notwithstanding the Investigator's advice to the Applicant on 7 August 2017 that the investigation was close to complete, nothing further seems to have transpired until February 2018 when he briefly corresponded with a witness seeking to finalise his investigation. Finally, on 26 February 2018 the Investigator produced his report; some 9 months after providing the s 621 notice to the Respondent and 7 months after the response from him.

46. The length of time to produce that report, even given some intransigence from the Respondent about the statutory declarations, is inordinate. The section 621 notice to MSP Legal had been responded to in detail in the first investigation. The Applicant Investigator, and subsequently the Investigator Mr Scotter, was in receipt of both the MSP Legal response and the invoices for the matters the Respondent had advised and appeared on. Court records would have evidenced his appearance on each of the relevant matters.

47. With respect to the *Petherick* matter, once again Supreme Court records would have shown his appearance and the Applicant had the statutory declarations following the failed prosecution in the Local Court and which they presumably finally passed to the Investigator in early October 2017 as the CEO had said they would. If the own motion complaint about the *Petherick* matter had been corrected as the Respondent had requested to correctly identify for whom he appeared, and which should have been corrected before being referred to the Investigator, there would not have been the delay that occurred. The Respondent may have been somewhat difficult about giving the statutory declarations to the Investigator but he was entitled to receive a correct own motion complaint about his conduct in that matter and the Applicant was clearly aware if not before,[20] then at least in January 2017 when it received the statutory declarations as to which party he had appeared for in that case.

48. The Respondent had accepted each of the allegations put to him with respect to those matters that have formed the subject of the disciplinary application in his response of 10 July 2017. He frankly volunteered and admitted the further matter of appearing for his friend on a domestic violence application which would have been easily evidenced by a short transcript of the proceedings.

49. Once the Investigator's Report was received it was at least promptly referred to the Applicant Ethics Committee which considered it on 12 March 2018. The Committee

[20] It would be a fair assumption that they had obtained a transcript of the Supreme Court proceedings from 7 April 2016 which would have identified for whom the Respondent appeared before laying criminal complaints. If not, then the conduct of the prosecution is even more remarkable.

resolved to recommend to the NT Applicant Council that grounds 1-3 of the complaint be referred to the Disciplinary Tribunal and that the Council amend ground 3 in relation to the *Petherick* matter to correct the attribution as to the party for whom he appeared.

50. On 23 April 2018, that is around 6 weeks later, the Manager of Regulatory Services sent an email to the Respondent attaching the recommendation of the Ethics Committee and advising him that the Council of the Applicant would consider the recommendation of the Ethics Committee at its meeting to be held on 31 May 2018 and also consider any response from him. Unsurprisingly, no response or submission from the Respondent was received because once again the Applicant had sent the email to the incorrect address.

51. The own motion complaint was considered by the Council of the Applicant on 31 May 2018 and it resolved to start proceedings in the Disciplinary Tribunal on grounds 1-3 including finally correcting ground 3.

52. However, it was not until 3 October 2018 that these proceedings in the Disciplinary Tribunal were finally commenced, that is 4 months after the Council's resolution. There was nothing complex about the application. The Disciplinary Application itself is a short 3-page document summarising the complaints.[21]

53. Section 501 of the Act provides *inter alia* that where a decision has been made to start proceedings in the Disciplinary Tribunal in relation to a complaint, the practitioner is entitled to receive a Statement of Reasons from the Applicant in relation to the decision. Although the provision does not state when that statement is to be provided, it seems only logical that the statement should be provided before, or at least contemporaneously, with the application in order for the practitioner to understand the detail of the findings of the Applicant on which the application to the Tribunal is based. In this matter the statement was not produced until 15 March 2019, that is 5 months after the Applicant commenced these proceedings and over 9 months after the decision of the Council.

54. It is notable that the allegations in the 3-page Disciplinary Application contain considerably less detail than the Statement of Reasons which is a 9-page document. One purpose of a Statement of Reasons is to provide a legal practitioner with an understanding of why the Applicant has determined to start proceedings in the Disciplinary Tribunal, and to provide to the practitioner the content of the complaints so that they might be readily addressed when the matter comes before the Tribunal. Those purposes are undermined by the creating and providing of a Statement 5 months after proceedings have commenced. That it should have taken 9 months after the decision of the Council to commence proceedings to produce a Statement of Reasons as to why that decision was made is an extraordinary delay.

55. On 18 March 2019, an email was sent to the Respondent enclosing the Statement of Reasons, the Disciplinary Application dated 3 October 2018, the Interlocutory Application dated 28 November 2018 and an affidavit of the process server in relation to the Interlocutory Application. He was advised that the Tribunal had already made the orders that were sought in the Interlocutory Application. The documents were also sent by post to his residential address. Once again, the incorrect email address was used. We do not accept the assertion in the affidavit of the Manager of Regulatory Services dated 13

[21] There also is a fourth page confined to the attestation clause.

February 2020 that this was his then known email address. A perusal of the correspondence sent by the Applicant shows a number of incorrect variations of his email address used by the Applicant over time.

56. However more significantly, as previously mentioned on 6 March 2017 the Respondent had sent an email (from his correct email address) to the then CEO of the Applicant in relation to the withdrawal of the complaints in the Local Court and asking what further disciplinary action was contemplated. The CEO replied to this email on 14 March 2017 advising that the Society's Council had decided in 2015 to initiate an own motion complaint but which did not include the Local Court matter and that now that the Local Court matter was finalised the investigation of the own motion complaint would be progressed. She asked that he provide an address to which correspondence about the matter could be sent. The Respondent replied later that same day advising that he had not received a copy of the complaint as required and asking that it be forwarded to "this email address". He further advised that the most reliable address to communicate with him was "this email address" and asked if that was suitable to the Applicant NT. No response to this request is in the documents provided to the Tribunal. As we know from the subsequent correspondence between the Respondent and the Investigator, the Applicant did not provide the Investigator with the correct email address. At some point clearly the Applicant reverted to the incorrect address and persisted with it.

57. It appears that eventually the Respondent became aware of the proceedings because, on 23 April 2019, he telephoned the CEO of the Applicant and spoke with her. She then provided to him the Disciplinary Application and the Interlocutory Application for Substituted Service. The matter had in fact been before the Tribunal that morning and on 1 May 2019 in response to an email request from the Respondent, the Manager of Regulatory Services advised the Respondent of that and provided a copy of the Orders made.

58. It was fortunate that the Respondent contacted the Applicant on 23 April because the Order that had been made by the Chair of the Tribunal that day was for the matter to be listed for hearing on 6 June 2019 and for it to proceed on the papers if the Respondent failed to appear. He subsequently sought leave to appear by phone from Tasmania and then once he was able to return to Darwin, the matter proceeded to a plea hearing following the parties agreeing a Statement of Facts as directed by the Tribunal.

59. In addition to the ineptitude of communication with the Respondent and the delay in progressing the matters is the general conduct of Applicant in the prosecution of the complaints. The initial own motion complaint was that the Respondent had not complied with his reporting obligations for his practising certificate and that he had engaged in legal practice without a practising certificate. There was no need to "investigate" the reporting obligation complaint as the Applicant's record would speak for itself. His engagement in legal practice without a practising certificate was clear after the response was received from MSP Legal. However, no action was taken to put those matters to the Respondent and they simply sat until they were referred to the external investigator in April 2017; that is 14 months after the initial investigation and receipt of the information from MSP Legal that would have been sufficient for the purpose of an application to the Disciplinary Tribunal.

60. The conduct of the *Petherick* own motion complaint occasioned further delay and was poorly managed administratively. The Applicant identified the Respondent as acting for the wrong party in *Petherick*, a fundamental error that took almost 2 years to correct on the record but which had to have been apparent right from the time that the Applicant added it to the own motion complaint in April 2016.

Orders Sought by the Applicant Law Society

61. Each party filed written submissions. The Tribunal has accepted additional written submissions on the issue of costs.

62. Ground One is that the Respondent failed to provide a CPD certificate for the 2013/1014 CPD year by 31 March 2014 or at any time after that date. It is a clear breach of the requirements of the scheme of mandatory professional education set out in Schedule 2 of the Legal Profession Regulations 2007. The parties agreed at hearing that this was unsatisfactory professional conduct and that the Tribunal should make that finding.

63. As the correspondence records produced to the Tribunal show, Applicant did not always send the reminders referred to in the application to the correct email address. However, that does not excuse the Respondent's failure to comply with the CPD requirements. The onus was on him to show compliance by production of the appropriate certificates. He failed to do so and in his written submissions accepts that such failure goes to the issue of diligence. The Respondent notes, however, that such failure was within a discrete and relatively short period. The Tribunal considers that the degree of the failure should also be considered within the context of the lengthy time over which the Respondent has practised and maintained compliance with CPD requirements. He does not seek to justify or excuse his conduct but asks that his personal circumstances at that time be taken into account.[22]

64. Applicant has referenced two cases[23] in which it was found by the relevant Tribunal that failure to comply with the regulatory scheme in relation to practising certificates was found to be professional misconduct. Both matters involved more than the single failure with respect to reporting including breaches of undertakings given to the Law Societies allowing for renewal of practising certificates. In both cases the Tribunal imposed a small fine and a public reprimand. The Tribunal agrees that the misconduct on this count is of a lesser degree than that in the referenced cases.

65. The full detail of Ground Two that the Respondent engaged in legal practice without a practising certificate is set out earlier in these reasons and does not need to be repeated. Applicant submits, and the Respondent agrees, that these failures amount to professional misconduct.

66. In totality, the Applicant says that the Tribunal should find that the Respondent is not a fit and proper person to engage in legal practice and, in addition, should make a

[22] Respondents Submissions [10].

[23] *Council of the Applicant of NSW v Sandroussi* [2012] NSWADT 40 and *Council of the Applicant of NSW v Arraj* [2014] NSWCATOD 117.

recommendation to the Supreme Court that his name should be removed from the local roll pursuant to section 525(3)(a).

67. To support its submission that the Respondent is not a fit and proper person, the Applicant referred to a number of matters. In particular, reference was made to his response to the proceedings and a lack of explanation for his conduct. As has been highlighted above, those submissions contain inaccuracies.[24] However, the Respondent readily conceded, both at the hearing and in his written submissions that this conduct amounted to professional misconduct. While it was not until the Tribunal hearing was imminent that such a concession was made, the Respondent submits that he did not want to be rushed to the proper characterisation of the conduct in each allegation and says that his refusal was in

> "...the context of repeated requests that I accede to certain consent orders proposed by Applicant under section 527 of the LPA. It was said by Applicant that it was a necessary pre-condition to the Applicant's Submissions that these proposed consent orders be signed by all parties. I disagreed with that assertion. It is also very important to note that the first set of draft consent orders involved characterization of all conduct as professional misconduct."[25]

68. The Tribunal is not in a position to determine whether the Respondent's assertions are correct but if the assertions at [64] and [80] of the Applicant's written submissions that the Respondent has failed to accept wrongdoing or express remorse are based on a failure to agree consent orders then without other evidence, this would be an improper characterisation of his conduct. It is not incumbent on a respondent to agree consent orders nor is the Tribunal required to agree with consent orders.[26]

69. The Applicant's characterisation of the Respondent's attitude to the complaints, for example, that "he has not indicated any acknowledgement of wrongdoing nor remorse for his conduct,"[27]and shown "a lack of candour,"[28] "demonstrates an attitude of at best indifference, but possibly disdain, for the important system of justice in which he is currently admitted"[29] are presented without any evidentiary basis. The lengthy history set out earlier in these reasons shows that once the Respondent was aware of investigations and complaints, he responded to them. He has been candid with the Tribunal, accepts responsibility and expresses remorse. He offers a candid account of his personal life at the time which he said affected his judgement. Indeed, it is the view of the Tribunal that he may well have said more in relation to his personal circumstances that may have assisted his case but refrained from doing so.

70. The Respondent is 61 years old. He was initially admitted to practice in Tasmania in 1980 and in the Northern Territory in July 1984. He held a practising certificate in the Northern Territory from that time until 30 June 2014. Between 1 October 2007 and 30 June 2014, he held a practising certificate as a Barrister. There has been one previous complaint against him in July 2002 for which he received an admonishment.

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[24] See the allegations at [64] and [80] of Applicant's written submissions.
[25] Respondent's submissions at [9].
[26] See s 527(10) of the Act.
[27] See [46] Applicant's written submissions.
[28] Ibid at [66].
[29] Ibid at [81].

71. Summarising his written submissions, he says that in mid-2014 his emotional circumstances became difficult. His relationship ended suddenly and in acrimonious circumstances causing him great distress and resulting in the failures in that year. He became the fulltime carer for a friend who was suffering a serious psychiatric condition and her required care became overwhelming and persisted into 2015. From early 2015 he distanced himself from law and the legal fraternity but retained an interest in law and social justice issues which he says led to his failings in 2015 (the *Petherick* matter) and 2016 (assisting his friend in the DVO matter). He has set out in detail in his submissions the circumstances in which he became involved in each of those matters, including as previously noted that he received no fee, gain or reward in relation to them.

72. The Respondent states that he is,

> "...emotionally, intellectually and physically capable of undertaking the practice of the law. I am fully cognisant of the gravity of the conduct to which I have admitted (and expressed). I am deeply and genuinely remorseful. Much has changed since 2014. Nothing of note has occurred since 2016."[30]

73. In addition to his submissions, the Respondent provided two character references. One is from Mr Colin McDonald QC who has known the Respondent since about 1984 but has been more closely associated with him professionally from about the mid 1990s. Mr McDonald sets out the history of his involvement both on a professional and personal level. He describes the Respondent as being a very capable and dedicated practitioner, both as a solicitor and barrister and speaks of his community interest and assistance to various activities and persons. He states that the Respondent is genuinely remorseful and that this is out of character "for the fellow practitioner I have known".

74. The other reference is from Mr Luke Gosling OAM MP who is the Federal Member for Solomon. Mr Gosling knows the Respondent through their mutual interest and involvement in the salvage and restoration of a World War II naval vessel and the Association formed for that purpose. He speaks highly of the great deal of work, more than any other volunteer, all unpaid and physically arduous, that the Respondent has contributed to the project. The association has provided him with an opportunity to get to know the Respondent on a personal level and he has formed the opinion that "he is a very capable and dedicated person with a strong commitment to the community expressed, in particular, by his hard work with the Association."

COSTS

75. Section 529(1) of the *Legal Profession Act* provides:

> "The Disciplinary Tribunal must make an order requiring an Australian legal practitioner whom it has found guilty of unsatisfactory professional conduct or professional misconduct to pay costs (including costs of the Applicant and the complainant) unless the Tribunal is satisfied exceptional circumstances exist."

[30] Respondent's submissions at [25].

76. The authorities both in the Northern Territory and other jurisdictions have held that the provision requires the Tribunal to make an order for costs upon a finding of unsatisfactory professional conduct or professional misconduct. Unlike most other legal proceedings there is no general discretion in the awarding of costs where unsatisfactory professional conduct or professional misconduct has been found. The only exception is where "exceptional circumstances" exist.[31] Exceptional circumstances have been variously described as, "out of the ordinary course, or unusual, or special, or uncommon".[32] As is also often cited, "[e]xceptional circumstances do not need to be unique, or unprecedented, or very rare; but it cannot be one that regularly, or routinely, or normally encountered".[33]

77. Exceptional circumstances can consist of either a single circumstance or may arise out of a combination of circumstances even if they would not individually meet the definition.

78. The Respondent puts forward five matters which he says amount either singularly, or taken together, amount to exceptional circumstances.[34] These are impecuniosity, age, no prospects of paid employment outside of employment in the law, the taking of no step of significance in the proceedings that prolonged them or caused unnecessary costs to be incurred by Applicant and extreme delay by Applicant in prosecuting these matters.

79. As to the issue of impecuniosity, the Respondent makes reference in his submissions to his limited assets and lack of income and has also provided an affidavit confirming those matters. He owns a home which had been subject to a bank mortgage, but which was discharged in 2016 after he received a personal loan of $78,146 but which is not yet registered on the title. Liability for interest on the loan has been deferred pending the outcome of these proceedings. An unimproved capital value notice from 2017 is provided of $600,000 and he attests to speaking to employees of the Valuer General's office in February this year who informed him that the valuation now may be between 5 to 10% lower. It is well known that the Darwin property market has been considerably depressed over at least the last 2 years. He does not believe that his home is saleable in the current market. The affidavit of the process server attested to the poor condition of the residence and its surrounds.

80. Other than his home, he owns a catamaran yacht built around 1975 that he purchased in 1995 for $7000 and believes that it has no present market value as there is no market for such a vessel in the Northern Territory. His motor vehicle is a 1999 Toyota Hi-Lux which is unregistered and for which he believes on internet research is worth about $5000. He has an extremely limited amount of superannuation which in February stood at $30,570.84. It is common knowledge that the Covid 19 pandemic has affected superannuation accounts, so his current balance is likely to be less than this. Other than these possessions he has home and personal items that he estimates would be valued at no more than $2,000.

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[31] It is not always the case that actual costs are ordered under this provision as parties sometimes agree the quantum of costs for the purposes of s 529(1).

[32] *Council of the Applicant NSW v Hinde* [2011] NSWADT 20 at [33].

[33] *R v Kelly* [2000] QB 198 at 243.

[34] Written submissions dated 20 January 2020.

81. For a man of 61 years old with no current employment his financial circumstances can well be said to meet the definition of impecunious. He submits that at the age of 61 years he is likely to only have only about 6 more years of working life. While this submission may underestimate his capacity to continue legal work, it is the case that he would not be eligible, on current federal rules, to the aged pension until he is 67 years old. He says that he has made numerous job applications to no avail. Applicant says that he has provided no evidence of this however, the Tribunal accepts that the job prospects for a 61-year old whose entire work experience has been in the law are no doubt limited. The current COVID-19 pandemic will have exacerbated his circumstances in this regard.

82. The final two matters that are submitted to amount to exceptional circumstances go to the conduct of Applicant Law Society, much of which has already been referred to in these reasons. As the Respondent asserts, on the material before the Tribunal, there is nothing in his conduct that prolonged or caused additional costs in the proceedings. The Tribunal accepts these submissions. It is the view of the Tribunal that the Applicant, by reason of the way in which it conducted the matters which has been set out in detail in these reasons, has added to the costs.

83. The Respondent puts forward the issue of delay as a result of that conduct as another factor to be taken into account in determining whether there are "exceptional circumstances". In his submissions the Respondent points to the own motion complaint being issued on 8 April 2016. In fact, the own motion complaint with respect to engaging in practice without a practising certificate and non-compliance with reporting obligations was even earlier than this, having been issued on 27 August 2015. The third ground of complain relating to *Petherick* was added on 28 April 2016.

84. There are a number of unexplained periods of delay in the process. They are referred to above, but it is convenient to list the delays so that the totality may be understood.

    a. The initial own motion complaint was initiated on 27 August 2015, but no action was taken on it until a notice letter was sent to MSP Legal on 19 November 2015.
    b. The response to the notice was received on 10 February 2016 but nothing further happened in relation to the investigation (other than replying to the Respondent on 14 March 2017 when he inquired about what further action would now be taken on the *Petherick* matter to tell him there had been an own motion complaint in 2015) until it was referred to the second investigator on 11 April 2017. That is a delay of around 19 months from the own motion complaint.
    c. The own motion complaint was modified to add the *Petherick* matter and resolve a section 18 prosecution on 18 May 2016, but it took to 4 October 2016 to file the criminal complaint i.e. almost 5 months.
    d. The Investigator finalised his report on 26 February 2018, that is, more than 9 months after he was instructed.
    e. The Council of the Law Society resolved to commence proceedings in the Disciplinary Tribunal on 31 May 2018 but the application to the Tribunal was not filed until 3 October 2018, that is, 4 months after the resolution.
    f. The section 501 notice was not produced until 4 1/2 months after the application to the Tribunal was filed which was almost 10 months after the Council determined to commence proceedings.

85. It is not a requirement of the *Legal Profession Act* that all complaints must be investigated. Section 497 of the Act allows for proceedings to be started in the Tribunal without the need to start or complete an investigation if the Applicant is satisfied action should be taken having regard to the nature of the subject matter of the complaint and the reasonable likelihood that the Disciplinary Tribunal will find the practitioner has engaged in unsatisfactory professional conduct or professional misconduct.

86. These may well have been such matters that might have proceeded to the Tribunal on own motion complaints. The Respondent did not hold a practising certificate. There was clear evidence that he had engaged in legal practice without a practising certificate. In such matters there is a need to bring such conduct to a stop in order "to provide for the protection of consumers of legal services and the public generally."[35] This is one of the main purposes of the Act and it is achieved by taking efficient and determinative action in relation to complaints. It is a matter that also may go to the issue of costs.

87. Section 505 of the Act provides:

> "It is the duty of the Applicant to deal with complaints as efficiently and expeditiously as is practicable."

There is a strong public purpose to this duty. The disciplinary provisions of the Act exist to protect those who use legal services and the public generally.[36] That protection can only be properly given if complaints are promptly acted upon and resolved. There was nothing either efficient or expeditious in the way in which this complaint was conducted. Compounding that delay is that these were own motion complaints.

88. Not only has Applicant failed to meet its duty under s 505 in relation to these complaints, the delay has added to the Respondent's difficult personal and financial circumstances that have already been mentioned.

89. In addition, the quantum of costs that the Applicant says it has incurred, $32,319 exclusive of GST, seems extraordinary for a matter that was not contested at any point. Even with the 20% reduction it proposes to a fixed amount of $25,855.20, this amount appears well in excess of what might have been expected had the complaints been dealt with in an efficient manner.

90. Applicant says that the Respondent has not made out exceptional circumstances. The Tribunal however is satisfied that a combination of the Respondent's personal circumstances and the manner in which the Applicant has conducted this matter is sufficient to amount to "exceptional circumstances" in relation to a costs order.

91. The Tribunal finds:

    a. The Respondent engaged in unsatisfactory professional conduct by failing to provide a CPD certificate for the 2013/14 CPD year by 31 March 2014 or at any time after

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[35] See section 3(b) *Legal Profession Act*.

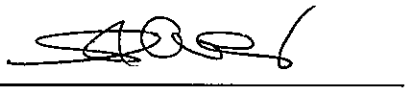
[36] This is one of the main purposes of the Act – see s3.

that date as required by the Legal Profession Regulations 2007 and section 78 of the *Legal Profession Act*.

b. The Respondent engaged in professional misconduct by engaging in legal practice without being an Australian legal practitioner contrary to section 18 of the *Legal Profession Act*.

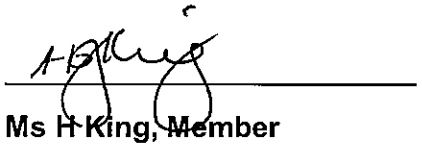
THE TRIBUNAL ORDERS:

1. The Respondent is to be publicly reprimanded.
2. Pursuant to section 525(5)(i) of the *Legal Profession Act* a practising certificate not to be granted to the Respondent for a period of 8 months from the date of hearing of this matter, namely 18 December 2019.
3. Each party is to bear its own costs



Acting Judge Oliver, Chair

Prof L McCrimmon, Member



Ms H King, Member