

CITATION: *Psychology Board of Australia v King* [2016] QCAT 140

PARTIES: Psychology Board of Australia
(Applicant)
v
Graeme King
(Respondent)

APPLICATION NUMBER: OCR173-14

MATTER TYPE: Occupational regulation matters

HEARING DATE: 18 March 2016

HEARD AT: Brisbane

DECISION OF: **Judge Suzanne Sheridan, Deputy President**
Assisted by:
Dr R Doley
Mr D McKenzie OAM
Dr S Morgan

DELIVERED ON: 4 July 2016

DELIVERED AT: Brisbane

ORDERS MADE:

- 1. Pursuant to s 196(1)(b)(iii) of the *Health Practitioner Regulation National Law Act 2009* (Qld) (National Law), the Tribunal finds the respondent has behaved in a way that constitutes professional misconduct.**
- 2. Pursuant to s 196(2)(e) of the National Law, the respondent's registration is cancelled.**
- 3. Pursuant to s 196(4)(a) of the National Law, the respondent is disqualified from applying for registration for a period of four years, commencing from the date of judgment.**
- 4. Pursuant to s 196(4)(b) of the National Law, the respondent is prohibited from using the title "counsellor" or "therapist" and from providing counselling or any such related health services.**
- 5. The respondent is to pay the applicant's costs of and incidental to these**

proceedings to be agreed, or failing agreement, to be assessed on the District Court Scale.

CATCHWORDS:

PROFESSIONS AND TRADES – HEALTH CARE PROFESSIONALS – MEDICAL PRACTITIONERS – DISCIPLINARY PROCEEDINGS – PROFESSIONAL MISCONDUCT AND UNPROFESSIONAL CONDUCT – DEPARTURE FROM ACCEPTED STANDARDS – where registrant engaged in a sexual relationship with a patient during the course of the therapeutic relationship – where registrant’s registration suspended following immediate action – where registrant’s registration lapsed during suspension – where registrant had faced prior disciplinary proceedings for the same conduct – where registrant continued to provide health services while suspended – where registrant admitted professional misconduct – whether registrant has engaged in professional misconduct – whether registrant should be prevented from re-applying for registration – whether registrant should be prohibited from providing counselling services – whether registrant should pay the costs of the proceedings

STATUTES – ACTS OF PARLIAMENT – INTERPRETATION – PARTICULAR WORDS AND PHRASES – SPECIFIC INTERPRETATIONS – “AND” “OR” – whether s 196(4)(a) and (b) of the *Health Practitioner Regulation National Law Act 2009* (Qld) should be read conjunctively

Australian Psychological Society’s Code of Ethics 2007
Health Practitioner Regulation National Law Act 2009 (Qld), ss 3, 3A, 4, 5, 138, 156, 158, 193 and 196
Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 102

BP Australia Ltd v South Australia (1982) 31 SASR 178, cited
Green v Premier Glynrhonwy Slate Co Ltd [1928] 1 KB 561, cited
Medical Board of Australia v Blomeley [2014] QCAT 160, distinguished

Medical Board of Australia v Jansz [2011]
 VCAT 1026, cited
Medical Board of Australia v Love [2013] QCAT
 608, discussed
Medical Board of Queensland v Alroe [2005]
 QHPT 004, discussed
Psychology Board of Australia v Cook [2014]
 QCAT 162, distinguished
Psychology Board of Australia v Dall [2011]
 QCAT 608, distinguished
Psychology Board of Australia v GA [2014]
 QCAT 409, distinguished
Psychology Board of Australia v Spring [2015]
 QCAT 314, applied

REPRESENTATION (if any):

APPLICANT: Mr A R Forbes of Lander & Rogers

RESPONDENT: Mr G King in person

REASONS FOR DECISION

Background

- [1] In early 2013, the Australian Health Practitioner Regulation Agency (**AHPRA**) received notifications regarding the professional conduct of the respondent psychologist, Mr Graeme King. Mr King was provided with copies of the notifications and an opportunity to make submissions, which he did. On 29 April 2013, the Psychology Board of Australia (**Board**) took immediate action under s 156 of the *Health Practitioner Regulation National Law Act 2009* (Qld) (**National Law**), and suspended the registration of Mr King. The matter was referred for an investigation and a health assessment.
- [2] On 5 August 2014, the Board referred the matter to the Queensland Civil and Administrative Tribunal (**Tribunal**) under s 193 of the National Law.
- [3] Mr King's registration lapsed on 30 November 2013. The fact that Mr King is no longer registered was no bar to the Board referring this matter to the Tribunal, nor to the Tribunal determining the referral. Pursuant to s 138 of the National Law, proceedings of this kind may be taken against a former registrant as though that person were still registered.
- [4] In these proceedings, Mr King admitted that he has continued to provide counselling services at all times since his suspension.
- [5] The referral to the Tribunal alleges that Mr King has engaged in conduct which constitutes professional misconduct as defined by s 5 of the National Law. Mr King has made admissions which include that he has

engaged in professional misconduct, and the matter has proceeded before the Tribunal by way of a statement of agreed facts. However, there remain some areas of factual dispute, and the parties have been unable to agree on the appropriate sanction.

The conduct

[6] The grounds for the referral are that Mr King engaged in a sexual relationship with a patient (**AB**) during the course of the therapeutic relationship. This sexual relationship continued for approximately six months.¹

[7] In early to mid 2012, AB was referred to Mr King by her general practitioner for psychological counselling. From as early as the initial consultation with AB on 18 May 2012, Mr King became aware that AB was a particularly vulnerable person and had suffered sexual abuse as a child. This is evident from his consultation notes of that session. Mr King wrote:

Since relocation ... lost b/friend. ... Already married with kids. Wife found out + he dropped [AB]. Abruptly left. ... Emotional trauma from breakup. ... PTSD. Dad sexually molested [AB].

[8] In Mr King's consultation notes of his second session with AB on 23 May 2012, he further records, "Wants to understand sexual abuse from dad. ... Feels alone. Anxiety. No connections to anyone".

[9] In early to mid 2012, a sexual relationship commenced between AB and Mr King.² Mr King has at all times admitted the sexual relationship occurred. However, it remains in dispute between the parties how the sexual relationship came to commence.

[10] Mr King attributes the commencement and continuation of the sexual relationship to the actions of AB. In an email to AHPRA on 7 November 2013, he said:

I hope the Psych Board takes the ... incident in context. ... In essence she raped and blackmailed me. ... I would not have started, or continued, a sexual liaison with [AB] if she had not sexually forced herself onto me (aggressively) and blackmailed me to continue to see her. ... [That] is the sole reason our sexual liaison started and then continued.

So I hope that the Board takes her extremely provocative and harassing behaviour (towards myself) into account when they determine my fate.³

¹ Statement of agreed facts, at [10]-[11].

² Ibid, at [10].

³ Email Mr King to AHPRA dated 7 November 2013.

- [11] An hour later he sent a further email, stating he “forgot to add” that he holds himself culpable for the sexual relationship, “even though she attacked and blackmailed me.”⁴
- [12] This account was reiterated in his response to the referral filed on 25 September 2014, where he said:
- Right from the outset [AB] was “rather forward”. When [AB] came for therapy she was very flirtatious. For example, she used to move her chair over right next to mine and touch my leg and say that she need (sic) to be close to me to gain the full effect of therapy. [AB] kept touching me and making suggestive comments towards me.*⁵
- [13] In that response, Mr King said the sexual relationship commenced when AB “jumped on him and raped him”.⁶ He said he allowed the relationship to continue because he was “trapped in a ‘no-win’ situation” where he was “very scared of a complaint vis a vis his (unintentional) unethical behaviour” being made to the Board.⁷
- [14] In his consultation notes dated 7 June 2012, Mr King wrote, “[AB] hugged me and tried to fondle me. Stopped therapy. Too intense.” Nevertheless, it is evident on the material before the Tribunal that a treating relationship continued beyond this date. Email correspondence between Mr King and AB indicates that AB continued to make and attend appointments with Mr King until at least 12 September 2012.⁸ In the statement of agreed facts, Mr King accepts that as at the date of commencing a sexual relationship with AB, he had not terminated or adequately terminated the treating relationship, nor had he transferred the psychological care of AB to an alternate psychologist.⁹
- [15] In her affidavit sworn 2 October 2015, AB said Mr King was flirtatious from her first consultation. She said he repeatedly commented, “you are so beautiful”, and “why aren’t you married? I can’t believe you’re not married!”¹⁰ At the end of the consultation, Mr King asked if he could hug her but she said no.
- [16] AB said in her second session on 23 May 2012, Mr King held her hand and rubbed it as she spoke. He continued to touch her during their second and third sessions, rubbing her leg as she talked. AB said Mr King told her, “I want to look after you”. Again, he asked if he could hug her. She said this time she let him, as “He had also been touching me a lot by then and I was beginning to be responsive”. As they were hugging,

⁴ Email Mr King to AHPRA dated 7 November 2013.

⁵ Form 36 response, Attachment B.

⁶ Ibid, Attachment A.

⁷ Ibid.

⁸ AB-1 to affidavit of AB, pp. 2-3.

⁹ Statement of agreed facts, at [12].

¹⁰ Affidavit AB, at [9].

Mr King said words to the effect of, “the electricity between us is intense”.¹¹

- [17] AB said that by her fourth session on 5 June 2012, “touching and fondling each other was becoming part of our sessions”. During this session, Mr King and AB talked about having a relationship.¹² AB said Mr King phoned her and invited her to a café on Saturday, 9 June 2012. She said:

*Graeme would tell me I was irresistible that day and that he wanted to be with me. I believed him and wanted to be with him. Our relationship became sexual that day.*¹³

- [18] On a number of occasions, AB suggested to Mr King that she should consult another psychologist. However, she said:

*Graeme didn't want me seeing anyone else. He didn't want anyone to find out about our relationship ... he told me it would ruin everything for him if anyone found out. I feel as though he emotionally blackmailed me not to see anyone else by using my loyalty and strong feeling for him in the hope of a future that he kept open.*¹⁴

- [19] According to AB, the relationship continued until 30 November 2012, when Mr King's wife discovered the affair. From this point, AB received text messages and emails from Mrs King. In her emails and text messages to AB, Mrs King repeatedly referred to AB's personal life and history of sexual abuse. AB also received emails from Mrs King's sister. AB described herself as “being terrorized” by the correspondence she was receiving, which did not cease until she changed her phone number and email address in March 2013.¹⁵

- [20] AB says Mr King stopped all contact with her in about January 2013.

- [21] In her affidavit, AB deposes to the impact of the relationship. She said:

*I felt I was abandoned by Graeme and not provided any help or care to deal with the harm he had caused me and the continual fear from the contact I received from Graeme's wife and his family.*¹⁶

She said the relationship had a severe impact in reactivating her PTSD symptoms, and that it took around 18 months to regain emotional stability.¹⁷

- [22] AB commenced treatment with another psychologist, Anette Renneflott, in December 2012. However, AB had made an appointment to see Ms

¹¹ Ibid, at [11]-[13].

¹² Ibid, at [14]-[15].

¹³ Ibid, at [16]-[17].

¹⁴ Ibid, at [33].

¹⁵ Ibid, at [27]-[30].

¹⁶ Ibid, at [38].

¹⁷ Ibid, at [42].

Renneflott as early as August 2012. In describing AB at her first appointment, Ms Renneflott said:

*[AB] presented highly anxious and distressed during this consultation. I observed the relationship to have a detrimental effect on her. She was in a state of despair. She was also suicidal.*¹⁸

- [23] In Ms Renneflott's view, the relationship had a detrimental impact on AB. She said:

*In [AB]'s case there was an extensive and gruesome history [of childhood sexual abuse] revealed, and the therapeutic relationship becoming sexual was therefore particularly damaging. It was so damaging in fact that [AB] believes her heart attack [in August 2012] was a direct consequence of the extreme distress experienced through the relationship and its aftermath.*¹⁹

- [24] Ms Renneflott said AB "continued to be traumatised" by the experience, and opined it would be "highly anti-therapeutic" if AB were exposed to any further involvement in these disciplinary proceedings.²⁰

Prior conduct

- [25] Mr King has been the subject of prior disciplinary proceedings for breach of professional boundaries.

- [26] Mr King was the subject of disciplinary proceedings before the former Health Practitioners Tribunal (**HPT**) for sexually exploiting his professional relationship with a patient, and engaging in sexual intimacy with her. On 23 July 2004, the HPT made orders suspending Mr King for a period of 12 months and imposing various conditions on his registration, including supervision, psychological or psychiatric treatment and preclusion from sole practice.²¹

- [27] In separate disciplinary proceedings before the HPT, Mr King was found to have breached the orders of 23 July 2004 by advertising himself as a psychologist during the period of suspension and continuing to practice as a sole practitioner. On 22 August 2008, the HPT made orders requiring supervision, reporting and a health assessment.²²

- [28] In those proceedings, the issue of whether Mr King had continued to actually work as a psychologist during his suspension was not determined. It did, however, become very clear that Mr King had, at all times, continued to work as a counsellor.

- [29] In its submissions in these proceedings, the Board contends Mr King's prior sexual relationship with a patient is an aggravating feature.

¹⁸ Affidavit Annette Renneflott, at [9].

¹⁹ Ibid, at [17].

²⁰ Ibid, at [18].

²¹ Ex 4, *Psychologists Board of Queensland v K* [2004] QHPT 006.

²² Statement of agreed facts, at [7].

Health assessments and reports

[30] For the purposes of these proceedings, medical reports were obtained from psychiatrists Dr Frank Varghese and Dr Greg Apel, and neuropsychologist Dr Jan Ewing.

[31] Following his suspension in 2013, the Board referred Mr King to Dr Varghese for a health assessment. The initial comments in his report dated 23 July 2013 were based solely on his interview with and observation of Mr King.

[32] In terms of his conduct in relation to AB, Dr Varghese says that Mr King acknowledged the inappropriateness of his actions but stated that he was “seduced by the client”. Mr King told Dr Varghese that during the therapy, “she started flirting with me.” He said, “she seduced me and I fell for it. I was then caught like a rabbit in a spotlight.”²³ Dr Varghese also discussed with Mr King the circumstances of the prior complaint.

[33] Dr Varghese commented:

*Mr King has acknowledged two serious breaches involving sexual involvement with female clients, and he is likely to have done both women serious harm. In his account to me despite the suspension by the Board and subsequent undertakings, he fails in his interview with me to acknowledge the seriousness of the transgression with respect to the first client and blames others for the complaint.*²⁴

[34] In reaching his conclusions, Dr Varghese had regard to the earlier reports of Drs Ewing, Leggett and Fredericks, which reports were obtained in dealing with the prior complaint. Those reports refer to the severe closed head injury sustained by Mr King in a motor cycle accident in 1980. There was general acceptance that as a result of the head injury, Mr King has frontal lobe dysfunction resulting in a significant impairment to a number of executive functions.

[35] Dr Varghese opined that the neurological impairment had given rise to a mental impairment, which detrimentally effected Mr King’s capacity to practice psychology. In his opinion, Mr King appeared “to lack the ability to learn from error even after acknowledging error.”²⁵ He stated, “I do not believe Mr King ought to be practising psychotherapy or counselling and certainly not in an individual practice in private.”²⁶

[36] Dr Ewing provided a report dated 24 February 2014, following the conduct of a further health assessment. She had previously seen Mr King in 2001, when she conducted the health assessment arising out of the prior disciplinary proceedings before the HPT.

²³ Report Dr Varghese dated 23 July 2013, pp. 2 and 6.

²⁴ Ibid, p. 13.

²⁵ Ibid.

²⁶ Ibid, p. 14.

- [37] In her report, Dr Ewing agreed with Dr Varghese in terms of Mr King's level of understanding and said he demonstrated very little understanding of the effect upon AB of the development of a sexual relationship within the therapeutic relationship. Dr Ewing said Mr King made no reference to the power differential involved in the treating relationship, and failed to appreciate his responsibility for directing therapeutic interactions. While he did not deny the sexual relationship with AB, he described her as predatory, attributing her sexually provocative behaviour as the major contributing factor to his breach.
- [38] She confirmed her earlier opinion that Mr King's traumatic brain injury had caused significant impairments in higher order executive processes. She commented that those deficits were likely to result in a reduced capacity to resist provocative or manipulative behaviour, or subjectively strong urges. In the circumstances, she considered Mr King was likely to have difficulty with rule-governed or knowledge-based mediation of his behaviour. Dr Ewing said the impairments were permanent and detrimentally affected Mr King's capacity to practice psychology.²⁷
- [39] During his consultation with Dr Ewing, Mr King reported that he had attended regular supervision during his suspension and for two years following his re-registration, and therapy once a month for three years during and after his suspension. When asked, however, Mr King could not name his therapist. Ultimately, despite these measures, Dr Ewing considered that Mr King demonstrated only a very superficial understanding of the contributing factors involved in his disciplinary breaches.
- [40] In summarising the assessment process, Dr Ewing said:

[Mr King] often provided relatively superficial responses and broad generalisations with a clear lack of understanding of the deeper, more abstract issues. He at no time demonstrated more than an extremely superficial understanding of the nature and relevance of the interpersonal dynamics involved in a therapeutic relationship ... even when prompted to discuss them.

...

*There was a clear lack of insight into the contribution of the regulatory deficits associated with his head injury and only a tokenistic gesture regarding his own responsibilities in determining the nature and course of therapeutic interactions.*²⁸

- [41] Ultimately, Dr Ewing recommended, "that AHPRA take all steps possible to ensure that Mr King is not able to continue to work in any form of counselling".²⁹ Dr Ewing did not consider further supervision or treatment would be likely to result in any significant improvement, and believed Mr

²⁷ Report Dr Ewing dated 24 February 2014, p. 22.

²⁸ Ibid, pp. 10 and 20.

²⁹ Ibid, p. 23.

King “will remain a danger to the public if he continues to practice in any counselling or therapeutic role.”³⁰

[42] Despite Dr Ewing’s observations, subsequently Mr King did attend additional therapy sessions with Dr Apel, a doctor he had consulted at the time of the prior complaint. As stated in the report of Dr Apel dated 15 June 2015, Mr King attended on 11 occasions between February 2014 and May 2015.

[43] Dr Apel said:

*Clinical supervision and medical care by myself, has demonstrated issues similar to that revealed to Dr Varghese and later Dr Ewing. As such there is a consistency across the picture of an individual who has struggled to contain employment in his work place in the context of impairment of judgement in psychotherapy situation, which are highly likely to be secondary to his frontal lobe injury. These deficits are of a long lasting nature and by their character tend to not be well recognised by the patient and so error correction strategies are difficult to implement.*³¹

[44] Dr Apel concluded that only supervision and extremely concrete rules will help, with the acceptance of the necessity of external structures. Upon realising that Mr King continued to work as a counsellor, Dr Apel stated that he made “strong suggestions” to Mr King, including that he should only work in a supervised or group situation, and should not engage in intensive counselling with females with personality disorders. He acknowledged the view which had been expressed by Dr Ewing, and interestingly despite the additional therapy to which he refers, he does not suggest any improvement in Mr King’s impairment.

Ethical standards

[45] At all material times, the standard of conduct reasonably expected of Mr King as a registered psychologist was that provided in the Australian Psychological Society’s Code of Ethics 2007 (**Code**), which provides relevantly:

C.4. Non-Exploitation

C.4.1 *Psychologists do not exploit people with whom they have or had a professional relationship.*

...

C.4.3 *Psychologists:*

(a) *do not engage in sexual activity with a client or anybody who is closely related to one of their clients;*

(b) *do not engage in sexual activity with a former client, or anybody who is closely related to one of their former*

³⁰ Ibid, p. 22.

³¹ Report Dr Apel dated 15 June 2015, p. 3.

clients, within two years after terminating the professional relationship with the former client;

- (c) *who wish to engage in sexual activity with former clients after a period of two years from the termination of the service, first explore with a senior psychologist the possibility that the former client may be vulnerable and at risk of exploitation, and encourage the former client to seek independent counselling on the matter; and*
- (d) *do not accept as a client a person with whom they have engaged in sexual activity.*

- [46] Having regard to the conduct admitted by Mr King, the Tribunal finds that Mr King is clearly in breach of the Code and has engaged in professional misconduct. Mr King has appropriately made admissions in that regard.³²
- [47] In oral submissions, the Board said this was purely a disciplinary case. It was not pleaded as an impairment case. However, both parties, including Mr King, acknowledged that Mr King has an impairment.
- [48] After hearing a matter, pursuant to s 196(1)(b) of the National Law, the Tribunal may decide to do one or more of the matters listed, including both a finding of misconduct and a finding that the practitioner has an impairment.
- [49] There can be no doubt that Mr King has an impairment. In fact, the unfortunate reality for Mr King, based on the medical evidence, is that there does not appear to be any treatment, including therapy, that will result in any improvement in that condition. The existence of the impairment must be a relevant factor in considering the appropriate sanction pursuant to s 196(2) of the National Law.
- [50] There is no suggestion that the impairment was such that Mr King cannot be held culpable for his behaviour.

Sanction

- [51] In its written submissions, the Board referred the Tribunal to the decision of *Medical Board of Australia v Jansz*,³³ which provides a useful summary of the principles involved in determining sanction:

[362] *The sole prerogative of the Tribunal and the purpose of the imposition of determinations in disciplinary matters is to protect the public. ...*

[366] *Determinations should in no sense be punitive and must not be framed in such a way, be constituted in such a way, or be so harsh as in reality to be punitive or retributive ...*

³² Statement of agreed facts, at [14].

³³ [2011] VCAT 1026.

- [367] *The objectives of determinations can be achieved through a variety of mechanisms, including by deterring the person concerned from further inappropriate conduct (specific deterrence), and deterrence of other practitioners minded to conduct themselves similarly (general deterrence), and facilitation of rehabilitation on the part of the practitioner.*
- [368] *The likelihood of recidivism, or, put another way, an assessment of the ongoing risk posed by the practitioner, should be central to the imposition of a determination.*
- [369] *Personal matters such as shame, personal ordeal, and financial difficulty likely to be occasioned by a determination are of little relevance save insofar as they contribute to the specific deterrence of the practitioner.*
- [170] *The degree to which the practitioner has acquired insight into his or her conduct has been held to be of potential relevance to the determination in that it goes to the continuing risk posed by the practitioner. ...*

- [52] The Board submits that Mr King's conduct was such that the only appropriate order is the cancellation of his registration and a disqualification from applying for re-registration for a period of not less than three years. In oral submissions, Mr Forbes for the Board explained that because Mr King's registration had lapsed while he was suspended, a formal cancellation of his registration is necessary to remove his name from the Board's register. Mr Forbes said the lapsing of the registration causes a "mechanical issue in terms of what happens to his registration on the face of the public register."³⁴
- [53] It is difficult to see on what basis the Board continues to record Mr King as a registered psychologist, albeit suspended, when his registration has lapsed. It would be expected that the public register would be appropriately updated when a practitioner's registration lapses. However, it may be that the effect of s 159 of the National Law is to maintain the suspension (and hence his name on the register) until the suspension ceases.
- [54] Obviously, Mr King should not appear on the register. As in *Psychology Board of Australia v Dall*,³⁵ had Mr King's registration not lapsed, the Tribunal would have cancelled his registration. Although the Tribunal has some doubt about the matter, given the need to ensure the health and safety of the public, it would seem that it is necessary for an order to be made clarifying the position.
- [55] In his written submissions, Mr King accepted that a disqualification period of not less than three years would be an appropriate order. However, he contended that as his registration had already been suspended for a

³⁴ T1-14, LL 36-37.

³⁵ [2011] QCAT 608.

period of three years, a further three year preclusion would be excessive. At the hearing, he said:

I guess, when I was suspended on 29th of April 2013, I thought I was disqualified then ... so therefore if I'm disqualified for three years from now on, I'll have ... a six-year period where I can't practice as a psychologist.³⁶

[56] Mr King contended that a more appropriate period of preclusion from re-registration would be 18 months.

[57] In his written submissions, Mr King contends that he has gained insight into the seriousness of his professional misconduct and its detrimental impact upon AB. However, on all the material, Mr King has a disturbing lack of insight into his offending conduct.

[58] This has been consistently recognised in the medical reports. In her report of 24 February 2014, Dr Ewing considered Mr King to have no insight into his behaviour or its effects upon AB. She said:

While he was able to pay 'lip service' to ideas that he is responsible, culpable, and remorseful, this appeared to reflect his awareness of this being the socially and professionally accepted stance rather than a genuine understanding of the nature and seriousness of his misconduct. He continually contradicted this stance by revealing his perception of the client as having the greater role/power in determining the course of the relationship, and her behaviour as predatory, provocative, and threatening, with his own capacities to determine the outcome to be inevitably curtailed by his fear of being reported to AHPRA if he upset her and the fact that her behaviour was sexually irresistible.³⁷

[59] Similarly, in his report of 23 July 2013, Dr Varghese described Mr King as having "a glib and flippant quality." He said, "There was a certain fatuous quality given the seriousness of [Mr King's] position. He was difficult to engage empathically other than at a superficial level."³⁸ Dr Varghese considered Mr King "did not appear to as yet fully appreciate the inappropriateness of his actions."³⁹

[60] In his oral submissions, Mr King took umbrage with the suggestion that he lacked insight into his conduct. He said:

The reason I was so glib and so flip[pant] on my previous interactions with the health professionals, etcetera, [was] because I was trying to minimise the legal outcome on myself. ... I'm saying I think I have an insight that I have not portrayed in the past.⁴⁰

[61] However, despite being repeatedly asked, Mr King was unable to explain to the Tribunal, at anything more than a superficial level, what insight he

³⁶ T1-36, LL 20-27.

³⁷ Report Dr Ewing dated 24 February 2014, p. 20.

³⁸ Report Dr Varghese dated 23 July 2013, p. 6.

³⁹ Ibid.

⁴⁰ T1-20, LL 7-19.

says he had gained into his conduct. Further, his attitude before the Tribunal also appeared very flippant. At one point, when being questioned by one of the assessors assisting the Tribunal about the likelihood of recidivism, Mr King responded, "Third time lucky!"⁴¹

- [62] Despite expressing apparent contrition for his behaviour and concern for AB in oral submissions, Mr King had persistently contradicted this position in his written submissions by continuing to blame AB for the commencement and continuation of the sexual relationship. Despite some years to reflect on the relationship, Mr King has failed to gain any appreciation of the full impact of his actions upon AB, or any deep understanding of the mechanisms underlying his conduct.
- [63] This lack of real insight was further emphasised by Mr King's continuing inability to accept full responsibility for the inappropriate relationship with the patient in the prior complaint. In these proceedings, he continued to justify that prior relationship based on his misapprehension that sexual contact was allowable after therapy, notwithstanding the very clear words of the Code.
- [64] By reference to the medical evidence, this lack of insight would appear to be connected to his impairment, but also consistent with the conclusion that his impairment is permanent and will not improve with treatment.
- [65] The Board contends Mr King's lack of insight is an aggravating feature to be taken into account in determining sanction. Likewise, the Board also referred to the prior disciplinary proceedings for the same type of conduct the subject of this referral.
- [66] Furthermore, the significant power imbalance between Mr King and AB by virtue of the therapeutic relationship is said to be another aggravating circumstance. The relationship between psychologist and patient is necessarily one involving a high degree of personal exposure on the part of the patient. That fact alone, notwithstanding any particular psychological issues, will place a patient in a position of greater vulnerability than may be the case in other therapeutic relationships.⁴² In this case, AB was extremely vulnerable, as Mr King was well aware. She placed a great deal of trust in Mr King and shared with him many intimate details of her life. In the circumstances, the sexual relationship was a gross violation of the responsibility and trust placed in Mr King as a health practitioner.
- [67] Mr King's behaviour was not an isolated transgression. Rather, his conduct was calculated and protracted. It occurred over a period of time and became progressively more serious in nature. His conduct was predatory and exploitative, and had significantly detrimental consequences for AB's physical and mental health.

⁴¹ T1-34, L 43.

⁴² *Medical Board of Australia v Alroe* [2005] QHPT 004 at [13].

[68] In his written submissions, Mr King contended he had taken action and enacted strategies to ensure he maintains ethical standards in the future. He said:

- *I no longer counsel young females who suffer from a personality disorder.*
- *I ensure that there is a barrier between myself and the client.*
- *I ensure I do not encroach upon client's "personal space" or touch any client.*
- *There is a glass door on the room I work out of.*
- *There is always someone present in the building (in a nearby room) when I am counselling people.*
- *I am undertaking ongoing supervision with Dr Greg Apel.*

[69] At the hearing, Mr King was only able to articulate these strategies after significant prompting. His answers were vague or non-responsive, and he frequently requested clarification of the question.

[70] When asked what strategies he had enacted, Mr King said he no longer treated females.⁴³ However, he contradicted this position on a number of occasions whilst giving oral evidence. When specifically asked to clarify whether or not he currently provides counselling services to women, Mr King said, "Well, I try not to."⁴⁴ He said he "tends" to refer them to alternate practitioners, but "it depends what her issues are".⁴⁵

[71] Mr King eventually explained, "I made a point of steering away from young females with personality disorders."⁴⁶ He indicated that he considered "young females" to be women under 30. When the Tribunal queried the efficacy of this age range given the fact that AB was 45 years old, Mr King was unable to provide any sensible response.⁴⁷

[72] In terms of the other strategies he has enacted, Mr King said:

*I've really ensured that I do not overstep the mark, vis-à-vis, sexual misbehaviour – sexual misconduct in the sense of not getting close to – not getting close to people, not – not asking questions or comments that might be sexually leading or misleading. I mean, I've – like my submission says, I've taken great effort and care and attention to not do that.*⁴⁸

[73] Mr King was unable to further particularise the strategies he says he has enacted, simply stating, "I'm making every effort to ensure it doesn't happen again".⁴⁹

[74] In her report, Dr Ewing expressed concern as to Mr King's strategies for maintaining ethical standards in the future. She said:

⁴³ T1-24, LL 27-29.

⁴⁴ T1-30, L 19.

⁴⁵ T1-25, LL 1; 17-21.

⁴⁶ T1-24, LL 24-25.

⁴⁷ T1-32, LL 7-24.

⁴⁸ T1-37, LL 43-47; T1-38, L 1.

⁴⁹ T1-34, L 45.

When asked how he could avoid similar difficulties occurring in the future if he continues to offer psychological/counselling services, he demonstrated that he continues to have no understanding of the dynamics and appropriate management of eroticized (or other) counter-transference issues. ... When asked to summarise his plan for managing therapeutic relationships in the future he replied: "Normal friendliness, if they misread that and become too flirty then terminate." He later flippantly added: "Third time lucky!"⁵⁰

- [75] Dr Ewing said Mr King failed to acknowledge and act on the importance of peer supervision. However, she did not consider further supervision or treatment likely to be of any utility.⁵¹
- [76] Indeed, throughout the medical evidence it is clear there remains concerns that Mr King poses a significant risk to the public should he continue to counsel in any capacity. Dr Varghese identified Mr King continuing to work as an unregistered counsellor to be a serious issue, and said, "I do not believe Mr King ought to be practising psychotherapy or counselling".⁵² Even Dr Apel considered that very onerous supervision conditions were required, and it was clear from the previous proceedings that Mr King was unable to find employment other than in solo practice.
- [77] The Tribunal is certainly not satisfied that the strategies Mr King says he has adopted in any way ensure his future compliance with ethical standards, or provide any measure of protection to the public.
- [78] It is well established that disciplinary penalties are imposed for the protection of the community, and for the maintenance of the reputation of the profession in the eyes of the public.⁵³ The likelihood of recidivism should be central to the determination of sanction. If it is considered that a practitioner may engage in similar misconduct in the future, orders deterring him or her from doing so will be appropriate.⁵⁴
- [79] In his submissions, Mr King referred to the effects these proceedings have had on his personal life and marriage. Indeed, his primary concern seemed to be his financial wellbeing. Whilst the hardship suffered or which will be suffered may be a factor, ensuring the health and safety of the public must always be paramount.⁵⁵
- [80] Given the extent of Mr King's boundary violations in the current and prior disciplinary proceedings, his ongoing physical impairment and the absence of any genuine remorse or insight into his conduct, the Tribunal considers it is unlikely that Mr King will be able to return safely to the profession.

⁵⁰ Report Dr Ewing dated 24 February 2014, pp. 15-16.

⁵¹ Ibid, p. 22.

⁵² Report Dr Varghese dated 23 July 2013, p. 14.

⁵³ See, for example, *Nursing & Midwifery Board of Australia v Evans* [2016] QCAT 77 at [54]; *Chinese Medicine Board of Australia v Garvin* [2015] QCAT 244 at [9]; and *Medical Board of Australia v Jones* [2012] QCAT 362 at [13].

⁵⁴ *Chinese Medicine Board of Australia v Garvin* [2015] QCAT 244 at [9].

⁵⁵ National Law, s 3A.

- [81] In the Tribunal's view, it is appropriate that an order be made pursuant to s 196(4)(a) disqualifying him from applying for registration for a specific period of time.

Period of disqualification

- [82] In determining the appropriate period of disqualification, as submitted by Mr King, a relevant consideration must be the overall time the practitioner will be precluded from practice. Part of that consideration would include any voluntary withdrawal from practice which the practitioner undertakes of their own volition.⁵⁶ However, as noted by the Honourable James Thomas AM in *Psychology Board of Australia v GA*:⁵⁷

*It will not always be appropriate to regard voluntary cessation of practice as equivalent to a de facto suspension, as a practitioner might take a convenient holiday and seek to obtain benefit from it.*⁵⁸

- [83] In that case, the respondent practitioner made a personal decision to completely withdraw from practice until the resolution of her disciplinary proceedings. She adhered to her voluntary suspension despite substantial loss of income. The Tribunal considered the practitioner's voluntary cessation of practice to be a genuine self-imposed discipline that she had contentiously followed.⁵⁹ In the circumstances, it was treated as a de facto suspension, and no further period of suspension was ordered.
- [84] That case is clearly distinguishable. The practitioner's decision in *GA* to completely withdraw from practice was found to be demonstrative of her insight into the inappropriateness of her conduct. In this case, Mr King has continued to work as a counsellor throughout the entirety of his suspension. Far from reflecting any level of insight, understanding or even remorse for his conduct, Mr King's constant provision of counselling services, despite his suspension, demonstrates his complete lack of understanding of the reasons for that suspension.
- [85] In submitting that no less than three years is the appropriate period of disqualification, the Board drew the Tribunal's attention to a number of cases involving professional boundary violations by medical practitioners. It submitted that in serious disciplinary matters, there may be cancellation or preclusion of between two to four years. In the Board's submission, Mr King's conduct placed him within the higher range of severity.
- [86] In *Psychology Board of Australia v Spring*,⁶⁰ the former registrant violated professional boundaries with respect to two patients. The practitioner commenced a sexual relationship with the first patient during the course of the therapeutic relationship. With respect to the second patient, he

⁵⁶ *Psychology Board of Australia v Spring* [2015] QCAT 314 at [15].

⁵⁷ [2014] QCAT 409.

⁵⁸ *Psychology Board of Australia v GA* [2014] QCAT 409 at [40].

⁵⁹ *Ibid.*

⁶⁰ [2015] QCAT 314.

demonstrated a preparedness to expose a clearly vulnerable patient to danger in furtherance of his own perceptions of his need for protection. Significantly, in that case Dr Varghese opined the practitioner failed to appreciate the boundary issues which applied to the practice of psychology, and considered he displayed a clear and disturbing lack of insight and empathy.

- [87] As at the date of the hearing, the practitioner had voluntarily withdrawn from practice for a period of two and a half years. Given his withdrawal, the Tribunal ordered that the practitioner be precluded from applying for registration for a further period of two years and six months. Taking into account his voluntary withdrawal, this effectively resulted in a five year preclusion from practice.
- [88] In *Medical Board of Queensland v Alroe*,⁶¹ the registrant psychiatrist engaged in sexual acts with a former patient on four occasions. The HPT referred to the significant power imbalance between psychiatrists and their patients, and considered the practitioner's conduct to have been predatory and knowingly exploitative. The HPT emphasised the importance of protecting the public from medical practitioners who are unable to attain the appropriate standard of professional behaviour particularly in relation to psychiatrists, "to whom patients disclose so much and in whom they place so much trust".⁶² Further, the HPT considered the practitioner displayed no real insight into his offending conduct.
- [89] In the circumstances, the HPT considered the only appropriate order was a cancellation of the practitioner's registration. He was precluded from applying for re-registration for a period of four years.
- [90] In *Psychology Board of Australia v Dall*,⁶³ the former registrant engaged in a sexual relationship with a patient who was a prisoner with a history of acute self-harming behaviour. The relationship spanned a number of years, and the practitioner had attempted to deceive both her employer and the Board about the relationship. In that case, the Board sought a preclusion period of three years. Despite expressing concern that the practitioner lacked insight about the ethical implications of her conduct, the Tribunal considered she had a genuine concern for the welfare of the patient. In the circumstances, the Tribunal imposed a preclusion period of 18 months.
- [91] In *Psychology Board of Australia v Cook*,⁶⁴ the practitioner engaged in a sexual relationship with the patient on four occasions during the course of the treating relationship. The practitioner made full admissions to the Board and had no prior history of disciplinary issues. Of her own accord, she sought training and counselling and moved to a large group practice where she received support and supervision. The practitioner was

⁶¹ [2005] QHPT 004.

⁶² *Medical Board of Queensland v Alroe* [2005] QHPT 004 at [13].

⁶³ [2011] QCAT 608.

⁶⁴ [2014] QCAT 162.

suspended for six months, with conditions imposed on her registration upon return to practice.

- [92] There are a number of other recent decisions where the Tribunal has conducted an analysis of the appropriate sanction in cases involving sexual misconduct by health practitioners.
- [93] In *Medical Board of Australia v Blomeley*,⁶⁵ the practitioner engaged in a sexual relationship with a patient during the course of the therapeutic relationship. In that case, the practitioner had promptly admitted the relationship, acknowledged its inappropriateness, confessed his shame and offered an apology to the patient. He also took steps of his own accord to reinforce and improve his understanding of professional boundaries. In the circumstances, the practitioner's registration was suspended for a period of 15 months.
- [94] In *Medical Board of Australia v Love*,⁶⁶ the former registrant engaged in a sexual relationship with a patient over a period of five years. The Tribunal considered the practitioner's behaviour to be a gross violation of his ethical obligations.
- [95] Dr Love's conduct was of the most reprehensible kind. It was conducted over a significant period, throughout which the patient remained highly vulnerable and a patient of Dr Love. It included Dr Love regularly collecting the patient from a clinic where she was undergoing treatment for anorexia nervosa and had been self-harming and overdosing, engaging in sexual intercourse and returning her to the clinic afterwards. His Honour Judge Horneman-Wren observed, "It is difficult to imagine how a patient could be move evidently vulnerable, yet so shamelessly exploited."⁶⁷
- [96] In the circumstances, the Tribunal ordered that Dr Love be precluded from applying for registration for a period of six years.
- [97] In my view, based on the authorities discussed above, Mr King's conduct falls towards the higher end of the spectrum of sexual misconduct. While it cannot be said to fall as high as the conduct in *Love*, it is clearly more egregious than that in *Blomeley*, *Dall* and *Cook*.
- [98] Mr King's conduct was significantly more reprehensible than that of Dr Blomeley. Mr King has not demonstrated anywhere near the level of co-operation, contrition or insight displayed by Dr Blomeley. Dr Blomeley had no prior professional transgressions. Furthermore, there was significantly greater vulnerability to the patient in this case given AB's conditions and history, and the significant power imbalance inherent in psychologist patient relationships.

⁶⁵ [2014] QCAT 160.

⁶⁶ [2013] QCAT 608.

⁶⁷ *Medical Board of Australia v Love* [2013] QCAT 608 at [29].

- [99] In *Dall*, the sexual relationship never progressed to a physical relationship due to the patient's incarceration. There was no evidence of predatory conduct, and Ms Dall displayed a level of concern for her patient's wellbeing which is absent in this case. Again, Ms Dall had never been the subject of prior disciplinary proceedings.
- [100] Finally, Mr King's misconduct is significantly more serious than that in *Cook*. He has failed to demonstrate the same degree of co-operation, remorse or insight. Further, Ms Cook's behaviour was not predatory, and she had no prior disciplinary transgressions.
- [101] In the circumstances, and having regard to the gravity of the offending conduct and the relevant case authorities, it is appropriate that Mr King be disqualified from applying for registration as a registered health practitioner for four years. Upon the expiration of that exclusion period, it will be for Mr King to satisfy the Board that he is, at that time, a fit and proper person to be registered as a psychologist.

Prohibition from providing a health service

- [102] Throughout his suspension Mr King has worked as a counsellor, and has openly acknowledged his intention to continue to work as a counsellor if his registration as a psychologist is not reinstated. In those circumstances, the Board has also sought an order pursuant to s 196(4)(b) of the National Law that Mr King be prohibited from providing health services. Section 194(4) provides:
- (4) *If the tribunal decides to cancel a person's registration under this Law or the person does not hold registration under this Law, the tribunal may also decide to—*
- (a) *disqualify the person from applying for registration as a registered health practitioner for a specified period; or*
- (b) *prohibit the person from using a specified title or providing a specified health service.*
- [103] In considering that sub-section, notwithstanding the submissions of the Board, a question arises as to whether or not s 196(4) authorises the Tribunal to make both orders or whether the Tribunal must make a choice.
- [104] Ordinarily it might be thought the use of the word "or" limits the Tribunal to making either a disqualification order or a prohibition order, but not both. If that course were adopted it would have the obvious practical consequence in this case that the practitioner, if disqualified from applying for registration, would continue to practice as a counsellor, or if prohibited from practising as a counsellor would be entitled to re-apply for registration at any time.

- [105] It is well accepted that sometimes an “or” in a statute should be read as an “and”. In *Green v Premier Glynrhonwy Slate Co Ltd*,⁶⁸ Scrutton LJ said:

*You do sometimes read ‘or’ as ‘and’ in a statute. In Brown & Co. v. Harrison McKinnon J. read ‘or’ as ‘and’ in the Carriage of Goods by Sea Act, 1924, and his decision was confirmed by this Court. But you do not do it unless you are obliged, because ‘or’ does not generally mean ‘and’ and ‘and’ does not generally mean ‘or’.*⁶⁹

- [106] In *BP Australia Ltd v South Australia*,⁷⁰ Wells J in referring to that decision and in considering the interpretation to be given to a section of the *Shop Trading Hours Act 1977-1980 (SA)*,⁷¹ said:

*However that may be, I am of the clear opinion that principle and authority not only authorize, but compel, the reader to bring the construction of the definition into line with what common sense would immediately suggest.*⁷²

- [107] In determining the question, it is necessary to consider the purpose and object of the law. The purpose of the National Law is to provide a scheme to provide protection to the public by ensuring that only health practitioners who are suitably trained and qualified to practise in a competent and ethical manner are registered. The guiding principles of the scheme, as stated in s 3, include a requirement for restrictions on the practice of a health profession to be imposed, but “only if it is necessary to ensure the health services are provided safely and are of an appropriate quality.”
- [108] Section 3A provides that the main principle for administering this Act is that the health and safety of the public is paramount. Section 4 provides that an entity with functions under this law are to exercise its functions having regard to the objectives and guiding principles of the national registration scheme.
- [109] Section 7 of Schedule 7 of the Act provides that in the interpretation of a provision of the National Law, the interpretation that will best achieve the purpose or object of the law is to be preferred to any other interpretation.
- [110] In construing s 196(4), the purpose and object of the law, in my view, compels a conclusion that the word “or” should be read as “and”, with the result that the Tribunal is empowered to both disqualify and prohibit.
- [111] On the facts here, Dr Ewing has expressed grave concerns for the safety of the public should Mr King continue to practice in any counselling or therapeutic role. She recommended AHPRA take all possible steps to prevent him counselling in any capacity. She said:

⁶⁸ [1928] 1 KB 561.

⁶⁹ *Green v Premier Glynrhonwy Slate Co Ltd* [1928] 1 KB 561 at 568.

⁷⁰ (1982) 31 SASR 178.

⁷¹ No. 35 of 1977; No. 115 of 1980.

⁷² *BP Australia Ltd v South Australia* (1982) 31 SASR 178 at 191.

I consider the risk of an unintentional breach to be very high. Furthermore, I consider his demonstrated lack of appreciation of the nature of therapeutic interactions and his clear lack of empathy and judgment make the risk of a range of harmful interactions (other than/in addition to sexual misconduct) when working with psychologically vulnerable clients to be very high.⁷³

[112] Similarly, Dr Varghese opined Mr King should not be practising psychotherapy or counselling.

[113] Concerns regarding Mr King's practice as an unregistered counsellor were initially raised during his prior disciplinary proceedings. In those proceedings, psychiatrist Dr Andrew Leggett conducted a health assessment on behalf of the Board. In his report dated 22 July 2005, Dr Leggett said:

It [is] likely that he would continue in solo practice as an unregistered counsellor, not subject to any conditions and not obliged to seek either treatment or professional supervision. Under such circumstances, he and his clients might be more likely to be at risk due to the potentially adverse behavioural consequences of his impairment.

[114] On the material, it is clear that Mr King's provision of counselling services places the public at continued risk. Given the Tribunal's findings above, it is appropriate that pursuant to s 196(4)(b) of the National Law, Mr King be prohibited from using the title "counsellor" or "therapist" and from providing counselling services or any such related health services in any capacity.

Costs

[115] By way of written submissions, the parties have agreed that Mr King should pay the Board's costs of and incidental to the proceedings in a sum to be agreed, or failing agreement, to be assessed.

[116] Such an order was regularly made under s 195 of the National Law, which conferred a broad jurisdiction on the Tribunal to "make any order about costs it considers appropriate for the proceedings". However, following the removal of s 195 by the *Health Ombudsman Act 2013* (Qld),⁷⁴ the issue of costs falls to be determined under the provisions of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) (**QCAT Act**).

[117] The relevant provisions of the QCAT Act provide that each party to a proceeding must bear its own costs unless otherwise provided in the QCAT Act or by an enabling Act,⁷⁵ or unless the interests of justice require it.⁷⁶ The matters to which the Tribunal may have regard in deciding whether to award costs are set out in s 102(3). Those matters include "anything else the Tribunal considers relevant."

⁷³ Report Dr Ewing dated 24 February 2014, p. 23.

⁷⁴ *Health Ombudsman Act 2013* (Qld), subparagraph 50 of s 326.

⁷⁵ QCAT Act, s 100.

⁷⁶ QCAT Act, s 102(1).

[118] In this case, the parties have consented to the making of an order awarding costs. Funded as it is by its practitioner members, the Board has limited resources. It has been put to expense in investigating and prosecuting these proceedings. In those circumstances, it would be inappropriate that the costs of the proceedings be borne by its members rather than Mr King, who has engaged in professional misconduct.

[119] Mr King has made detailed submissions as to his current financial position, and has indicated he would be unable to pay any costs order. Nevertheless, the appropriate order is that Mr King pay the Board's costs of and incidental to these proceedings as agreed, or in default of agreement, as assessed.

Orders

[120] Accordingly, the Tribunal orders that:

1. Pursuant to s 196(1)(b)(iii) of the National Law, the Tribunal finds Mr King has behaved in a way that constitutes professional misconduct.
2. Pursuant to s 196(2)(e) of the National Law, Mr King's registration is cancelled.
3. Pursuant to s 196(4)(a) of the National Law, Mr King is disqualified from applying for registration for a period of four years, commencing from the date of judgment.
4. Pursuant to s 196(4)(b) of the National Law, Mr King is prohibited from using the title "counsellor" or "therapist" and from providing counselling or any such related health services.
5. Mr King is to pay the Board's costs of and incidental to these proceedings to be agreed, or failing agreement, to be assessed on the District Court Scale.