

# QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Psychology Board of Australia v Sweeney* [2019] QCAT  
134

PARTIES: **PSYCHOLOGY BOARD OF AUSTRALIA**  
(applicant)  
v  
**MARK SWEENEY**  
(respondent)

APPLICATION NO/S: OCR198-15

MATTER TYPE: Occupational regulation matters

DELIVERED ON: 10 May 2019

HEARING DATE: 29 November 2016

HEARD AT: Brisbane

DECISION OF: Judge Sheridan

Assisted by:

Mr S Brimstone

Mr P Murdoch

Dr N French

- ORDERS:
- 1. Pursuant to s 196(1)(b)(iii) of the *Health Practitioner Regulation National Law (Queensland) (National Law)*, the Tribunal finds that Mr Sweeney behaved in a way that constitutes professional misconduct.**
  - 2. Pursuant to s 196(4)(a) of the National Law, Mr Sweeney is prohibited from applying for registration for a period of one month from the date of these orders.**
  - 3. There be no order as to costs.**

CATCHWORDS: PROFESSIONS AND TRADES – HEALTH CARE PROFESSIONALS – DISCIPLINARY PROCEEDINGS – PROFESSIONAL MISCONDUCT – GENERALLY – where the practitioner failed to maintain appropriate professional boundaries with respect to a patient – where the practitioner provided false and misleading information to the Board – where the practitioner induced another vulnerable person to sign a false statement to further mislead the Board – where the practitioner some years later self-reported his wrongdoing – where the parties have agreed the conduct amounts to professional misconduct

and agreed the sanction to be imposed - whether conduct amounts to professional misconduct – whether sanction agreed appropriate

*Health Practitioner Regulation National Law (Queensland)*, s 3A, s 5, s 193B, s 195, s 196  
*Queensland Civil and Administrative Act 2009 (Qld)*, s 32, s 100, s 102

*Health Ombudsman v Antley* [2016] QCAT 472, applied  
*Health Ombudsman v Dalziel* 2017 QCAT 442, applied  
*Psychology Board of Australia v Wakelin* [2014] QCAT 516, considered

#### REPRESENTATION:

Applicant: A Forbes, instructed by Lander & Rogers Lawyers

Respondent: Self-represented

#### APPEARANCES:

This matter was heard and determined on the papers pursuant to s 32 of the *Queensland Civil and Administrative Tribunal Act 2009 (Qld)*.

#### REASONS FOR DECISION

- [1] On 3 November 2015, the Psychology Board of Australia (**Board**) referred to the Queensland Civil and Administrative Tribunal (**Tribunal**) disciplinary proceedings against the practitioner, Mark Sweeney. The referral was made pursuant to s 193B of the *Health Practitioner Regulation National Law (Queensland)* (**National Law**) on the basis that the Board reasonably believed Mr Sweeney had behaved in a way that constituted professional misconduct (**Referral**).
- [2] The Referral relates to allegations of false and misleading information and/or documents provided by Mr Sweeney to the Psychology Board of Queensland (**Former Board**).
- [3] The allegations in the referral arise from a complaint dated 7 June 2007 which alleged that Mr Sweeney had engaged in an inappropriate relationship with the complainant.
- [4] At the time of the investigation into the complaint by the then Former Board in a letter to the Former Board Mr Sweeney denied the relationship. He provided to the Former Board a letter under the hand of SM supporting his denial. The Former Board concluded that the complaint was not fully substantiated.
- [5] Seven years later, on 16 May 2014, Mr Sweeney wrote to the Australian Health Practitioner Regulation Agency (**AHPRA**) and admitted that his previous letter and the letter under the hand of SM were both false and admitted to having had an inappropriate relationship with the complainant.
- [6] The Referral alleges that both the letter from Mr Sweeney provided to the Former Board and the letter under the hand of SM were false and/or misleading and were intended to mislead the investigator and the Former Board. It was alleged the letter

under the hand of SM was signed by SM under coercion and undue influence. It is alleged that by reason of the information and/or documents provided by Mr Sweeney to the Former Board, the Former Board were misled or deceived when it took no action with respect to the complaint.

- [7] The matter proceeded before the Tribunal by way of a statement of agreed facts and a statement of disputed facts. Despite certain facts remaining in dispute, the parties were able to reach an agreed position as to the orders which should be made by the Tribunal.

### **Background**

- [8] Mr Sweeney was first registered as a psychologist in Queensland in 1991, and remained registered in Queensland at the time of the complaint to the Former Board.
- [9] At that time, Mr Sweeney was employed by and practised psychology as a rehabilitation consultant at Commonwealth Rehabilitation Services Australia in Brisbane. The rehabilitation service offered a program which was designed to assist patients to get off government benefits and into work. The complainant became a patient of Mr Sweeney through the program in late 2006.

### **The original complaint**

- [10] In her letter of complaint to the Former Board, the complainant alleged that Mr Sweeney had perpetrated a boundary violation against her. In her letter, she stated that on 20 May 2007 she received a phone call from Mr Sweeney inviting her to join him at “The Willow Hotel”. When inviting her, Mr Sweeney told the complainant to catch a taxi to the hotel and he would meet her outside and pay for the taxi.
- [11] The complainant accepted the invitation. Mr Sweeney was with a group at the hotel. The complainant alleged in her complaint that Mr Sweeney and the others were drinking heavily and Mr Sweeney had made advances towards her while they were at the hotel. She said that she asked to be dropped home.
- [12] Consistent with the matters stated in the letter of complaint, it is alleged in the Referral that on that night:
- (a) instead of driving the complainant home from the social function, Mr Sweeney drove her to his house;
  - (b) Mr Sweeney invited her to watch a DVD at his house;
  - (c) where they watched the DVD, the only furniture to sit upon was a bed;
  - (d) Mr Sweeney said to her words to the effect of: “he wanted to cuddle” and “he wanted to be held”;
  - (e) Mr Sweeney took his shirt off;
  - (f) Mr Sweeney attempted to move the complainant’s hand onto his chest;
  - (g) Mr Sweeney wrapped his arms around the complainant whilst she was sitting cross-legged on the floor at the foot of his bed;

- (h) Mr Sweeney lifted up the complainant's shirt and slobbered on her stomach; and
- (i) Mr Sweeney drove her back to her house, at which time he expressed remorse and regret at what he had done.

- [13] In response to the complaint, Mr Sweeney sent a letter to the Former Board dated 1 October 2007 denying most of the allegations made by the complainant. Mr Sweeney admitted to having invited the complainant to join him at the hotel, the complainant attending and to his having paid the taxi fare. He denied having taken the complainant back to his house that night; though admitted in the course of treating the complainant she had previously attended at his house and he had previously attended at her house.
- [14] With that letter, Mr Sweeney also sent to the Former Board a letter which purported to be under the hand of SM which supported his denial of the complaint and a document signed by him explaining the nature of his relationship with SM. The letter purportedly signed by SM explained the extensive help that Mr Sweeney had given her over a number of years.
- [15] In the letter, SM had said that she had a key to the house and explained that on the night on 20 May 2007, she could remember being at the house studying because she had an upcoming chemistry exam which she was worried about. She said she had stayed up late studying and had just gone to bed at the house when Mr Sweeney arrived home. The letter said that he had arrived home alone.
- [16] Following receipt of those letters, on 9 October 2008 the Former Board conducted a hearing into the complaint. Mr Sweeney attended the hearing by phone.
- [17] By the time the matter was being dealt with by the Former Board, Mr Sweeney had already moved to Tasmania and obtained registration as a psychologist in Tasmania. His registration in Tasmania had been made subject to conditions, pending the completion of the investigation in Queensland.
- [18] The Former Board found that while a ground for disciplinary action had been established against Mr Sweeney in that he had acted in a way that constituted unsatisfactory professional conduct insofar as he had formed a 'dual relationship' with the complainant. The Former Board found the complaint was not substantiated in relation to the alleged sexual comments and physical conduct of Mr Sweeney.
- [19] Given the status of Mr Sweeney's registration in Queensland, in its findings, the Former Board resolved that had Mr Sweeney still been registered in Queensland he would have been reprimanded and invited to enter into an undertaking for a period of supervision of between 12 months and two years with the focus of the supervision being boundary violations, psychopathology and ethics.
- [20] Upon receipt of the decision of the Former Board, Mr Sweeney's registration in Tasmania was made subject to certain conditions.
- [21] In the intervening period, the registration system has been nationalised across Australia. Mr Sweeney's registration as a psychologist lapsed on 6 January 2015. Mr Sweeney has not sought to renew his registration since that time.

### **The referral**

- [22] On 16 May 2014, Mr Sweeney wrote to AHPRA to self-report that in his answer to the Former Board to a complaint made in approximately 2007 he was “not truthful with the Board”. He admitted to having sought to discredit the complainant “by conscripting another individual, SM, to lie in [my] support.” Mr Sweeney stated:

SM is not to be blamed for this action. Such was the nature of our relationship at that time that her complicity in this matter was the result of manipulation of her feelings towards me. I accept sole and full responsibility for my dissimulation.

- [23] AHPRA, on behalf of the Board, conducted an investigation. That investigation resulted in the bringing of the Referral proceedings.
- [24] In the Referral, it is alleged that both the denial by Mr Sweeney and the letter under the hand of SM were false and misleading and were intended to mislead the Former Board (and the investigator assisting the Former Board).
- [25] It was alleged that the letter in the name of SM was signed by SM under coercion or undue influence, the particulars of which were that Mr Sweeney had treated or otherwise provided care and support to SM, was or had engaged in a sexual relationship with SM and had used coercion, domestic violence and psychological abuse throughout their relationship.
- [26] The Referral detailed the extent of the misconduct towards the complainant by reference to her initial letter of complaint. Whilst it is not clear from the wording of his letter of 16 May 2014, in these proceedings Mr Sweeney continued to deny that he had made sexual comments or touched the complainant in the manner alleged. Contrary to his initial response, Mr Sweeney admitted to having taken the complainant to his house that night, to having watched a DVD and to having expressed remorse and regret for the way he had behaved.
- [27] The Board did not press for findings in relation to the allegations that he made sexual comments or touched the complainant in the manner alleged.
- [28] The matter proceeded before the Tribunal by way of a statement of agreed and disputed facts. Mr Sweeney acknowledges that the information and/or documents provided by himself to the investigator and the Former Board were false and misleading, and were intended to mislead the investigator and the Former Board. By reason of this information and/or documents, he acknowledges the Former Board was misled or deceived when it took no further action with respect to some aspects of the complaint.
- [29] While Mr Sweeney admitted the letter in the name of SM was signed by SM under undue influence, he would not admit that there was “coercion, domestic violence and psychological abuse throughout their relationship.” The details of the relationship given by Mr Sweeney in the letters and statements tendered by him and the evidence given by SM by way of a sworn statement in these proceedings are contradictory. SM states she was never a patient of Mr Sweeney. Mr Sweeney has admitted that he “had treated or otherwise provided care and support” for SM; though says such care began at a time when he was unregistered.

- [30] Both agree they had engaged in sexual intercourse on occasions, though the exact nature of the relationship is disputed.
- [31] In terms of the allegations of their being elements of “coercion, domestic violence and psychological abuse”, if the evidence of SM is accepted then the Tribunal could be satisfied that the relationship could be so described.
- [32] Mr Sweeney says any statement that SM was physically, sexually and psychologically abused are manifestly untrue. He says the Tribunal could not act on the evidence of SM. Mr Sweeney says that SM told lies regarding her family, the supposed death of her parents and the physical and sexual abuse of her by her parents. He says he was subjected to physical abuse by her and he says that she was a user of marijuana and speed.
- [33] Mr Sweeney has admitted, however, to the letter being signed by SM under undue influence. He admitted in his letter to the Board to their having been “manipulation of her feelings towards me”.
- [34] Mr Sweeney has agreed that he had behaved in a way that constitutes professional misconduct but disagreed that his conduct is inconsistent with him being “a fit and proper person to hold registration in the profession”.
- [35] Despite the areas of dispute, the parties reached an agreed position as to the sanction which should be imposed, it being agreed that Mr Sweeney should be disqualified from re-applying for registration as a psychologist for a period of 24 months from the date of the Tribunal’s orders.
- [36] Given the nature of the proceedings, the way the parties chose to conduct the proceedings and the evidence before the Tribunal, it is not possible for the Tribunal to decide the true position regarding the areas of dispute. In any event, given the agreed position, the Tribunal considers it will be sufficient to determine the matter on the basis of the admissions made.
- [37] In subsequent submissions, the Board sought its costs of the proceedings.

### **Characterisation of conduct**

- [38] Despite having agreed that the conduct is *professional misconduct*, the parties are not in agreement as to which particular limb of the definition Mr Sweeney’s conduct falls.
- [39] Professional misconduct is defined under s 5 of the National Law. Sub-paragraphs (a) and (b) of the definition are defined by reference to *unprofessional conduct*, being conduct that amounts to conduct “substantially below the standard reasonably expected” and sub-paragraph (c) defines the term as being conduct “inconsistent with the practitioner being a fit and proper person to hold registration”. The latter category is the most serious.
- [40] In their submissions, the Board says the conduct the subject of this Referral should be regarded as conduct “*inconsistent with the practitioner being a fit and proper person to hold registration in the profession.*”
- [41] Mr Sweeney disputes that his conduct should be viewed in that manner. In his affidavit dated 25 July 2016 he says that “on one occasion in a career spanning 23

years, I breached professional boundaries in respect of caring for another human being.” In another submission, he describes it as a “once in a career error of judgement.”

- [42] In his submissions, Mr Sweeney fails to address his conduct of having provided false and misleading statements to the Former Board and of having used undue influence in having another sign a false and misleading statement, which he then provided to the Board and of having misled the Board. It is that behaviour which is the subject of the Referral.
- [43] On any view, it is now apparent from the admissions made in these proceedings that the statements provided by Mr Sweeney to the Former Board contained elaborate detail, involving carefully calculated steps, with the clear intention of both discrediting the complainant and misleading the Board.
- [44] In the circumstances, the Tribunal considers that Mr Sweeney’s behaviour can be properly categorised as professional misconduct “inconsistent with him being a fit and proper person to hold registration” as defined by s 5 of the National Law.

### **Sanction**

- [45] In accepting the submissions that Mr Sweeney’s conduct amounted to professional misconduct, the Tribunal must determine the sanction to be imposed under s 196(2) of the National Law.
- [46] At the time of the hearing, the parties agreed the appropriate sanction was a disqualification period of two years. By that time, Mr Sweeney had not sought renewal of his registration since January 2015. It was not suggested that that period of non-practise should not be directly taken into account. Effectively, that makes the period of disbarment in the vicinity of four years.
- [47] In imposing any sanction the guiding principle is protective, not punitive.<sup>1</sup> The health and safety of the public is paramount.<sup>2</sup> The Tribunal must consider issues of general and personal deterrence, the maintenance of both professional standards and public confidence.
- [48] The existence of genuine remorse and insight into the misconduct will be relevant.
- [49] Where the parties have, as here, reached an agreed position as to sanction, the Tribunal should adopt the agreed position provided it is within the “permissible range”.<sup>3</sup>
- [50] The Board directed the Tribunal to the case of *Psychology Board of Australia v Wakelin*,<sup>4</sup> in which the registrant denied and then conceded that she had engaged in a sexual relationship with a patient shortly after terminating the treating relationship.

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<sup>1</sup> *Clyne v NSW Bar Association* (1960) 104 CLR 116; *NSW Bar Association v Evatt* (1968) 117 CLR 177; *Medical Board of Australia v Dolar* [2012] QCAT 271, [30].

<sup>2</sup> National Law, s 3A.

<sup>3</sup> *Medical Board of Australia v Fitzgerald* [2014] QCAT 425, [17]; *Medical Board of Australia v Martin* [2013] QCAT 376, [91] - [93].

<sup>4</sup> [2014] QCAT 516 (*Wakelin*).

- [51] In considering whether an 18 month period of disqualification was an adequate sanction, the Honourable J Thomas AM QC noted that:

The Respondent's dishonest responses to AHPRA in the course of the investigation is in some respects an even more serious reflection on her character and [sic] the sexual transgression. The character revealed by a practitioner's actions is obviously a matter with which any disciplinary body must be concerned. She was prepared to misrepresent the truth to the professional body, and made unsuccessful attempts to cover up her actions...<sup>5</sup>

- [52] The Board submitted that Mr Sweeney's conduct justified a longer period of suspension than *Wakelin*.
- [53] There is no doubt that, notwithstanding his admissions and the agreed position, Mr Sweeney does not fully understand the significance of his deception of the regulator. It is clear from his first letter to the Board on 16 May 2014 in which he admitted the provision to the Former Board of false statements, that he was deeply remorseful for the hurt his actions had caused the complainant. His statements showed insight into his wrongdoing, describing it as a "cowardly act, lacking any integrity or character." He requests, if it is in the purview of the Board, the complainant be located and "apprised of this admissions and helped towards appropriate assistance."
- [54] He acknowledges that his fate is in the hands of the Board but he offers no apology to the Board. In his subsequent statements in these proceedings, his focus remains on the harm to the complainant without any real appreciation of the impact of his actions on the regulator. Nor is there any recognition of the impact on SM.
- [55] Here, not only was there the provision of false statements to the regulatory authority but Mr Sweeney has admitted to using "undue influence" to obtain from another a statement prepared by him to be provided to the regulator for the purpose of bolstering his own credit and discrediting that of the complainant. Such action was taken in circumstances where it is accepted by him that the complainant was a "vulnerable, trusting" client. Further, there can be no doubt that SM, the provider of the statement, had her own vulnerabilities.
- [56] The vulnerability of both the complainant and SM are aggravating features of the misconduct. Even in his initial letter of response to the Former Board, the details as to the past history of the complainant paints a clear picture as to the extent of her vulnerability. Mr Sweeney stated "What was clear from initial sessions, was that [the complainant] had experienced a very miserable life and that she was at that time of her presentation at CRS, seriously struggling to cope."
- [57] The Tribunal accepts that a period of two years is within range. Accordingly, the Tribunal should make orders which, as much as possible, gives effect to the agreed position. If an order had been made as agreed, at or about the time of the hearing on the papers, the period of disqualification would have been served by now. It is reasonable to proceed on the basis that, during the period of delay in the Tribunal giving its reasons, for which the Tribunal apologises, Mr Sweeney should be treated as having been effectively disqualified from practising. In those circumstances, the

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<sup>5</sup> Ibid, [21].



appropriate order of the Tribunal will be to disqualify Mr Sweeney from applying for registration for a period of one month from the making of this order.

- [58] It will be a matter for the Board to determine questions of competency, fitness to practice and possible supervision at the time of assessing any application made by Mr Sweeney.

### **Costs**

- [59] Since the removal of s 195 of the National Law, the position as to costs in health disciplinary proceedings is that provided for under the *Queensland Civil and Administrative Act 2009 (Qld) (QCAT Act)*. The starting point is that each party bears their own costs.<sup>6</sup>
- [60] Pursuant to s 102(1) of the QCAT Act, the Tribunal may make an order for costs if the Tribunal considers that the interests of justice require such an order, and s 102(3) of the QCAT Act identifies some of the facts to which the Tribunal may have regard in making that order.
- [61] The Board has filed submissions seeking its costs. The Board contends that although Mr Sweeney admitted in 2014 that he was not truthful with the Former Board, he only made limited admissions in the statement of agreed facts and it was only one day prior to the original hearing date that there was the consent orders as to sanction.
- [62] These submissions only take the Board so far. The Tribunal has not made any findings in respect of the disputed facts because it is unable to do so given the nature of the proceedings. Nothing has been put before the Tribunal as to the efforts made by the Board to reach an agreed position regarding sanction at an earlier time.
- [63] The Board says its costs are borne by the profession but, as the Tribunal has previously commented, that fact alone would not be a reason for the making of a costs order.<sup>7</sup> It should also not be forgotten that there are benefits to the profession in having only fit and proper people practising in it.
- [64] Mr Sweeney is on a disability support pension, he has significant health issues and lives in public housing.
- [65] In the circumstances, the Tribunal does not consider the interests of justice require the making of any order for costs.

### **Orders**

- [66] Accordingly, it is the decision of the Tribunal that:
1. Pursuant to s 196(1)(b)(iii) of the *Health Practitioner Regulation National Law (Queensland)* (National Law), the Tribunal finds that Mr Sweeney behaved in a way that constitutes professional misconduct.
  2. Pursuant to s 196(4)(a) of the National Law, Mr Sweeney is prohibited from applying for registration for a period of one month from the date of these orders.

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<sup>6</sup> QCAT Act, s 100.

<sup>7</sup> *Health Ombudsman v Dalziel* 2017 QCAT 442; *Health Ombudsman v Antley* [2016] QCAT 472.

3. There be no order as to costs.