QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*The Health Ombudsman v Wabersinke* [2019] QCAT 156
PARTIES:	**THE HEALTH OMBUDSMAN** (applicant) **v** **SHELTON WABERSINKE** (respondent)
APPLICATION NO/S:	OCR251 of 2016
MATTER TYPE:	Occupational regulation matters
DELIVERED ON:	14 June 2019
HEARING DATE:	8 March 2018
HEARD AT:	Brisbane
DECISION OF:	Judge Sheridan Assisted by: Dr Kong Goh Dr D Khursandi Mr K MacDougall
ORDERS:	**1. Pursuant to s 107(2) of the *Health Ombudsman Act* 2013 (Qld), the respondent has behaved in a way that constitutes professional misconduct.** **2. Pursuant to s 107(3) of the *Health Ombudsman Act* 2013 (Qld), the respondent is reprimanded.** **3. The applicant is to file any submissions on costs by 4.00 pm on Friday 28 June 2019.** **4. The respondent is to file any submissions on costs by 4.00 pm on Friday 12 July 2019.**
CATCHWORDS:	PROFESSIONS AND TRADES – HEALTH CARE PROFESSIONALS – DISCIPLINARY PROCEEDINGS – PROFESSIONAL MISCONDUCT – GENERALLY – where the practitioner admitted the four charges but not the particulars of one of the charges – where the charges related to the prescribing of restricted drugs and keeping of adequate medical records - where parties agreed the conduct in relation to each allegation amounted to unprofessional conduct – where the parties agree that the conduct, when looked at in totality, amounts to

professional misconduct – whether appropriate sanction required a period of suspension
Health (Drugs and Poisons) Regulation 1996 (Qld)
Health Ombudsman Act 2013 (Qld), s 103, s 107
Health Practitioner Regulation National Law (Queensland), s 5, s 156, s 159, s 225

Gayed v Walton [1997] NSWCA 121, cited
Lee v Health Care Complaints Commission [2012] NSWCA 80, cited
Legal Profession Complaints Committee and a Legal Practitioner [2013] WASAT 37, cited
Health Care Complaints Commission v Dr Platt [2013] NSWMT 14, cited and distinguished
Health Care Complaints Commission v King [2013] NSWMT 9, cited
Health Care Complaints Commission v West [2017] NSWCATOD 39, distinguished
Medical Board of Australia v Alroe [2014] QCAT 677, distinguished
Medical Board of Australia v Evans [2013] QCAT 217, distinguished
Medical Board of Australia v Ong [2016] QCAT 54, distinguished

APPEARANCE & REPRESENTATION:	
Applicant:	A Tarrago, counsel in the employ of the Office of the Health Ombudsman
Respondent:	A Luchich, counsel instructed by Moray and Agnew

REASONS FOR DECISION

[1] The Health Ombudsman referred disciplinary proceedings to the tribunal comprising four charges of disciplinary misconduct. The referral was made pursuant to s 103(1)(a) of the *Health Ombudsman Act* 2013 (Qld) (**HO Act**).

[2] The charges in the referral relate broadly to the prescribing of restricted drugs of dependency in relation to two patients in the period between 30 January 2011 and 17 October 2013 and failing to maintain clear and accurate medical records in relation to those two patients.

[3] In her formal response, Dr Wabersinke admitted to the misconduct in respect of all charges, but did not admit all the particulars of charge one.

[4] The matter proceeded before the Tribunal by way of a statement of agreed facts and a statement of disputed facts in relation to the particulars of charge one. The Health Ombudsman (**Ombudsman**) filed four affidavits; one from Dr Jacobs, an expert briefed in the matter, one from an investigation officer with the Department of Health

and one from an investigation officer with the Office of the Health Ombudsman and one from Dr Fowler, an employee with the Alcohol Tobacco and Other Drugs Service (**ATODS**).

[5] Dr Wabersinke filed a detailed affidavit. Affidavits were also filed by two doctors both of whom practise with Dr Wabersinke, an affidavit containing a report by Dr Walters as a medico legal adviser to the professional indemnity insurer and a character reference.

[6] Despite certain facts remaining in dispute and submissions being made challenging aspects of her evidence, the Ombudsman did not seek to cross examine Dr Wabersinke. At the oral hearing, the position taken by the Ombudsman was that the Tribunal did not need to determine the facts in dispute and that any such determination would not affect the sanction proposed.

[7] It was common ground between the Ombudsman and Dr Wabersinke that her conduct in regard to each charge, in isolation, amounted to unprofessional conduct but that, looked at in totality, her conduct amounted to professional misconduct.

[8] Both parties agreed the orders to be made by the Tribunal should include a reprimand. Where the parties disagree is whether the conduct necessitates the imposition of a period of up to six months suspension from practice.

Background

[9] Dr Wabersinke obtained her Bachelor of Medicine and Bachelor of Surgery from the University of Sydney in 1985. After completing a two year internship, she has worked in general practice and/or corporate health since. Together with colleagues, she founded the Lake Kawana General Practice (the **Practice**) in 1993. She continues to work at the Practice.

[10] Dr Wabersinke is a member of the Royal Australian College of General Practitioners and holds general and specialist registration (general practice) with the Medical Board of Australia (**Board**). She has a particular interest in mental health.

The original complaint

[11] In November 2012, Dr Wabersinke received a letter from the Australian Health Practitioners Regulation Agency (**AHPRA**) notifying her of a complaint having been received from the Practice. The complaint concerned her prescription of schedule 8 (**S8**) medications to a small group of patients for the management of chronic pain.

[12] The concerns raised by the Practice in its notification to AHPRA had been raised personally with Dr Wabersinke in August 2012. In response to the concerns of her colleagues, in August 2012 Dr Wabersinke voluntarily surrendered her S8 prescribing rights in order to address the concerns raised.

[13] In May 2013, Dr Wabersinke gave an undertaking to the Board. At the time of giving the undertaking, Dr Wabersinke resumed prescribing S8 medications but was required to work under indirect supervision and to consult a Board approved supervisor before prescribing S8 medication. Another doctor at the Practice was appointed as the Board approved supervisor. The Board revoked the undertaking in October 2014.

Immediate action conditions

[14] In the intervening period, however, Dr Wabersinke received a further letter from AHPRA as a result of a notification from Queensland Health concerning two patients who became the subject of the present charges before the Tribunal. The two patients were in an intimate relationship at all relevant times. As a result of the notification, on 1 November 2013 the Board imposed immediate action conditions on Dr Wabersinke's registration. The conditions required Dr Wabersinke to work under level 2 supervision and for the Board approved supervisor to approve any prescriptions for restricted drugs of dependency (**RDD**). In August 2014, the Board referred the complaint to the Office of the Health Ombudsman for investigation.

[15] By a decision made on 6 January 2016, the Board reduced the level of supervision imposed by the conditions from level 2 to level 3. Subsequent requests were made by Dr Wabersinke for the removal of the immediate action conditions, but it was not until 8 June 2017 that those conditions were removed.

The referral

[16] The referral proceedings were filed by the Health Ombudsman on 22 December 2016 and an amended referral was filed on 17 May 2017. The conduct the subject of the four charges before the Tribunal can be summarised as follows:

Charge 1 – Between 30 January 2011 and 17 October 2013, Dr Wabersinke prescribed restricted drugs of dependency, namely Diazepam and Temazepam, to Patient 1, a drug dependent person, without the approval of the Chief Executive of Queensland Health**;**

Charge 2 – On four occasions, namely 18 February, 19 February, 25 March and 26 September 2013, Dr Wabersinke prescribed restricted drugs of dependency, name Diazepam and Temazepam, to Patient 2 without examining or speaking to him;

Charge 3 – On or about 26 September 2013, Dr Wabersinke made six post-dated prescriptions for restricted drugs of dependency, namely Diazepam and Temazepam, to Patients 1 and 2;

Charge 4 – In the period between 30 January 2012 and 1 March 2013, Dr Wabersinke failed to maintain clear and accurate medical records in respect of Patients 1 and 2.

[17] In respect of Charge 1, the Health Ombudsman alleges that Dr Wabersinke knew or ought to have known at the time of prescribing the restricted drugs of dependency to Patient 1 that Patient 1 was a drug dependent person. In making that allegation, the Ombudsman relied on two letters dated 18 January 2011 and 28 September 2011 from the Sunshine Coast ATODS addressed to Dr Wabersinke. In respect of Patient 1 the letters advised Dr Wabersinke of the registration status of Patient 1 on the Queensland Opioid Treatment Program. A letter from Queensland Health Drug Dependence Unit (**DDU**) addressed to Dr Wabersinke dated 8 March 2011, also advised Dr Wabersinke of Patient 1's registration status.

[18] The letters dated 8 March 2011 and 28 September 2011 also advised Dr Wabersinke that it was unlawful to treat Patient 1 with controlled drugs or drugs of dependence without the prior approval of the Chief Executive of Queensland Health or his delegate.

[19] In the particulars, the Health Ombudsman alleges that on 9 March 2012, another doctor at the Practice was advised by Dr Fowler from ATODS that Patient 1 was opiate dependent and had a Benzodiazepine abuse history. The patient's file history for that date noted, "Do not prescribe any Benzos". It was further alleged that on 9 May 2012, Dr Fowler spoke with Dr Wabersinke and advised Dr Wabersinke that any further prescribing in relation to Patient 1 needed to be with the permission of DDU. The patient file was further noted on 19 July 2012, "No Benzodiazepines".

[20] Dr Wabersinke has, throughout these proceedings, admitted that at the relevant time she ought to have known that Patient 1 was a drug dependent patient but denies that she knew that Patient 1 was at that time drug dependent.

[21] In admitting Charge 1, Dr Wabersinke admitted that as she ought to have known Patient 1 was a drug dependent patient and as she did not seek the approval of the Chief Executive of Queensland Health before prescribing restricted drugs of dependency to Patient 1, she had failed to comply with s 213 of the *Health (Drugs and Poisons) Regulation* (Qld) 1996.

[22] Dr Wabersinke explained in her affidavit the complexities of Patient 1, a patient whom she had been treating for 12 years. Patient 1 had significant mental health and illegal substance abuse issues and had experienced periods of incarceration. She was a victim of both childhood sexual abuse and domestic violence. At the time, she was under the care of a psychiatrist.

[23] Dr Wabersinke admitted, in error, her focus had been in maintaining Patient 1's abstinence from illicit substance use. At the time of swearing the affidavit, Dr Wabersinke was still treating Patient 1; though she had continued to have all prescriptions for RDD prescribed by another doctor at the Practice.

[24] Dr Wabersinke said that she could not recall receiving the letters dated 18 January 2011 and 8 March 2011, though accepted that she must have received the letters as the letters contained her initials. She explained the basis for her denial that she had received the letter dated 28 September 2011 was that there was no record of receipt of that letter amongst the records of the patient or the records of the Practice.

[25] In her affidavit, Dr Wabersinke gave details of her recollection of her conversation with Dr Fowler from ATODS and her recollection of a subsequent conversation on 16 July 2012 with Mr Yum of DDU. She said she asked Mr Yum for guidance as to Patient 1's ongoing management. Dr Wabersinke said she remembered Mr Yum suggested the longer acting Diazepam for Patient 1 might be preferable. She said she interpreted her discussion with Mr Yum as meaning she had permission to prescribe Benzodiazepines to Patient 1.

[26] In her conversation with Mr Yum she says she was not told that Patient 1 was currently registered with the Queensland Opioid Treatment Program or that Patient 1 was currently considered a drug dependent person or that she would need to apply for Chief Executive approval before prescribing further medications. Her understanding of the conversation was given as an explanation for her continuing to prescribe Patient 1 with Diazepam in late 2012.

[27] Notwithstanding Dr Wabersinke's interpretation of her telephone discussion with Mr Yum, she accepts fully the error of her judgment in prescribing Diazepan to Patient 1 as detailed in the referral.

[28] Throughout the proceedings, the Ombudsman disputed Dr Wabersinke's denial that she knew Patient 1 was drug dependent and disputed Dr Wabersinke's recollection of the telephone call with Mr Yum. Despite that dispute, the Ombudsman did not seek to cross-examine Dr Wabersinke and no sworn evidence was placed before the Tribunal from Mr Yum.

[29] By the time of the oral hearing, the position taken by the Ombudsman was that he did not seek findings by the Tribunal in relation to the disputed facts. That attitude is not, however, satisfactory where, as here, there is a difference between the parties as to sanction, and, at least part of the reasons for the Ombudsman seeking a tougher sanction is dependent upon his view of the character of Dr Wabersinke or, more accurately, his view of her insight that what she did was wrong.

[30] The Tribunal has before it the sworn evidence of Dr Wabersinke. There is no sworn material before the Tribunal challenging the veracity of her evidence.

[31] There is said to be an inconsistency between her evidence on the one hand and the patient notes on one day and the agreed facts relating to that day. Dr Wanersinke is not, however, able to recall the date of the event she describes in her affidavit and simply records the event as happening on at least one occasion. The event she describes may have happened on a date other than the one recorded in the notes or in the statement of agreed facts. There is no necessary inconsistency between these matters.

[32] Even if there is an inconsistency relating to this one event, that would not justify the rejection of her evidence. There is no evidence contradicting Dr Wabersinke's evidence. Moreover, the contents of her affidavit show there is every reason to accept her evidence: it is comprehensive in her explanation and recollection of events, including declarations against self-interest, and it is internally consistent and logical.

[33] On that basis, the Tribunal accepts that Dr Wabersinke did not know at the relevant time Patient 1 to be drug dependent but, as admitted by Dr Wabersinke, the Tribunal accepts she ought to have known that Patient 1 was drug dependent. Further, the Tribunal accepts Dr Wabersinke's evidence with respect to her recollection of her discussion with Mr Yum.

[34] In respect of Charge 2, Dr Wabersinke accepts that by failing to examine or speak to Patient 2 before prescribing the restricted drugs of dependency, the respondent had failed to comply with clause 2.1 of the Good Medical Practice: A Code of Conduct for Doctors in Australia.

[35] Dr Wabersinke accepted the particulars of the charge, but further says that Patient 2 had been a patient since January 2011 and the prescriptions were written in early 2013. Dr Wabersinke denies that in giving the prescriptions she did not take into account Patient 2's history or Patient 2's views as expressed in previous consultations.

[36] In respect of Charges 3 and 4, Dr Wabersinke made full admission as to the particulars of those charges. In writing the post-dated prescriptions for Patient 1 and Patient 2, Dr Wabersinke had failed to comply with s 190(2)(b) of the *Health (Drugs and*

Poisons) Regulation 1996 (Qld). From the outset, Dr Wabersinke unreservedly accepted her error of judgement in this regard.

[37] In relation to the medical records maintained, Dr Wabersinke again admits unreservedly that on occasions, there were substantial deficiencies in her record keeping. She says that she did not fail to maintain clear and accurate records of each and every occasion she consulted Patient 1 and Patient 2 and further says that the copies of the paperwork completed for Patient 1 were appropriately contained as part of her medical records.

Characterisation of conduct

[38] The parties agree that Dr Wabersinke's conduct in relation to each individual charge would constitute unprofessional conduct. They also agree and jointly submit that, when considering the breaches together, Dr Wabersinke behaved in a way that constitutes professional misconduct.

[39] Professional misconduct is defined under s 5 of the *Health Practitioner Regulation National Law (Queensland)* (**National Law**) to include:

(a) Unprofessional conduct by the practitioner that amounts to conduct that is substantially below the standard reasonably expected of a registered health practitioner of an equivalent level of training or experience; and

(b) More than one instance of unprofessional conduct that when considered together, amounts to conduct that is substantially below the standard reasonably expected of a registered health practitioner of an equivalent level of training or experience;

…

[40] In the circumstances, there can be no doubt that the totality of Dr Wabersinke's behaviour is properly categorised as professional misconduct.

Sanction

[41] In accepting that the totality of the conduct amounted to professional misconduct, the Tribunal must determine the sanction to be imposed under s 107 of the HO Act.

[42] The parties accepted Dr Wabersinke should be reprimanded and that in the circumstances, no further conditions on her registration were warranted. The issue to be determined by the Tribunal is whether the circumstances warrant a period of suspension of between three and six months. The Ombudsman contended a period of suspension was required, though accepted that a finding of professional misconduct does not necessarily result in the suspension (or cancellation) of registration.[1]

[43] In imposing sanction, the guiding principle for the Tribunal is protective, not punitive.[2] The health and safety of the public is paramount.[3]

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1 *Health Care Complaints Commission v Guard* [2016] NSWCATOD 164.

2 *Clyne v NSW Bar Association* (1960) 104 CLR 116; *NSW Bar Association v Evatt* (1968) 117 CLR 177, 183; *Medical Board of Australia v Dolar* [2012] QCAT 271, [30].

3 *Health Ombudsman Act* 2013 (Qld), s 4(1).

[44] Orders aimed at protecting the public necessarily include the need to address issues of both personal and general deterrence, the maintenance of professional standards and the maintenance of public confidence.[4] It is accepted that the making of orders aimed at protecting the public may be incidentally punitive in effect, though that is not the purpose of the orders.[5]

[45] Central to any determination of sanction must be an assessment of the ongoing risk posed by the practitioner. The degree to which the practitioner has acquired insight into the misconduct, as well as evidence of rehabilitation, will be relevant.[6]

[46] The Tribunal will need to consider any other circumstances aggravating the conduct or mitigating its seriousness.[7]

Submissions

[47] In making submissions on behalf of the Ombudsman, reference was made to the nature and seriousness of this type of conduct, the importance of maintaining professional standards, the need to ensure public confidence in the health system and the respondent's present lack of insight. In oral submissions, the Ombudsman also stated that the Tribunal must also consider whether the conduct was an isolated event or recurring conduct, but in the end only relied on the conduct as it related to the two patients in question.

[48] The Ombudsman did not accept that "the respondent has truly had a reformation of character". In making that submission, the Ombudsman relied on what was described as "recurring conduct" and "superficial insight into her conduct".

[49] The Ombudsman submitted that Dr Wabersinke had numerous opportunities to improve her prescribing practices, in particular referring to the earlier notification and undertaking given: it being acknowledged that the undertaking related to the prescribing of S8 drugs, not RDD.

[50] In making the submission as to the superficiality of her insight, the Health Ombudsman referred to what was described as "the qualifications given by Dr Wabersinke in her affidavit to justify her inappropriate prescribing by stating that it was to ensure continuity of care, ensure Patient 1 did not relapse into illicit drug use and because of her misguided understanding of the regulations."

[51] On behalf of Dr Wabersinke, it was submitted that no good purpose would be served by suspending Dr Wabersinke for a significant period when the evidence demonstrates she is otherwise of good character, has plainly learnt her lesson, has made substantial improvements in her practice and following the removal of her conditions is clearly now accepted by the regulator as being of no future risk.

[52] It was further submitted that the conduct occurred during "a particularly difficult period" for the respondent. The evidence before the Tribunal was that in the period between 2009 and 2013, Dr Wabersinke was principal of a very busy practice with a

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4 *Health Care Complaints Commission v King* [2013] NSWMT 9.

5 *Lee v Health Care Complaints Commission* [2012] NSWCA 80 at [20], [31]; *Health Care Complaints Commission v Dr Platt* [2013] NSWMT 14.

6 *Medical Board of Australia v Blomely* [2018] QCAT 163, [142].

7 *Legal Profession Complaints Committee and a Legal Practitioner* [2013] WASAT 37.

heavy work load and in her personal life she had dealt with the complications of a marriage breakdown, the death of her father in law in September 2012 with whom she remained very close and the death of her own father in March 2013. She was also dealing with her own health issues. It was said these were relevant factors in considering her conduct in terms of these proceedings and the prior notification.

[53] In terms of the prior notification, Dr Wabersinke says the focus of the education as a result of that notification was on chronic pain management, schedule 8 medications and the risk of addiction in that setting. She explains how she failed to give sufficient weight to the lessons she learnt through that training as to signs of drug dependency in the broader context in her treatment of Patient 1 and Patient 2. She explained that she had viewed her failure in that first notification as a failure of her knowledge and skills in pain management.

[54] She explains that this notification concerned the management of the prescribing habits to drug dependant patients. She describes gaining an understanding about restricted drugs of dependency as the "biggest and hardest lesson" of her career.

[55] By the time of the hearing, Dr Wabersinke had reviewed many resources, undertaken training through her defence organisation and also through Carramar Education. In her affidavit, significantly she identified at least three fundamental errors:

> (a) I did not fully appreciate my legislative and other obligations in so far as they related to communicating with the Chief Executive Officer, ATODS and DDU;
> (b) I was too willing to attribute lost/destroyed scripts to the chaotic and disorganised living arrangements of Patient 1 and Patient 2;
> (c) I considered the frequency of the prescriptions was clinically indicated as a way to potentially assist both Patient 1 and Patient 2 from abstaining from illegal substances, without appreciating their potential dependency.[8]

[56] In her affidavit, Dr Wabersinke refers to her lack of familiarity with the legislative framework and takes complete responsibility for that, identifying the steps taken to address that issue. She refers to the changes to her work habits appreciating the importance of a work-life balance and the need for exercise, sleep and relaxation. She speaks of reassessing her work load both in consultation hours and the number of appointment booked.

[57] She describes the changes to her prescribing practises and of having developed a set of guidelines to ensure she never prescribes to a patient again in a way that has potential to compromise their well-being. She refers to the three drug dependent patients whose care she is currently managing and to requiring that they consult another doctor for their RDD prescribing. She says she prefers not to prescribe S8 or RDD for the more complex patients and only does so in the framework of a multidisciplinary team including the involvement of ATODS and/or a pain clinic.

[58] Dr Wabersinke is supported in her evidence, by evidence from the Board appointed Practice supervisor, who supervised Dr Wabersinke for a period of some four years. He confirms that he has no concerns "whatsoever that her current prescribing or general practice poses a risk to the public." He refers to her admissions to the

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8 Affidavit of Dr Wabersinke sworn 13 June 2017, [139].

substance of the charges and says that does not surprise him. He states, "She has always been open and frank with me when discussing the notifications and surrounding circumstances."

[59] Another colleague at the Practice refers to Dr Wabersinke having learnt from her lessons and states that he has no ongoing concerns about her prescribing or general practice. He states, "I consider her to be a highly effective and caring general practitioner."

[60] Dr Walters, as a medico-legal adviser with the professional indemnity insurer, after reviewing Dr Wabersinke's draft affidavit, over 223 pages of de-identified medical records and a lengthy discussion with Dr Wabersinke, concluded that "it is difficult to imagine what extra Dr Wabersinke could do to ensure that she had addressed any deficiencies in knowledge and practice." The Ombudsman submitted that little weight should be placed on that opinion as it was said the doctor was conflicted, did not have access to all the material filed and had not deposed in the format now required for all experts. He was not cross-examined on any issue; let alone these matters. There is every reason to consider he has given his honest professional opinion on the subject matter.

Analysis

[61] The fact that the conduct amounted to significant breaches of the required standard of practice is not disputed. There is no doubt there is an expectation that doctors will comply strictly with the regulatory framework, particularly as it exists to protect vulnerable patients who are sometimes being prescribed potentially harmful drugs.

[62] In the circumstances here, however, through the exercise of the Board's immediate action power, as a result of this notification Dr Wabersinke was required to practise for a period of nearly four years, subject to quite stringent conditions including supervisory conditions and conditions requiring that she not prescribe RDD without obtaining the approval of her supervisor.

[63] The decision of the Board to remove the conditions in June 2017 is clear evidence that at that time the Board were satisfied the conditions were no longer necessary "to protect public health or safety."[9] In these proceedings, the Health Ombudsman did not seek the imposition of any further conditions.

[64] The Tribunal does not accept that Dr Wabersinke has not had a "reformation of character", nor that her insight is superficial. As previously observed, the Tribunal accepts Dr Wabersinke's evidence.

[65] In her affidavit, she has unreservedly accepted that her prescriptions for benzodiazepines for the two patients was "inadequate and potentially put them at risk". She says she is truly sorry and admits to not sufficiently appreciating the "bigger picture". She refers to the gaps in her knowledge and to the continuing education undertaken to positively address those shortcomings.

[66] She also acknowledges now understanding the vulnerabilities of her own personality and of having put in place safeguards to ensure future patients are not put at risk.

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9 National Law, s 156 and s 159.

[67] Her evidence of insight, education and change are supported by the independent evidence of her supervisor and Dr Walters.

[68] The particular focus of the Ombudsman on the alleged superficiality of insight and the conduct as being recurring conduct fails to take full account of Dr Wabersinke's evidence which shows how the conduct occurred and her regrets about it. The Tribunal has accepted that evidence.

Case Comparatives

[69] These findings by the Tribunal are relevant in considering the comparative cases to which the Tribunal was referred. In referring to past authorities, the Ombudsman relied on the Tribunal accepting the submissions that the full extent of Dr Wabersinke's insight should be questioned and accepting the particular significance which should be given to the previous notification. For the reasons stated, those submissions are not accepted.

[70] The Ombudsman relied upon four decisions in support of the submission that the practitioner ought to be suspended: *Health Care Complaints Commission v West*,[10] *Health Care Complaints Commission v Dr Platt,*[11] *Medical Board of Australia v Evans*[12] *and Medical Board of Australia v Alroe.*[13]

[71] The decision in *West* provides little guidance. The conduct there involved prescribing practises in relation to nine patients, some of whom were treated for period of three and four years and included allegations of prescribed doses exceeding the appropriate therapeutic amount and the practitioner having been found to have little insight and it being said that the Tribunal had little confidence that the practitioner would not offend again.

[72] *Platt* involved 12 patients over a five year period and some 1423 prescriptions, as compared to two patients and 63 prescriptions over a two year period. It is difficult to see on what basis it could be said that Dr Wabersinke's conduct could be described as more serious than Dr Platt. Such a submission places undue emphasis on the prior notification.

[73] The Tribunal's view in *Platt* was that a period of suspension was called for. A three month suspension was imposed together with the imposition of a number of quite stringent conditions on her return to practice. The Tribunal considered that a short period of suspension was required to serve as a strong deterrent to both her and other practitioners generally. It was commented that the period of suspension would afford Dr Platt "the undistracted opportunity to take remedial steps". Here, the Tribunal accepts there is little more that Dr Wabersinke could do to address any deficiencies. In contrast to Dr Platt, who had been subject to conditions for 18 months, Dr Wabersinke had spent almost four years subject to conditions.

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10 [2017] NSWCATOD 39 (***West***).
11 [2013] NSWMT 14 (***Platt***).
12 [2013] QCAT 217 (***Evans***).
13 [2014] QCAT 677 (***Alroe***).

[74] *Evans* involved the practitioner prescribing drugs to 18 patients in excess of on 1000 occasions, and prescribing controlled or RDD to drug dependent persons in a manner that was excessive, unnecessary and not remotely required.

[75] *Alroe* was found liable for disciplinary action in respect of three charges of misconduct in relation to the prescription of controlled drugs of dependency. Dr Alroe had previously been suspended from practice after being found to have engaged in unsatisfactory professional conduct and had had his registration cancelled. In respect of the charges before the Tribunal in that case, the Tribunal reprimanded the practitioner, ordered that he surrender his authority to prescribe controlled drugs and prohibited him from reapplying for reinstatement of his authority.

[76] On behalf of Dr Wabersinke reliance was placed on the decisions of the Tribunal in *Health Care Complaints Commission v Guard,*[14] *Health Care Complaints Comission v Arreza*[15] and *Health Care Complaints Commission v Chong*[16] as examples of cases involving the wrongful prescriptions of S8 and/or RDD and where the protective orders made did not include a period of suspension from practice.

[77] The decision of *Medical Board of Australia v Ong*[17] was given by way of a comparative where the Tribunal did impose a one month suspension together with the imposition of a number of conditions on the practitioner's registration. The conduct involved 12 patients and the practitioner's excessive quantities and frequency of prescribing in relation to those patients, making any real comparison difficult; particularly given that the parties had reached an agreed position and by the time of the hearing the practitioner was still considered to be in need of some conditions being placed on her registration.

Conclusion

[78] A review of all the cases to which the Tribunal was referred highlight, as is often observed, the difficulty in drawing comparisons between one case and the next.[18] Each case must be looked at according to its own unique facts.

[79] The Tribunal, guided by the assessors, is not satisfied that on the facts here the protective orders require a period of suspension. The finding of professional misconduct together with a reprimand which will appear on the National Register[19] will act as an appropriate denunciation of the misconduct in this case.

[80] The reprimand together with the limitations which were imposed upon the right and ability of Dr Wabersinke to practice as a consequence of her actions are a warning to others of the consequence of any transgression of this type; as is the possibility that, if there is not shown to be a transformation in practice and attitude, suspension might follow.

[81] The protective orders proposed do not diminish the seriousness with which the Tribunal views the conduct and the harm or potential harm caused. However, given

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14 [2016] NSWCATOD 164.
15 [2017] NSWCATOD 119.
16 [2017] NSWCATOD 81.
17 [2016] QCAT 54.
18 *Gayed v Walton* [1997] NSWCA 121 [10]; *Lee v Health Care Complaints Commission* [2012] NSWCA 80.
19 National Law, s 225.

the effectiveness of the immediate action conditions over an extended period and the steps otherwise taken, there has been a complete transformation of practice and attitude by Dr Wabersinke and the imposition of any further order is not considered necessary.

[82] The parties had reserved their right to make an application for costs following the Tribunal's decision.

Decision

[83] Accordingly, it is the decision of the Tribunal that:

1. Pursuant to s 107(2) of the *Health Ombudsman Act* 2013 (Qld), the respondent has behaved in a way that constitutes professional misconduct

2. Pursuant to s 107(3) of the *Health Ombudsman Act* 2013 (Qld), the respondent be reprimanded.

3. The applicant is to file any submissions on costs by 4.00pm, Friday 28 June 2019.

4. The respondent is to file any submissions on costs by 4.00pm, Friday 12 July 2019.