

# SUPREME COURT OF SOUTH AUSTRALIA

(Full Court)

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## LEGAL PROFESSION CONDUCT COMMISSIONER v FITZPATRICK

[2025] SASCF 1

**Judgment of The Full Court** (*ex tempore*)

(The Honourable President Livesey, the Honourable Justice S David and the Honourable Justice Stanley)

7 March 2025

**PROFESSIONS AND TRADES - LAWYERS - COMPLAINTS AND DISCIPLINE  
- PROFESSIONAL MISCONDUCT AND UNSATISFACTORY PROFESSIONAL  
CONDUCT - GENERALLY**

**PROFESSIONS AND TRADES - LAWYERS - COMPLAINTS AND DISCIPLINE  
- PROFESSIONAL MISCONDUCT AND UNSATISFACTORY PROFESSIONAL  
CONDUCT - NEGLIGENCE AND DELAY**

This is an application by the Legal Profession Conduct Commissioner for an order that the Practitioner's name be struck off the roll of legal practitioners.

Following the commencement of four actions before the Legal Practitioners Disciplinary Tribunal from 2017 to 2023, on 11 June 2024, the Tribunal found that the Practitioner had engaged in 12 instances of professional misconduct and three instances of unsatisfactory professional conduct.

The Tribunal found that the Practitioner's misconduct comprised repeated failures and breaches of rules relating to the conduct of legal practitioners, including, inter alia, repeated failures to respond in an adequate and timely manner to requests for information, failing to honour an undertaking, failing to act in the best interests of clients, failing to deliver services competently and diligently, acting without instructions, making dishonest statements to other solicitors, and failing to complete MCPD requirements. The Practitioner also breached an order of the Supreme Court on two occasions.

In further reasons delivered on 19 June 2024, the Tribunal recommended that disciplinary proceeding be commenced in the Supreme Court in respect of these findings.

The Practitioner has not held a practising certificate since June 2022, and has since retired.

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**Applicant: LEGAL PROFESSION CONDUCT COMMISSIONER**  
**Solicitor: LEGAL PROFESSION CONDUCT COMMISSIONER**

**Counsel: MR A KEANE -**

**Respondent: JOHN MARK FITZPATRICK No Attendance**

**Hearing Date/s: 07/03/2025**

**File No/s: CIV-24-007336**

**A**

HELD (by the Court) striking the Practitioner's name from the roll of legal practitioners:

- In light of the extent and seriousness of the Practitioner's conduct over a number of years, the Practitioner is not fit to practise law as a member of the profession and his name should be struck off the Roll.
- In circumstances involving charges of professional misconduct, it is necessary to protect the public from legal practitioners whose mental illness renders them unable to adhere to recognised rudimentary professional standards.

*Legal Practitioners Act 1981* (SA) ss 82(6)(a)(v), 88A, 88A(2), 89(1), 89(1a), 89(5), referred to. *Legal Profession Conduct Commissioner v McCardle (No 2)* [2024] SASCFC 4; *Legal Profession Conduct Commissioner v Radin* [2024] SASCFC 1, discussed. *Council of the Law Society of NSW v Jafari* [2020] NSWCA 53; *Law Society of New South Wales v Foreman* [1994] NSWCA 69; *Legal Practitioners Conduct Board v Clisby* [2012] SASCFC 43; *Legal Practitioners Conduct Board v Figwer* [2013] SASCFC 115; *Legal Practitioners Conduct Board v Hay* [2001] SASC 322; *Legal Profession Conduct Commissioner v Cleland* [2021] SASCA 10; *LPCC v Fitzpatrick* [2017] SASC 81, considered.

**LEGAL PROFESSION CONDUCT COMMISSIONER v FITZPATRICK  
[2025] SASFC 1**

**Full Court – Civil: Livesey P, David and Stanley JJA**

1 **THE COURT (*ex tempore*):** By Originating Application dated 7 August 2024, the Legal Profession Conduct Commissioner (‘the Commissioner’) seeks the following orders concerning John Mark Fitzpatrick (‘the Practitioner’):

2 That the name of the practitioner be struck off the Roll of Legal Practitioners maintained under the *Legal Practitioners Act 1981* (SA).

3 That the Practitioner pay the Commissioner’s costs of these proceedings.

4 The Commissioner’s application is made pursuant to ss 89(1), 89(1a) and 88A(2) of the *Legal Practitioners Act 1981* (‘the Act’) and the inherent jurisdiction of the Court. It follows a protracted history of dealings with the Practitioner, involving a number of matters heard and findings made by the Legal Practitioners Disciplinary Tribunal (‘the Tribunal’).

5 In bringing the application, the Commissioner relies on the Affidavit of Kathryn Anne Caird dated 7 August 2024, and the attached exhibits, being the findings of the Tribunal and communications with the Practitioner.

6 On 11 June 2024, the Tribunal found that the Practitioner had engaged in 12 instances of professional misconduct and three instances of unsatisfactory professional conduct.<sup>1</sup> The Tribunal’s *Reasons (No 2)*<sup>2</sup> recommended that disciplinary proceedings be commenced in the Supreme Court in respect of these findings, pursuant to s 82(6)(a)(v) of the Act.

7 The Commissioner invited the Court to adopt and act upon the findings of the Tribunal without further inquiry, in accordance with s 89(5) of the Act, but has now accepted that this Court has the power to do so by reason of an implication derived from s 89(1) and its inherent jurisdiction.<sup>3</sup>

**Introduction**

8 The Practitioner was first admitted to legal practice in South Australia on 15 December 1986. As of 19 June 2024, when the Tribunal’s *Reasons (No 2)* were delivered, the Practitioner was considered to be retired due to ill-health. He has not held a practising certificate since 30 June 2022.

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<sup>1</sup> Actions No. 4 of 2017 & 7 of 2018, *Reasons in the matter of John Mark Fitzpatrick* Legal Practitioners Disciplinary Tribunal 11 June 2024; Action No. 9 of 2018, *Reasons in the matter of John Mark Fitzpatrick* Legal Practitioners Disciplinary Tribunal 11 June 2024; Action No. 3 of 2023, *Reasons in the matter of John Mark Fitzpatrick* Legal Practitioners Disciplinary Tribunal 11 June 2024.

<sup>2</sup> *Reasons (No. 2)* Legal Practitioners Disciplinary Tribunal 19 June 2024.

<sup>3</sup> *Legal Profession Conduct Commissioner v McCardle (No 2)* [2024] SASFC 4 at [97] (Livesey P, S Doyle and David JJA).

9 Over a period of seven years, four actions were commenced in the Tribunal in relation to charges brought by the Commissioner against the Practitioner. The particulars of each proceeding are set out in the Tribunal's *Reasons*, which were delivered together on 11 June 2024. A brief overview of each Action is provided below.

### **Overview of proceedings before Tribunal**

#### ***Action No. 4 of 2017***

10 On 23 February 2017, the Commissioner laid a Charge in the Tribunal against the Practitioner alleging ten counts of professional misconduct, comprising five counts of failing to respond to requests for information by the Commissioner (in relation to five separate investigations into the Practitioner's alleged misconduct) and five counts of failing to respond to notices issued by the Commissioner under clause 4(1), Schedule 4 of the Act.

11 The Charge was later amended by consent and with the leave of the Tribunal on 13 February 2018, prior to the hearing in 2018.

12 For reasons unrelated to the proceedings in February 2018, whilst part-heard before the Tribunal the matter was adjourned. At that time, the Practitioner was represented by counsel. The Tribunal's inquiry recommenced in May 2024, concurrently with the three further proceedings relating to additional charges, outlined below. The Practitioner was no longer represented, and did not attend the inquiry in any capacity.

#### ***Action No. 7 of 2018***

13 On 9 April 2018, a further Charge was laid in the Tribunal against the Practitioner, which formed the substantive conduct underlying five of the counts previously laid in *Action No. 4 of 2017*. The Charge comprised allegations of two counts of professional misconduct and two counts of unsatisfactory professional conduct, as follows:

- Failing to lodge a low-income sole practitioner Statutory Declaration for the 2014/2015 financial year in breach of an undertaking given by the Practitioner;
- Failing to respond to requests by the Law Society Audit Officer to supply supporting documentation for Mandatory Continuing Professional Development ('MCPD') for the 2014/2015 period;
- Delay without reasonable excuse in relation to the transfer of client documents to a client's solicitor; and
- Failing without reasonable excuse to respond to telephone messages and correspondence received from a client's solicitor in relation to the transfer of documents.

**Action No. 9 of 2018**

14 On 28 August 2018, a further Charge was laid in the Tribunal against the Practitioner, alleging four counts of professional misconduct, comprising two counts of breaching a Supreme Court order and a condition on the Practitioner's practising certificate; swearing a false affidavit; and misleading the court.

15 This conduct arose following an application by the Commissioner to the Supreme Court for an order suspending the Practitioner's practising certificate on an interim basis, pending the outcome of proceedings before the Tribunal.<sup>4</sup> The matter was heard by Justice Nicholson, who declined to order the suspension, but imposed conditions on the Practitioner's practising certificate pursuant to s 89A of the Act.

16 The conditions imposed on the Practitioner required him to provide a report from his treating psychiatrist as to his mental state and progress to the Commissioner at intervals of no less than two months. Following initial non-compliance from the Practitioner, the order was varied to permit a report from his treating psychiatrist **or** his General Practitioner.

17 The Practitioner swore an Affidavit dated 16 January 2016, in which he stated he had informed his treating psychiatrist of the orders and the requirement to provide a regular report. The Affidavit was filed in the proceedings and relied on in Court. It was later confirmed that his treating psychiatrist had not in fact been informed of the orders or the requirement to provide a report, by the Practitioner. This formed the basis for the allegations of swearing a false affidavit and misleading the court.

**Action No. 3 of 2023**

18 On 11 September 2023, a further and final Charge was laid in the Tribunal against the Practitioner, alleging 15 counts of professional misconduct, as follows:

- Seven counts of breaching duties to a client;
- Three counts of failing to respond to the Commissioner's communications;
- Three counts of failing to comply with a Notice issued by the Commissioner under clause 4, schedule 4 of the Act;
- One count of failing to be honest in all dealings in legal practice;
- One count of failing to comply with MCPD requirements; and
- One count of failing to return original documents and making a false and misleading statement.

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<sup>4</sup> *LPCC v Fitzpatrick* [2017] SASFC 81.

### ***Other matters***

19 In the Tribunal's *Reasons (No 2)* of 19 June 2024, the Practitioner's previous disciplinary history was noted, in particular a finding of the Tribunal in 1999 in which it was found that the Practitioner had engaged in 'unprofessional conduct' for failing to respond to requests for information and statutory notices issued by the Legal Practitioners Conduct Board, as it was then constituted. The Tribunal said:<sup>5</sup>

[T]he Practitioner's repeated failure to cooperate with the Commissioner's investigations suggests the Practitioner was not sufficiently deterred by the outcome imposed by the Tribunal in 1999. It appears that the Practitioner is simply incapable of dealing with the regulator. Stressful and unpleasant as responding to complaints may be, it is an important responsibility which all legal practitioners must take seriously.

### **Tribunal's Findings**

20 The Tribunal found the Practitioner's misconduct comprised repeated failures and breaches of the Australian Solicitors Conduct Rules ('ASCR'), the Legal Practitioner Education and Admission Council ('LPEAC') Rules, and the South Australian Legal Practitioner Conduct Rules ('SALPCR') including:

- Repeated failures to respond in an adequate and timely manner, or at all, to requests from the Commissioner for information and documents in the course of investigations, contrary to r 43 of the ASCR and cl (4)(1) of Sch 4 of the Act;
- failing to honour an undertaking to the Law Society of South Australia contrary to ASCR r 6.1;
- failing to respond to the Law Society of South Australia's request for documentation in relation to the Practitioner's MCPD obligations, contrary to LPEAC r 3A.3;
- on two occasions, breaching an order of the Supreme Court;
- failing to act in the best interests of clients and failing to deliver services competently, diligently and promptly as reasonably possible, contrary to ASCR rr 4.1.1 and 4.1.3;
- failing to provide clear and timely advice to a client, contrary to ASCR r 7.1;
- acting without instructions, contrary to ASCR r 8;
- making dishonest statements to other solicitors, contrary to ASCR r 4.1.2;

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<sup>5</sup> *Reasons (No. 2)* Legal Practitioners Disciplinary Tribunal 19 June 2024 at [8].

- failing to complete the MCPD requirements in 2020/2021, contrary to SALPCR r 43; and
- failing to return original documents to a former client or their solicitor, contrary to ASCR 14.1.

21 In addition to these breaches, it was found by the Tribunal that the Practitioner delayed without reasonable excuse the transfer of client documents; breached a condition of the Practitioner's practising certificate; behaved discourteously by failing to communicate with an opposing party's solicitors; misled a client; and made a false and misleading statement to a former client.

### Relevant Principles

22 Pursuant to s 82(6)(a)(v) of the Act, the Tribunal may 'recommend that disciplinary proceedings be commenced against [a] legal practitioner in the Supreme Court'. The Practitioner is a 'legal practitioner' within the meaning of s 5 of the Act. Referral of a disciplinary matter to the Supreme Court invokes the inherent jurisdiction of the Court by operation of s 88A of the Act.

23 The principles applicable to the exercise of the Court's disciplinary jurisdiction, pursuant to s 88A of the Act, are well settled and were recently confirmed in *Legal Profession Conduct Commissioner v McCardle (No 2)*, in which it was stated by the Court:<sup>6</sup>

The purpose of this Court's exercise of disciplinary powers concerning a practitioner is for the protection of the public rather than the punishment of a practitioner. The protection of the public will require that any disciplinary sanction be exercised having regard to specific and general deterrence. In other words, so as to make it clear to the practitioner and to the legal profession that the Court will not tolerate misconduct.

By deterring misconduct and upholding professional standards, the Court maintains public confidence in the legal profession; that, indeed, is the purpose of appropriate professional regulation and enforcement.

It will usually be necessary for this Court to have regard to the totality of the practitioner's conduct, as well as the character of the practitioner. Because the Court acts in the public interest, rather than with a view to the punishment of a practitioner, the personal circumstances of the practitioner and any extenuating circumstances are generally of less importance. In cases of serious wrongdoing, it will often follow that a practitioner's good professional conduct before or after professional misconduct will remain a secondary consideration.

Only those practitioners who can and do observe the minimum professional standards expected of the legal profession should be permitted to remain members of that profession.

When considering whether to strike a practitioner's name from the roll there are usually three key considerations. First, the public must be protected from legal practitioners who

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<sup>6</sup> *Legal Profession Conduct Commissioner v McCardle (No 2)* [2024] SASFC 4 at [115]-[120] (Livesey P, S Doyle and David JJA), see also *Legal Profession Conduct Commissioner v Cleland* [2021] SASCA 10, [41]-[44] (Livesey JA, Kelly P and Bleby J agreeing).

are ignorant of or indifferent to the basic rules and requirements of proper professional practice. Second, to the extent that the practitioner is not fit to practise, the entitlement to practise should either be restricted or denied. Finally, and for so long as a practitioner's name remains on the roll, that practitioner is effectively being held out by this Court as fit to practise the profession of the law.

Ultimately, the question for this Court is whether the practitioner is at the time of the determination of the application fit to remain a member of the legal profession.

(Citations omitted.)

### Consideration and Findings

24 The order sought by the Commissioner, that the Practitioner be struck from the Roll, requires the Court to determine whether the Practitioner is fit to remain a member of the legal profession.<sup>7</sup>

25 An order removing the name of a practitioner from the Roll, to the extent that the practitioner is not fit to practise, is directed at ensuring the entitlement to practise is either restricted or denied.<sup>8</sup>

26 The Commissioner acknowledges that the Practitioner does not currently hold a practising certificate and has indicated that he has retired, but submits that allowing the Practitioner's name to remain on the Roll would not achieve the objectives of protecting the public and maintaining public confidence in the proper regulation of the legal profession and administration of justice.<sup>9</sup>

27 Here, although the Practitioner has not held a practising certificate for some years, and is not able to effectively practise law in that sense, it is necessary to consider the underlying professional standard and public confidence placed in those whose names appear on the Roll as members of the legal profession.

28 The Court is required to consider the Practitioner's fitness to practice at the time of the hearing rather than at the date the conduct occurred.<sup>10</sup>

29 The Practitioner had filed a notice of acting, however at the time of the hearing before this Court, the Practitioner had not made any attempt to submit material in support of any contrary position to that of the Commissioner. There is no evidence before the Court to suggest that the Practitioner has gained insight into his past conduct or that he has taken adequate steps to remedy the deficiencies in his behaviour and character.

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<sup>7</sup> *Legal Profession Conduct Commissioner v Cleland* [2021] SASCA 10, [45] (Livesey JA, Kelly P and Bleby J agreeing).

<sup>8</sup> *Law Society of New South Wales v Foreman* [1994] NSWCA 69; (1994) NSWLR 808, 471 (Mahoney JA).

<sup>9</sup> *Legal Practitioners Conduct Board v Figwer* [2013] SASCF 115 at [15] (Kourakis CJ, Peek and Stanley JJ).

<sup>10</sup> *Legal Profession Conduct Commissioner v McCardle (No 2)* [2024] SASCF 4 at [115]-[120] (Livesey P, S Doyle and David JJA) citing *Council of the Law Society of NSW v Jafari* [2020] NSWCA 53 at [31]-[32].



30 Indeed, when the matter was first due to come before the Court at callover on 23 August 2024, the Practitioner contacted the Court Registry on 22 August 2024 to say that he could not attend due to illness and would provide a note from his treating medical practitioner. Nothing further was received from the Practitioner or any treating medical practitioner as to his non-attendance, and the callover proceeded in his absence.

31 It is perhaps necessary to say something of the Practitioner's mental health, which was raised before the Tribunal as a contributing factor to his conduct. It was accepted by the Tribunal that the Practitioner suffered from a recognised psychiatric illness for the whole of the period of 2015 to 2016, and that he did not receive effective treatment until about April or May 2017.

32 The Tribunal commented in the *Reasons of Actions No. 4 of 2017 and 7 of 2018*, that 'mental illness is not a defence to professional misconduct (nor unsatisfactory professional conduct) ... [it] does not impact whether the charge is proven. The test for the standard of conduct expected of a legal practitioner is an objective one. Mental illness cannot provide a defence to liability, no matter how debilitating.'<sup>11</sup>

33 The Practitioner's mental health was addressed by the Tribunal in its *Reasons of 19 June 2024*, as follows:<sup>12</sup>

The extent to which [the Practitioner's] depression contributes to his inability to manage the responsibilities of being a member of the profession at the present time is unclear on the evidence available to us. However, we are troubled by the fact that when the Supreme Court imposed conditions on the Practitioner's practising certificate requiring regular reports as to his mental health, he failed to comply.

34 As illustrated by the findings of the Tribunal, the Practitioner's conduct represents a gross departure from proper professional standards. As this Court said in *Legal Profession Conduct Commissioner v Radin*,<sup>13</sup> in circumstances involving charges of professional misconduct, 'it is necessary to protect the public from legal practitioners who lack personal integrity and who are indifferent to rudimentary professional standards.' Likewise, it is necessary to protect the public from legal practitioners whose mental illness renders them unable to adhere to rudimentary professional standards.

35 The Tribunal commented 'that if the Practitioner was to return to legal practice, he would pose a risk to members of the public'<sup>14</sup> and the Commissioner similarly submits that:

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<sup>11</sup> *Actions No. 4 of 2017 & 7 of 2018, Reasons in the matter of John Mark Fitzpatrick* Legal Practitioners Disciplinary Tribunal 11 June 2024 at [25]-[26].

<sup>12</sup> *Reasons (No. 2)* Legal Practitioners Disciplinary Tribunal 19 June 2024 at [9].

<sup>13</sup> *Legal Profession Conduct Commissioner v Radin* [2024] SASFC 1 at [109] (Livesey P, Bleby and David JJA) citing *Legal Practitioners Conduct Board v Clisby* [2012] SASFC 43 at [8] (Doyle CJ and Stanley J, Anderson J agreeing).

<sup>14</sup> *Reasons (No. 2)* Legal Practitioners Disciplinary Tribunal 19 June 2024 at [7].

The totality of the Practitioner's conduct, as found by the Tribunal, demonstrates that the Practitioner lacks the qualities of character and integrity which are essential attributes of a person entrusted with the rights and responsibilities of a legal practitioner.<sup>15</sup>

36 The Commissioner contends that the only appropriate course of action is to now strike the name of the Practitioner off the Roll. Any discipline or reprimand otherwise available to the Court in this disciplinary jurisdiction, would be inadequate in the circumstances.

37 An order imposing conditions on or suspending a practising certificate where a practitioner does not hold a current practising certificate would be clearly inadequate. Similarly, imposition of a reprimand such as a monetary fine or prohibition on practising in a certain area, would be of minimal effect, not only given the Practitioner's ongoing and blatant disregard for his professional responsibilities, but because he is said to have retired.

38 In light of the extent and seriousness of the Practitioner's conduct over a number of years, resulting in the Tribunal's findings of professional misconduct and unsatisfactory conduct, we are satisfied that the Practitioner is not fit to practise law as a member of the profession and his name should be struck off the Roll.

### Conclusion

39 We order:

1. That the Practitioner's name be removed from the roll of practitioners maintained by this Court.
2. That the Practitioner pay the Commissioner's costs.

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<sup>15</sup> Applicant Submissions, [23] citing *Legal Practitioners Conduct Board v Hay* [2001] SASC 322; (2001) 83 SASR 454 at [61] (Prior ACJ, Bleby and Martin JJ).