[2017] WASAT 23

JURISDICTION	**:**	STATE ADMINISTRATIVE TRIBUNAL
ACT	**:**	HEALTH PRACTITIONER REGULATION NATIONAL LAW (WA) ACT 2010
CITATION	**:**	MEDICAL BOARD OF AUSTRALIA and LAL [2017] WASAT 23
MEMBER	**:**	JUSTICE J C CURTHOYS (PRESIDENT) MS H LESLIE (MEMBER) DR K JEFFERIES (SENIOR SESSIONAL MEMBER)
HEARD	**:**	11 NOVEMBER 2016
DELIVERED	**:**	31 JANUARY 2017
FILE NO/S	**:**	VR 13 of 2016
BETWEEN	**:**	MEDICAL BOARD OF AUSTRALIA Applicant AND VIPIN LAL Respondent

Catchwords:

Professional misconduct - Sexual misconduct - Dishonesty - Misleading clinical notes - False statements

Legislation:

Health Practitioner Regulation National Law (WA) Act 2010, s 178(2), s 195, s 196(2), s 196(4)(a)
State Administrative Tribunal Act 2004 (WA), s 87. s 87(2)

Result:

Practitioner's registration cancelled and disqualified from applying for registration for five years

Summary of Tribunal's decision:

Following an agreement on the facts between the Medical Board of Australia and Dr Vipin Lal, a medical practitioner, the Tribunal considered the appropriate penalty to be imposed relating to the conduct of Dr Lal.

The Tribunal concluded that Dr Lal's conduct in relation to a Patient constituted a serious breach of professional boundaries and sexual misconduct.

In addition, Dr Lal's misleading medical notes on the Patient and his prolonged course of conduct between 18 November 2013 and 15 April 2015, including the statements he made to the Western Australia Police, the Australian Health Practitioner Regulation Agency and the Board, demonstrated serious, active and continuing dishonesty.

The Tribunal determined that the appropriate sanctions included cancellation of Dr Lal's registration with an order disqualifying Dr Lal from reapplying for registration for five years from the date of its order.

Category: B

Representation:

Counsel:

Applicant	:	Mr H Quail
Respondent	:	Mr TJ Palmer

Solicitors:

Applicant	:	Tottle Partners
Respondent	:	Clayton Utz

Case(s) referred to in decision(s):

Barristers' Board v Darveniza [2000] QCA 253; (2000) 112 A Crim R 438
Chan and The Nurses Board of Western Australia [2005] WASAT 115

Craig v Medical Board of South Australia (2001) 79 SASR 545
HCCC v Fraser (No. 2) [2014] NSWCATOD 84
HCCC v King [2011] NSWMT 5
Law Society of New South Wales v Foreman (1994) 34 NSWLR 408
Legal Practitioners Complaints Committee v Thorpe [2008] WASC 9
Legal Profession Complaints Committee and A Legal Practitioner [2013] WASAT 37 (S)
Legal Profession Complaints Committee and in de Braekt [2013] WASAT 124
Legal Profession Complaints Committee and Leask [2010] WASAT 133
Legal Profession Complaints Committee v Brickhill [2013] WASC 369
Legal Profession Complaints Committee v Detata [2012] WASCA 2014
Legal Profession Complaints Committee v Love [2014] WASC 389
Legal Profession Complaints Committee v Masten [2011] WASC 71
Legal Profession Complaints Committee v Segler [2014] WASC 159
Medical Board of Australia and Myers [2014] WASAT 137 (S)
Medical Board of Australia and Veettill [2015] WASAT 124 (S)
Medical Board of Western Australia and Bham [2006] WASAT 190
New South Wales Bar Association v Cummins [2001] NSWCA 284; (2001) 52 NSWLR 279
New South Wales Bar Association v Hamman [1999] NSWCA 404
Psychologists Registration Board of Victoria v Ferriere (2000) PRBD (Vic) 3
Quinn v Law Institute of Victoria [2007] VSCA 122
Re A Practitioner (1984) 36 SASR 590
Re Maraj (a Legal Practitioner) (1995) 15 WAR 12
Smith v New South Wales Bar Association [1992] HCA 36; (1992) 176 CLR 256
Veterinary Surgeons Investigating Committee v Howe (No 2) [2003] NSWADT 159

REASONS FOR DECISION OF THE TRIBUNAL:

Introduction

1 These reasons for decision relate to the penalty to be imposed upon Dr Vipin Lal, a medical practitioner, following an agreement on the facts relating to the conduct of Dr Lal. The agreed facts are set out in a minute dated 4 October 2016.

2 The agreed facts are:

> 1. Sexual Misconduct
>
> 1.1 Dr Lal, in the course of his practice as a medical practitioner registered under the National Law, behaved in a way that constitutes professional misconduct in that on 18 November 2013, Dr Lal engaged in sexual contact with the Patient during the course of a consultation at Dr Lal's practice at the [medical centre]. The sexual contact involved the performance of fellatio upon Dr Lal by the Patient.
>
> 1.2 The conduct as set out in paragraph 1.1 above was aggravated by the fact that Dr Lal had treated the Patient for gynaecological issues, and in or about September 2013, had provided her with medication to increase her libido.
>
> 1.3 In having sexual contact with the Patient, Dr Lal breached section 8.2 of the Medical Board of Australia's '*Good Medical Practice: A Code of Conduct for Doctors in Australia*'.
>
> 2. Misleading Entries in Clinical Notes
>
> Dr Lal, in the course of his practice as a medical practitioner registered under the National Law, behaved in a way that constitutes professional misconduct in that:
>
> 2.1 Following the consultation on 18 November 2013, Dr Lal made a misleading entry in the clinical notes for the Patient at the [medical centre] on that date, indicating that Dr Lal had examined and advised the Patient regarding lower back pain, when no such examination had been undertaken and no such advice had been given.
>
> 2.2 Following a consultation with the Patient on 22 November 2013, which the Patient had attended an appointment with Dr Lal to discuss the sexual contact between them, Dr Lal made a further misleading entry in

the clinical notes for the Patient at the [medical centre] on that date, indicating that:

(a) Dr Lal had counselled the Patient regarding issues with her partner;

(b) Dr Lal had advised the Patient of contacts for psychiatric emergency and resources for women;

when in fact, neither of those things had been discussed with the Patient.

3. Making False Statements to AHPRA and the Board

Dr Lal, in the course of his practice as a medical practitioner registered under the National Law, behaved in a way that constitutes professional misconduct in that:

3.1 On 14 January 2014, in a response to a notification dated 28 November 2013 which had been made against him by the Patient to the Australian Health Practitioner Regulation Agency (AHPRA), for referral to the applicant under the National Law (the Notification), Dr Lal made a number of false statements as follows:

(a) He denied that 'anything of a sexual or romantic nature', or 'sexual activity' took place during the consultation with the Patient on 18 November 2013.

(b) He said that the allegations of sexual contact made by the Patient were 'false allegations'.

(c) He said that he had not embraced, or engaged in any kind of sexual activity with the Patient.

(d) He denied that the Patient had performed fellatio on him.

(e) He said that during the course of a consultation on 22 November 2013, the Patient had made forceful demands for stronger pain killers and calmatives than those already prescribed for her.

3.2 The statements set out in paragraph 3.1 above were false, and were made to discredit the Patient and influence the applicant in relation to the outcome of the Notification.

3.3 On 31 March 2015, Dr Lal wrote a letter to an investigator employed by AHPRA, in which:

(a) He admitted that he had not provided a full and candid response to the Patient's notification, in his letter to AHPRA of 14 January 2014.

(b) He admitted that his penis had been in the Patient's mouth.

(c) He claimed that the Patient had initiated the sexual contact between them.

(d) He implied that the sexual contact with the Patient had not been consensual from his perspective.

3.4 The statements set out in paragraph 3.3(c) and 3.3(d) above were false statements, and were made to influence the applicant in relation to the outcome of the Notification.

4. Making Incorrect Statements in a Witness Statement to Police in Relation to a Criminal Complaint against the Patient

Dr Lal, in the course of his practice as a medical practitioner registered under the National Law, behaved in a way that constitutes professional misconduct in that:

4.1 On 27 December 2013, Dr Lal signed a statement before a police officer who was investigating a criminal complaint that he had made to police regarding the Patient (First Statement).

4.2 In the First Statement, Dr Lal said:

(a) His consultation with the Patient on 18 November 2013 was a normal consultation without issue.

(b) His consultation with the Patient on 22 November 2013 was a normal consultation.

4.3 These statements were incorrect, and Dr Lal knew that they were incorrect at the time that he signed the First Statement.

5. Making Incorrect Statements in a Witness Statement Made for the Purposes of the Criminal Prosecution of the Patient

Dr Lal, in the course of his practice as a medical practitioner registered under the National Law, behaved in a way that constitutes professional misconduct in that:

5.1 On 15 April 2015, Dr Lal signed a further witness statement for the purposes of a criminal prosecution of the Patient pursuant to section 397(2) of the *Criminal Code* (WA) (Second Statement) in which he admitted that:

(a) It was not correct that his consultation with the Patient on 18 November 2013 was a normal consultation without issue.

(b) His penis had been in the Patient's mouth at the consultation on 18 November 2013.

(c) It was not correct that his consultation with the Patient on 22 November 2013 was a normal consultation.

5.2 Further, in the Second Statement, Dr Lal:

(a) Said that the Patient had initiated the sexual contact between them.

(b) Implied that the sexual contact between him and the Patient had not been consensual from his perspective.

5.3 The statements set out in paragraphs 5.2(a) and 5.2(b) above were incorrect statements, which were made in a signed witness statement that Dr Lal was aware would be used for the purposes of a criminal trial in the District Court of Western Australia.

Schedule 'A'

The parties have agreed the following background facts:

1. Breach of Professional Boundaries

1.1 Dr Lal failed to properly maintain proper professional boundaries with the Patient in the period June 2010 to 18 November 2013 in that he hugged the Patient, kissed the Patient, and made remarks of a personal nature to the Patient all of which gave rise to a view on the part of the Patient that Dr Lal was interested in the establishment of an intimate personal relationship with her.

1.2 Dr Lal's conduct as set out in paragraph 1.1 above was aggravated by the fact that Dr Lal had treated the Patient for gynaecological issues, and had provided her with medication to increase her libido.

1.3 The failure to maintain proper professional boundaries was in breach of section 8.2 of the Medical Board of

> Australia's 'Good Medical Practice: A Code of Conduct for Doctors in Australia'.

Documents

3 The Medical Board of Australia's (Board) bundle of documents for hearing was admitted into evidence as Exhibit A. Dr Lal's bundle of documents was admitted as Exhibit B.

'Sexual Boundaries: Guidelines for doctors - Warning signs

4 The Board's *'Sexual Boundaries: Guidelines for doctors*' (Guidelines) dated 28 October 2011 at section 9 stated:

> Warning signs
>
> The beginning of a sexual relationship between a doctor and a patient may not always be immediately obvious to either doctor or patient. Doctors need to be alert to warning signs that indicate that boundaries may be being crossed. Warning signs include:
>
> - patients requesting or receiving non-urgent appointments at unusual hours or locations, especially when other staff are not present
> - inviting each other out socially
> - a doctor revealing intimate details of his or her life, especially personal crises or sexual desires or practices, to patients during a professional consultation
> - patients asking personal questions, using sexually explicit language or being overly affectionate
> - patients attempting to give expensive gifts.
>
> If a doctor senses any of these warning signs, or if a patient talks about or displays inappropriate feelings towards the doctor or exhibits sexualised behaviour, the doctor should consider whether this is interfering with the patient's care and/or placing the doctor (or the patient) at risk. In such instances, the doctor should seek advice from an experienced and trusted colleague or a professional indemnity insurer on how to best manage the situation.
>
> If there is a possibility that the doctor may not remain objective or that boundaries could be breached, the doctor should transfer the patient's care to another practitioner.
>
> (Exhibit A page 4)

Professional boundaries

5 Section 3.2.6 of the Board's '*Good Medical Practice: A Code of Conduct for Doctors in Australia*' (Code of Conduct) provides:

> A good doctor-patient partnership requires high standards of professional conduct. This involves:
>
> > Recognising that there is a power imbalance in the doctor-patient relationship, and not exploiting patients physically, emotionally, sexually or financially.

6 Section 8.2 of the Board's Code of Conduct relevantly provides:

> Professional boundaries
>
> Professional boundaries are integral to a good doctor-patient relationship. They promote good care for patients and protect both parties. Good medical practice involves:
>
> 8.2.1. Maintaining professional boundaries.
>
> 8.2.2 Never using your professional position to establish or pursue a sexual, exploitative or other inappropriate relationship with anybody under your care. This includes those close to the patient, such as their carer, guardian or spouse or the parent of a child patient.
>
> …

7 The Board's Guidelines at section 6 state:

> Establishing and maintaining boundaries
>
> Doctors are responsible for establishing and maintaining boundaries with their patients. A doctor should not:
>
> - enter into a sexual relationship with a patient even with the patient's consent
> - discuss his or her own sexual problems or fantasies
> - make unnecessary comments about a patient's body or clothing or make other sexually suggestive comments
> - ask questions about a patient's sexual history or preferences unless this is relevant to the patient's problem and the doctor has explained why it is necessary to discuss the matter.
>
> (Exhibit A page 21)

Sexual Misconduct

8 The Board's Guidelines defines 'sexual misconduct' to include:

- engaging in sexual activity with:
  - a current patient regardless of whether the patient consented to the activity or not
  - a person who is closely related to a patient under the doctor's care
  - a person formerly under a doctor's care
- making sexual remarks, touching patients or clients in a sexual way, or engaging in sexual behaviour in front of a patient.

(Exhibit A page 21)

Honesty

9 Section 1.4 of the Board's Code of Conduct provides:

> Professional values and qualities of doctors
>
> While individual doctors have their own personal beliefs and values, there are certain professional values on which all doctors are expected to base their practice.
>
> Doctors have a duty to make the care of patients their first concern and to practise medicine safely and effectively. They must be ethical and trustworthy.
>
> Patients trust their doctors because they believe that, in addition to being competent, their doctor will not take advantage of them and will display qualities such as integrity, truthfulness, dependability and compassion. Patients also rely on their doctors to protect their confidentiality.
>
> …

Events leading to Dr Lal's sexual misconduct

10 The background events to Dr Lal's sexual misconduct are set out above in Schedule A of the agreed facts.

11 The facts set out in Schedule A are amplified by a statement of the Patient which commences at page 75 of Exhibit A.

12 The evidence of the Patient as to her relationship with Dr Lal prior to 18 November 2013 is set out at paragraphs 15-52.

15. I found Dr Lal to be friendly, down to earth and flirtatious.

16. In approximately June 2010 (three months after I started attending upon Dr Lal at [the Practice], Dr Lal greeted me with a hug upon me entering his consultation room.

17. After this consultation, Dr Lal greeted me with a hug at every consultation.

18. I am unsure exactly when, but some weeks later, Dr Lal greeted me with a kiss on the cheek, in addition to a hug.

19. Once I started seeing Dr Lal at [the Practice], Dr Lal became more flirtatious with me.

20. For example, during a consultation in early 2011 at [the Practice], as I was getting ready to leave the consultation room, Dr Lal asked me, in a jokey tone, words to the effect of, 'When are we going to go out for tea?'

21. I responded in a similar jokey tone that I would take Dr Lal out another day.

22. By way of a further example, during a consultation that occurred approximately two weeks later, Dr Lal told me I needed a holiday because of issues I had been having with ongoing pain, and my children misbehaving at school.

23. I responded that I have never actually been on holiday before, and Dr Lal said, in a jovial, flirtatious manner, words to the effect of, and said words to the effect of, 'I'll take you on a holiday one day'.

24. I responded in a similar manner that I would think of somewhere I'd like to visit.

25. Once I started seeing Dr Lal at the Practice, it became a common occurrence for him to hug me and kiss me on the cheek at the beginning and end of each consultation. These actions would only occur inside the consultation room and once his door was shut.

26. The door was not usually locked.

27. I felt like we had become good friends.

28. In July 2013, 1 took a friend, C, with me to see Dr Lal at the Practice for an ulcer on her leg.

29. My friend's appointment was first and I sat in with her.

30. After my friend's appointment, she left the consultation room and went to a nearby shop whilst I had my appointment with Dr Lal.

31. At the appointment, Dr Lal treated my genital warts, and provided me with prescriptions.

32. As I was getting ready to leave the consultation room, Dr Lal hugged me, as usual; however, Dr Lal held the hug for about a minute.

33. I hugged Dr Lal back.

34. Then Dr Lal said words to the effect of, 'I could stay here forever'. I did not respond.

35. Dr Lal then started to move his arms down my back slowly and almost touched my bottom. He moved his arms back up to the middle of my back.

36. I hugged Dr Lal a little tighter.

37. I could see Dr Lal's waiting room was full because I could see surveillance footage, from four different cameras around the Practice, on his computer screen.

38. I then broke the hug and told Dr Lal he had a full waiting room.

39. Dr Lal said, 'See you next time' or words to that effect.

40. I recall feeling flattered and special.

41. The following week (early August 2013), I returned to see Dr Lal for the purposes of laser removal of my genital warts.

42. Once Dr Lal finished the procedure, he stood back, looked at my vagina and said, 'That's perfect'.

43. I then got up off the examination bed and got dressed.

44. As I was leaving, Dr Lal moved in for our usual hug.

45. Dr Lal then kissed me on the lips with a closed mouth. This lasted approximately 30 seconds.

46. While we kissed, Dr Lal had his arms around me and was stroking my back by moving his arms up and down my back.

47. I recall thinking that maybe Dr Lal really likes me.

48. I then pulled away from the kiss and rested my head on his left shoulder while we continued to hug.

49. After I broke the hug, neither of us said anything and I then left the Practice.

> 50. I did not tell anyone about what had happened.
>
> 51. After this, I made an effort to see Dr Lal more regularly, approximately once to twice a week.
>
> 52. At the end of every consultation, Dr Lal kissed me on the lips with a closed mouth.

13 It is evident from the Patient's statement that from June 2010 until November 2013, Dr Lal was flirtatious with her and hugged and kissed her initially on the cheek and eventually on the lips for a long period of time. It is also evident from the Patient's statement that Dr Lal progressively increased the amount and nature of the physical contact with the Patient from about July 2013.

14 The Patient's statement reveals an escalation in the relationship between her and Dr Lal and an increase in the seriousness of the breaches of the professional boundaries between Dr Lal and the Patient.

15 Dr Lal has not offered any evidence in mitigation of his conduct during this period.

16 The warning signs of a breach of professional boundaries as set out in the Guidelines were clearly apparent in that Dr Lal was using sexually explicit language and both parties were being overly affectionate prior to the sexual misconduct of 18 November 2013.

Sexual misconduct 18 November 2013

17 The events that followed illustrate why professional boundaries are so important and a breach of them needs to be viewed seriously. The agreed facts set out in paragraph 1 above are amplified by the Patient's statement at Exhibit A pages 80-83 paragraphs 58-107.

> 58. I recall Dr Lal's waiting room was empty whilst I waited for my appointment.
>
> 59. When I entered Dr Lal's consultation room, he closed the door but did not lock it.
>
> 60. There were two chairs next to Dr Lal's desk, against the wall to the left.
>
> 61. As I was stood in front of the chair directly next to Dr Lal's desk, Dr Lal and I hugged, as per normal.
>
> 62. This time, however, Dr Lal held on to me more tightly than usual.

63. Dr Lal then pressed his body against mine so strongly, that I felt like I would fall back over the chair that was behind me; however, I did not want to break contact so I readjusted my feet so I would not fall over.

64. This embrace lasted for approximately one minute.

65. Dr Lal then put his right hand on my left breast over my top.

66. Under my dress, I was wearing a purple padded bra with a lace trim, purple lace knickers and I was wearing thongs on my feet.

67. Dr Lal was stroking my left breast over my dress.

68. Dr Lal then put his right hand down the top of my dress and continued stroking my breast.

69. Dr Lal appeared frustrated that my bra was padded, so he put his right hand down the front of my bra and caressed my left breast and nipple.

70. I did not say anything.

71. Approximately one minute later, Dr Lal put his hand up under my dress and rubbed my genitals over the top of my underwear.

72. Dr Lal then moved my underwear to one side and continued to rub my genitals.

73. I responded by pressing against him.

74. Dr Lal then stopped suddenly and walked to the door and locked it.

75. Dr Lal then said words to the effect of, 'Just hop up on the bed', which I did.

76. Dr Lal did not ask me to, but I lied down.

77. Dr Lal then climbed up and over me on the examination bed so that he was lying next to me, with his back against the wall (the examination bed is positioned against a wall).

78. I had an ankle length dress on and Dr Lal used his hand to pull it up to my thigh.

79. He then moved his hand under my skirt, moved his fingers underneath my underwear and digitally penetrated me.

80. I touched Dr Lal's chest through the top of his shirt, I recall that his chest was bare.

81. I did not orgasm, but I was aroused.

82. Dr Lal then said, 'Very sexy'.

83. Then, suddenly, Dr Lal got up off the examination bed.

84. Dr Lal turned to me and asked me, what I thought was, words to the effect of, 'Do you have a condom?'

85. I answered that I did not.

86. Dr Lal then said words to the effect of, 'You didn't?'

87. I became confused and asked, "What did you say?"

88. Dr Lal then asked me, 'Did you orgasm?' or words to that effect.

89. I responded, 'Yes'.

90. Then I sat up and got off the examination bed.

91. Dr Lal had been looking at his computer screen which showed CCTV images of various areas of the practice.

92. As I got off the bed, Dr Lal turned around to face me and took a step forward.

93. Then Dr Lal and I were standing in the middle of his room.

94. Dr Lal then unzipped his jeans while we were still standing up facing each other and said words to the effect of, 'Just feel how hard it is'.

95. Dr Lal was wearing silky style boxer shorts.

96. Dr Lal removed his penis from his underwear and I held it in my hand. Dr Lal was uncircumcised.

97. Dr Lal then put his hand over mine and squeezed it a few times.

98. I then dropped to my knees and gave Dr Lal oral sex.

99. The oral sex lasted for between two to three minutes.

100. Dr Lal then pulled his penis out of my mouth and came into a tissue.

101. Straight after this, I stood up, Dr Lal gave me a hug and he walked me towards the door.

102. We did not say anything at all to each other.

103. Dr Lal then kissed me on the lips with a closed mouth.

> 104. I recall thinking that Dr Lal looked worried and he remained quiet. Therefore, I reverted back to 'patient mode' and said, 'Thanks, Dr Lal' or words to that effect and then exited his room and went to the reception desk.
>
> 105. I recall that the waiting area near the reception desk was almost full, with between eight and 10 people waiting.
>
> 106. Dr Lal bulk bills to Medicare so I signed the necessary paperwork at the reception desk and then left.
>
> 107. I estimate that my consultation with Dr Lal lasted approximately 30 minutes.

18 Dr Lal's sexual misconduct is more serious because it involved penetration. Both in criminal law and in disciplinary matters, sexual penetration is regarded more seriously than instances of sexual misconduct not involving sexual penetration.

19 Dr Lal's conduct on 18 November 2013 was clearly calculated. It represented a significant increase in the breach of professional boundaries between him and the Patient in that it involved serious sexual misconduct between a doctor and a patient. It clearly involved sexual exploitation of the Patient by Dr Lal.

20 It is not suggested that the conduct was non-consensual in a broad sense as between Dr Lal and the Patient.

21 However, as the Guidelines note at section 4:

> 4. Why breaching sexual boundaries is unethical and usually harmful
>
> A breach of sexual boundaries is unethical and unprofessional because it exploits the doctor-patient relationship, undermines the trust that patients (and the community) have in their doctors and may cause profound psychological harm to patients and compromise their medical care.
>
> **Power imbalance**
>
> The doctor-patient relationship is inherently unequal. The patient is often vulnerable. In many clinical situations, the patient may depend emotionally on the doctor. It is an abuse of this power imbalance for a doctor to enter into a sexual relationship with a patient.
>
> **Trust**
>
> Trust is the foundation of a good doctor-patient relationship. Patients need to trust that their doctors will act in their best interests. It is a breach of trust for a doctor to enter into a sexual relationship with a patient.

> This breach of trust may impact on that patient's (or other patients') ability to trust other doctors.
>
> **Loss of objectivity**
>
> A sexual relationship, even if the patient is a consenting adult, may impair the doctor's judgement and compromise the patient's care.
>
> …

22 Even though on the face of it, sexual conduct between a patient and a doctor may be consensual, the power imbalance between a doctor and a patient often means that the patient's consent is compromised by reason of the power imbalance between the doctor and the patient.

23 Dr Lal's conduct on 18 November 2013 was clearly unethical and unprofessional.

Dr Lal's file note of 18 November 2013

24 The agreed facts relating to Dr Lal's file note of 18 November 2013 are set out in paragraph 2.1 above.

25 Following the consultation on Monday 18 November 2013, Dr Lal made a purported note of the consultation (Exhibit A page 361). That note was inaccurate in that it indicated that Dr Lal had examined and advised the Patient regarding lower back pain when no such examination had been undertaken and no such advice had been given. The conduct was plainly dishonest.

26 As is explained later in these reasons, Dr Lal sought to justify his dishonesty on the basis of alleged extortion by the Patient and an assault on him by her partner.

27 It is apparent from Dr Lal's inaccurate file note that Dr Lal, as of 18 November 2013, had certainly appreciated that what he had done was wrong and was setting in place documentation that was calculated to mislead.

20 November 2013

28 The Patient saw Dr Lal again on 20 November 2013 when she attended with a friend of hers who had an appointment with Dr Lal. Once the friend's appointment was finished, Dr Lal called the Patient from his door. On this occasion, the Patient described Dr Lal as being in

'professional mode' and not acknowledging what had happened two days before (Exhibit A page 84 at paragraph 123).

22 November 2013

29 The Patient had another appointment on Friday, 22 November 2013. The agreed facts relating to the file note of 22 November 2013 are set out at paragraph 2.2. above are amplified by the Patient's statement at Exhibit A at pages 86-88 paragraphs 147-180.

> 147. I arrived at the Practice for my 5 pm appointment.
>
> 148. Dr Lal's wife was on reception. I was disappointed.
>
> 149. When Dr Lal called me into his room, I refused to hug him as I was angry that he had not called me back.
>
> 150. Dr Lal and I then engaged in a lengthy, at time heated, conversation. Although I cannot recall the exact words of the conversation, the effect of the words is as set out below.
>
> 151. Dr Lal asked me what was going on.
>
> 152. I told Dr Lal that I had thought about what had happened on Wednesday, and that I thought that I had wrecked my marriage.
>
> 153. I told Dr Lal that I was leaving [my partner].
>
> 154. Dr Lal asked me what I meant, and that 20 years of marriage was a lot to throw away.
>
> 155. I then said, 'You could at least have called me back'.
>
> 156. Dr Lal asked, 'When?'
>
> 157. I responded, 'The other night'.
>
> 158. Dr Lal said that he never got my message.
>
> 159. I responded, 'I knew you'd say that'.
>
> 160. I asked Dr Lal, 'Where do we go from here? What do we do about what happened?'
>
> 161. Dr Lal acted that he did not know what I was referring to and asked, 'What?'
>
> 162. I responded, 'You know what I'm talking about'.
>
> 163. Dr Lal responded, I don't know what you're talking about. You should be saving your marriage'.

164. I asked, 'Are you going to pretend what happened didn't happen?'

165. Again, Dr Lal asked, 'What?'

166. I asked, 'Are you going to pretend I didn't suck your dick?' in an angry tone.

167. Dr Lal said, '[Patient], stop. Why are you doing this? I've been a good doctor' and started listing the things he had done for me medically.

168. I said, 'You're supposed to fucking do those things! You're my doctor!'

169. Dr Lal didn't say anything.

170. Then I said, 'So, as far as you're concerned, nothing happened?'

171. Still, Dr Lal said nothing.

172. Then I said, 'Well, you can give me $10,000 if you're not going to admit anything. $10,000 or I'll take you to court.'

173. At the mention of $10,000, Dr Lal looked at me for the first time and made eye contact, which was my intention when I mentioned money.

174. I felt so angry and totally used.

175. Dr Lal still did not respond,

176. I then stormed out of the room.

177. I forgot to pick up my water bottle as I left the room.

178. In the waiting room, I said words to the effect of, 'I wouldn't trust that doctor' to the people in the waiting room.

179. I did not stop at the reception desk to sign any paperwork, and left the Practice.

180. After I got home, I telephoned my friend, and told her what had just happened.

30 Following the consultation of 22 November 2013, Dr Lal again made a note of the consultation. The note appears in Exhibit A pages 361-362. Once again, there was no note of what had occurred at the consultation and the note that was made was deliberately misleading.

Dr Lal's misleading medical notes

31 Dr Lal's explanation for his misleading entries in the medical notes is based upon the fact that he understood that the statement by the Patient on 22 November 2013 about the payment of $10,000 amounted to a threat of extortion.

32 In assessing the conduct that followed and Dr Lal's explanation for it, it is important to bear in mind that from 18 November 2013, Dr Lal had engaged in a process of deliberate deception in his notetaking.

33 One might give Dr Lal's explanation weight if he had not in fact commenced his course of deception by creating misleading medical notes on 18 November 2013, before the sum of $10,000 was allegedly mentioned by the Patient.

23 November 2013

34 On Saturday, 23 November 2013, the Patient went to the practice again because she said she was angry and wanted to speak to Dr Lal again. The Patient's evidence was that she saw Dr Lal at the surgery and the following exchange took place:

> 192. I said words to the effect of, 'have you thought about what we're going to do?
>
> 193. Dr Lal responded with words to the effect of, 'About what? There is nothing to do'.
>
> 194. I asked 'You're not actually going to admit it, hey?' or words to that effect.
>
> 195. Dr Lal said nothing.
>
> 196. I said, 'Fine! See you in court' or words to that effect, and stormed off.
>
> (Exhibit A page 89 at paragraphs 192-196)

35 Subsequently, Dr Lal's wife called the Patient and she and her friend attended at the practice at 2 pm. The Patient's evidence is that the following exchange took place (Exhibit A pages 89-90 at paragraphs 205-227):

> 205. I made my way to the door with [my friend], and Mrs Lal opened the sliding door to let us in. She then closed it and locked it.
>
> 206. Mrs Lal said she did not expect me to bring anyone with me.

207. Mrs Lal left and went to Dr Lal's room.

208. When she returned. Mrs Lal said she and Dr Lal wanted to see me on my own in his room.

209. I responded that if it was just me and Dr Lal, then that was fine.

210. Mrs Lal said she would also be there.

211. I said that in that case, I wanted [my friend] in with me.

212. Mrs Lal then went back to Dr Lal's room and returned with him to the waiting room a short time later.

213. I cannot recall the exact words of the conversation, but I can recall the effect of the words was as set out below.

214. Dr Lal said, '[Patient], I've done so much for you' and started listing things he had done for me. For example, referring me to the Fremantle Hospital pain clinic.

215. I responded, 'That's your fucking job!'

216. Mrs Lal said, '[Patient], I've been married to Vipin for 20 years and he has never asked me to do something like that' referring to me having performed oral sex on Dr Lal.

217. I said, 'He got his cock out of his pants'.

218. Mrs Lal asked, 'How dare you say these things about my husband?'

219. I started to get progressively angrier as Dr Lal was acting like nothing had happened between us.

220. I then tried to leave, but the door was locked.

221. I yelled, 'Open the fucking door!'

222. Neither Dr Lal nor his wife moved to open the door.

223. I yelled, 'If you don't open the door, I will smash it!'

224. I then took out my mobile and said I was going to call the police.

225. Mrs Lal then stood up and opened the door. I stormed out, but [my friend] stayed for approximately another five minutes.

226. [My friend] then walked out and I heard her say, 'See you in court' or words to that effect.

227. As [my friend] and I drove off, Mrs Lal waved at us from the door.

36 The most probable inference from the statements made by Mrs Lal is that Dr Lal had been dishonest to Mrs Lal about what had occurred.

37 On 23 November 2013, the Patient told her partner what had happened.

Notification to AHPRA

38 On 26 November 2013, the Patient notified the Australian Health Practitioner Regulation Agency (AHPRA) of the events by telephone (Exhibit A page 52).

39 There was a further telephone attendance on the Patient by an officer of AHPRA on 27 November 2013 (Exhibit A pages 60-61).

40 The Patient made a written notification to AHPRA on 28 November 2013 (Exhibit A pages 53-59).

29 November 2013

41 On 29 November 2013, Dr Lal was assaulted by the Patient's husband. The diagnosis of the immediate injuries sustained on that day was a closed right distal third spiral tibial shaft and a right fibula neck fracture and abrasions to the left anterior knee and right elbow. Complicating his operation was a deep peroneal neuropraxia, infra patella branch of the saphenous nerve neurotmetrsis and distill saphenous irritation (Exhibit B Tab 6). It is apparent that Dr Lal sustained serious injuries as a result of the beating he received from the Patient's husband.

Dr Lal's incorrect statement to the Police - 27 December 2013

42 On 27 December 2013, Dr Lal signed a statement for the police (Exhibit A paragraph 43) containing the customary statement that:

> This statement is true to the best of my knowledge and belief. I have made this statement knowing that if it is tendered in evidence, I will be guilty of a crime if I have wilfully included in the statement anything that I know to be false or that I do not believe is true.
>
> (Exhibit A pages 120-130)

43 The purport of the statement was that Dr Lal denied that there had been any sexual relationship with the Patient and that his interactions with her had been as a doctor-patient relationship only. That statement was plainly misleading.

9 January 2014 - charges against the Patient

44 The Patient was charged with demanding property by oral threats, contrary to s 397(2) of the Criminal Code as a result of a complaint by Dr Lal.

45 The prosecution notice as filed in the Magistrates Court of Western Australia on 9 January 2014 stated the details of the alleged offence as:

> Demanding Property by Oral Threats
>
> on 23/11/ 2013
>
> with intent to extort or gain, orally demanded $10,000.00 from Vipin LAL with threats of detriment to Vipin LAL if the demand was not complied with.
>
> (Exhibit A page 133)

Dr Lal's response to AHPRA

46 Dr Lal responded to AHPRA's notification in writing on 14 January 2014 (Exhibit A pages 62-65).

47 The agreed facts relating to Dr Lal's letter of 14 January 2014 are set out at paragraph 3.1 and 3.2 above.

48 Dr Lal's response to the AHPRA enquiry was written after the assault by the Patient's husband (Exhibit A pages 62-65).

49 In the letter of 14 January 2014, Dr Lal made the following statements:

> I note [the Patient's] allegation that in the weeks leading up to the 18 November 2013 consultation my conduct was 'increasingly less professional' that I kissed her on the lips and embraced her when saying goodbye. I emphatically deny that I ever kissed [the Patient] on the lips or at all. [The Patient] would regularly move toward me and embrace me at the beginning and at the end of a consultation which always made me feel very uncomfortable, particularly given my Indian culture. The sole reason I tolerated this was because I recognised it as behaviour which was not uncommon in the Australian culture and I was very keen to build up my practice and not offend or alienate my patients. I emphatically deny that I ever instigated an embrace with [the Patient] or actively reciprocated her embraces. I deny that my actions and behaviour toward [the Patient] were anything other than completely professional at all times.
>
> …

I vehemently deny each and every assertion made by [the Patient]. In her notification regarding what transpired during the consultation on 18 November 2013 or that anything of a sexual or romantic nature occurred during that or any of my consultations with [the Patient].

My interactions with [the Patient] at all other times have always been entirely professional. The only time I performed an intimate examination of her was at [the Practice] with a nurse present. I did not embrace [the Patient], or touch her breast and I deny that any sexual activity took place. I also deny ever having locked the door of my consulting room during any of my consultations with [the Patient].

…

When I called [the Patient] into my office I noticed that she seemed subdued and not her usual self. I asked her how I could help her, and she told me that she was not happy with me at all. She then made allegations of a physical relationship having taken place between us, and that she felt used by me. When I indicated that 1 had no idea to what she was referring, she told me I could pay her $10,000 or she would go to court with sexual allegations about me (or words to that effect). She repeated her threat several times.

I was extremely shocked and dismayed by what she was saying. I asked her to leave my consultation room. [The Patient] became angry and promptly walked out of the consultation. I was concerned for my wife's welfare and so I followed her out of my office, and she then left the practice.

I immediately told my wife that [the Patient] had asked me for $10,000 and If I didn't agree to pay her the money she would pursue sexual allegations against me. My wife was also extremely shocked and traumatised by these events.

My wife and I discussed the matter and decided that we needed to confront [the Patient] to try and get clarity over why she was making such a threat and to gauge whether this was just a spur of the moment lapse in judgment by a deeply troubled woman or a serious attempt to extort money from me.

My wife rang [the Patient] and asked her if she could come back to the practice at 2.00 pm for a meeting.

[The Patient] arrived at the practice with a female friend at about 2 pm. The friend said she was a Registered Nurse but she refused to disclose her name when asked by my wife. [The Patient] repeated her threat that 'either you pay $10,000 or I'll take you to the courts'. Her friend supported [the Patient] and also threatened that either I pay the money or else she would report me to the medical board. [The Patient] was very clear with the fact that if she was paid $10,000 then she wouldn't complain to the

> Medical Board or anybody else. I unequivocally refused to succumb to this threat.
>
> …

50 Dr Lal's letter enclosed a copy of the Patient's notes.

51 Dr Lal's letter was dishonest. It continued the course of deception that he had commenced on 18 November 2013 when he made the inaccurate note. The letter noted that Dr Lal had lodged a complaint of extortion by the Patient with the police as result of advice from a lawyer.

52 Not only were the statements in the letter false but the enclosed medical notes for 18 and 22 November 2013 were knowingly false.

53 As the agreed facts state at 3.2, the statements set out in 3.1 of the agreed facts were false and were made to discredit the Patient and influence the Board in relation to the outcome of the notification.

Dr Lal commences psychological treatment - 22 January 2014

54 Dr Lal commenced seeing a psychologist, Dr Forbes, on 22 January 2014.

5 November 2014 - indictment filed

55 An indictment on the charge of demanding property by oral threats was filed on 5 November 2014 (Exhibit A page 135).

56 By the time the indictment was filed on 5 November 2014, Dr Lal had seen Dr Forbes on frequent occasions as is apparent from the letter from Dr Forbes dated 22 April 2016.

Dr Lal's statement to AHPRA of 31 March 2015

57 On 31 March 2015, Dr Lal wrote to AHPRA advising that he wished to correct his account of what happened. In that letter he made a misleading statement about what had occurred in that he stated, in effect, that the Patient had initiated the contact. As in the statement to the police, he referred to the assault and the AHPRA notification (Exhibit A pages 97-100).

Dr Lal's incorrect statement to the Police on 15 April 2015

58 Paragraph 5 above sets out the agreed facts relating to Dr Lal's incorrect statement to the Police on 15 April 2015.

59 On 15 April 2015, Dr Lal made a further statement, again with a standard clause that the statement was true, in which he admitted to sexual conduct on 18 November 2013. What the revised statement relevantly said was:

> 6. [The Patient] had an appointment to see me.
>
> 7. While [the Patient] was in my consult room, she made a sexual advance towards me, during which she put my penis in her mouth.
>
> 8. I did not ask her to put my penis in her mouth.
>
> 9. I was very shocked and embarrassed by [the Patient's] sexual advance towards me during this consult.
>
> 10. I said in paragraph 51 of my statement on 27 December 2013 that I consulted [the Patient] as a patient on Friday 22 November 2013 and that this was a normal consult.
>
> 11. It was not a normal consult.
>
> 12. It was not a normal consult because of what had happened during the consult on 18 November 2013.
>
> 13. [The Patient] did not make any further sexual advance towards me on that occasion and there was no contact between us of a sexual nature.
>
> 14. At the time I signed my statement on 27 December 2013, I was experiencing symptoms of depression and anxiety. I was not able to sleep and my judgment was impaired because of strong medications that I was taking.
>
> 15. As an Indian man, my cultural background makes me feel extremely uncomfortable discussing any sexually related or such shocking subject matter. I felt too embarrassed and uncomfortable about what had happened on 18 November 2013 to discuss it with the police. In hindsight, I believe my depression, anxiety and impaired judgment at the time had affected my appreciation of the importance of disclosing what happened when I made my statement to the police.
>
> 16. My state of mind at that time was due to a number of things that had occurred over the previous few weeks.
>
> 17. The first was [the Patient's] sexual advance towards me on 18 November 2013. I had been very shocked by this and had felt embarrassment and shame about what had happened.

> 18. I had also been very shocked by what [the Patient] had said to me when I saw her on 23 November 2013, both initially and when she returned to the practice with the other woman. I set out my recollection of those events in paragraphs 15 to 29 and 35 to 46 of my statement dated 27 December 2013.
>
> 19. I had also been very emotionally affected by [the Patient] having complained to the Australian Health Practitioner Regulation Agency about me on 26 November 2013, where she had alleged that we had had some consensual sexual activity on 18 November 2013. I was very upset by these allegations and was concerned about the impact they would have on my ability to practice medicine.
>
> 20. I was also assaulted on 29 November 2013. I suffered a number of fractures to my right leg in that assault. I had had to be hospitalised for five days and needed a rod and screws fixed in my leg and ankle. I was very depressed and suffered a lot of pain during my recuperation.
>
> 21. I was contacted by the police and asked to make a statement within a week or two after coming home from the hospital.
>
> 22. I have now had an opportunity to recover from my depression and am less uncomfortable discussing what happened.
>
> 23. I also know that it is important that I correct the errors in my original statement, which I have done by making this statement today.
>
> 24. This statement is true to the best of my knowledge and belief. I have made this statement knowing that, if it is tendered in evidence, I will be guilty of a crime if I have wilfully included in the statement anything that I know to be false or that I do not believe is true

(Exhibit A pages 137 140 at paragraphs 6-24)

60 Although Dr Lal admitted that there had been a sexual advance, the purport of the statement is that the advance was made by the Patient without his consent and that he was shocked and embarrassed by that sexual advance. His explanation for the errors in his original statement to the Police of 14 January 2014, was that he was experiencing symptoms of depression and anxiety and that he was not able to sleep and that his judgment was impaired because of the strong medication he was taking.

61 Dr Lal stated that his state of mind at the time he made the inaccurate statement was due to a number of matters including the sexual advance of the 18 November 2013 and what the Patient had said to him on

23 November 2013, both initially and when she returned to the practice in the afternoon.

62 Dr Lal also said that he was emotionally affected by the Patient having complained to AHPRA. He then referred to the assault on 29 November 2013. By this date, Dr Lal had seen Dr Forbes on 43 occasions. Dr Lal stated that he has had the opportunity to recover from his depression and was less uncomfortable discussing what had happened. He also acknowledged that it is important that he correct the errors in his original statement

The statement of 15 April 2015

63 In his statement of 15 April 2015, Dr Lal specifically stated that he had an opportunity to recover from his depression and felt less uncomfortable about a discussion about what had happened.

64 Even if Dr Lal's depression affords some explanation for his misleading statement of 27 December 2013 and his response to AHPRA of 14 January 2014, it affords no explanation for his misleading statement of 15 April 2015.

65 The statement of 15 April 2015, while coming some way towards the truth, was incomplete, deceptive and misleading.

Dr Lal's witness statement of 4 November 2015

66 Dr Lal then signed a further statement on 4 November 2015 (Exhibit A pages 141-142) when he again effectively continued the process of deception in that he blamed the Patient for initiating the sexual contact.

Trial - 9 November 2015

67 The matter went to trial on 9 November 2015 before his Honour Judge O'Neal of the District Court of Western Australia. In the course of the trial, Dr Lal gave evidence that the Patient had initiated the sexual conduct (Exhibit A pages 180-183). The Patient was acquitted at the trial on 11 November 2015.

68 Any trial is obviously an ordeal for the person who has been indicted. It is difficult to believe that the Director of Public Prosecutions (DPP) would have proceeded with the trial had Dr Lal been honest with the police in the first place on the basis that, given what had occurred, there would have been no reasonable prospect of success.

Dr Forbes' reports

69 On 22 April 2016, Dr John Forbes, a clinical psychologist, provided a report to D. G. Price & Co whom the Tribunal assumes to be Dr Lal's solicitors at the time. The history provided by Dr Lal to Dr Forbes of the alleged sexual assault on 18 November 2013 was:

> …
>
> 4. *What was your assessment of [Dr Lal's] state of mind at that time when he started seeing you? In particular, did you discern the presence of any factors that may have clouded or affected [Dr Lal's] to make correct decisions and judgements? If so, what were these factors?.*
>
> Dr Lal presented in what appeared to be a distressed state of mind, and his presentation was supported by the information he provided at the time … The nature of Dr Lal's conditions (please see my response to Question 5 below) are such that I would not be at all surprised if he had difficulty with decision, making and judgement. Mood disorders (such as anxiety and depression) are disorders of cognition (thought) and, as such, people find it difficult to properly assess situations and adequately evaluate information. I do not believe that it is appropriate for people to make significant decisions while they are experiencing such disorders without adequate support and advice.
>
> 5. *Did you diagnose [Dr Lal] as suffering any and what condition/s?*
>
> It is my opinion that Dr Lal has been experiencing an Acute Stress Response as a consequence of his assault and his patient's alleged threats and demand for money. It is also my opinion that Dr Lal has been experiencing Major Depressive Disorder, and that he has been experiencing Agoraphobic features and Generalised Anxiety Disorder.
>
> 6. *What is [Dr Lal's] present condition, and what is the prognosis?*
>
> In my opinion, Dr Lal continues to experience Generalised Anxiety Disorder and Major Depressive Disorder, and these have been and are being exacerbated by previous and current legal issues. To a large degree, Dr Lal's prognosis will be affected by the outcome of his current proceedings and, as such, I do not believe that I am in a position to express a definitive opinion in this regard.

(Exhibit B Tab 4)

70 It was common ground that Dr Lal did not give an accurate history of the events to Dr Forbes.

71 Dr Lal relied upon Dr Forbes' advice in support of a submission that, as a result of the alleged request for money, to use a neutral term, and the assault that Dr Lal's judgment-making was impaired. Dr Forbes' opinion is hardly emphatic as to the influence of the request for money and the assault on Dr Lal.

72 It is not the case that Dr Forbes says that Dr Lal's conduct up to this point and beyond was as a result of impaired decision-making, rather that Dr Forbes would not at all be surprised if Dr Lal had difficulty with decision-making and judgment.

73 In assessing the weight of Dr Forbes' report, it is important to bear in mind that, other than the fact of the assault, and the reference to the $10,000, the history which Dr Lal had given to Dr Forbes was untrue.

74 There is also no evidence that Dr Forbes was informed that the process of deception employed by Dr Lal had commenced before there was any request for $10,000 or an assault. The Tribunal is not in a position to know what influence those further facts might have had on the opinion expressed by Dr Forbes and whether he would have come to a different conclusion. Accordingly, the Tribunal has given little weight to Dr Forbes' opinion.

The Tribunal's conclusions as to Dr Lal's conduct

75 The Tribunal has concluded that Dr Lal decided to embark on a process of deception on 18 November 2013, immediately following his sexual misconduct on that date, which he continued until sometime in September 2016 when he finally admitted to the conduct which is set out in the order dated 4 October 2016.

76 The Tribunal does not accept that Dr Lal's deceptive conduct was as a result of the request for $10,000 or of the assault on him by the Patient's partner. He had ample opportunity to make a true statement and only did so after a period of nearly three years. He commenced his deception before there was any mention of money or an assault by the Patient's partner.

77 Dr Lal was receiving support from his psychologist from as early as 22 January 2014 and saw him frequently, at least until 20 April 2016.

78 The breach of professional boundaries by Dr Lal was sustained, ultimately resulting in the sexual misconduct of 18 November 2013.

79 Dr Lal's conduct following the consultation of 18 November 2013 reflects a serious and sustained course of dishonesty, both to AHPRA, to the Police and the DPP. It was a course of dishonesty that had serious consequences for the Patient in that she faced a District Court trial.

Dr Lal's references

80 Dr Lal's bundle of documents (Exhibit B) contained a large number of references. By and large, those references did not indicate that Dr Lal had admitted the facts in the minute of agreed facts filed on 4 October 2016. The reason for that is because Dr Lal had not admitted the agreed facts at that stage.

81 The fact that Dr Lal failed to tell his referees about the true facts of his conduct evidences a continuing course of dishonesty.

82 Subsequent to the hearing, Dr Lal filed 10 reference letters with the consent of the Board. Dr Lal did not seek leave from the Tribunal to file those references.

83 Hearings as to penalty and costs are intended to be final. If a party seeks to rely on further evidence after a final hearing, they should seek the leave of the Tribunal.

84 As is evident from the covering letter of 17 November 2016 sent with the references, it was a tactical decision on the part of Dr Lal not to update those references.

85 Had leave been sought, it would have been refused by the Tribunal.

86 However, despite the failure to seek leave, the Tribunal has read the references. The references by and large evidence that Dr Lal has been a caring medical practitioner in relation to those patients. Some of the references state that despite Dr Lal's admitted dishonesty, they still regard him as honest. If those who gave such references regard Dr Lal as 'honest' in the face of his admissions, then the Tribunal can only conclude that those references are of no value.

87 The references establish that Dr Lal has been a caring doctor but they are of little value beyond that.

The Tribunal's powers in relation to penalty and costs

88 The Tribunal's powers in relation to penalty are set out in s 196(2) of the *Health Practitioner Regulation National Law (WA) Act 2010*

(National Law) which provides the Tribunal may decide to do one or more of the following:

> (a) caution or reprimand the practitioner;
>
> (b) impose a condition on the practitioner's registration[.]
>
> (c) require the practitioner to pay a fine of not more than $30 000 to the National Board that registers the practitioner;
>
> (d) suspend the practitioner's registration for a specified period;
>
> (e) cancel the practitioner's registration.

89 Section 196(4)(a) of the National Law provides:

> 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 -
>
> > disqualify the person from applying for registration as a registered health practitioner for a specified period.

General principles in relation to penalty

90 Where there is a choice of sanctions, the Tribunal will choose that sanction which maximises the protection of the public (***Medical Board of Australia and Veettill*** [2015] WASAT 124 (S) (***Veettill***) at [14] citing ***Quinn v Law Institute of Victoria*** [2007] VSCA 122 at [31]).

91 The Tribunal repeats what it stated in ***Medical Board of Australia and Myers*** [2014] WASAT 137 (S) (***Myers***). The jurisdiction of the Tribunal is protective rather than punitive, and such protection runs to both the public and the profession (***Craig v Medical Board of South Australia*** (2001) 79 SASR 545 at [41]; ***Re Maraj (a Legal Practitioner)*** (1995) 15 WAR 12 at 25; ***Legal Profession Complaints Committee v Love*** [2014] WASC 389 (***Love***) at [19]; ***Law Society of New South Wales v Foreman*** (1994) 34 NSWLR 408 at 4400441A - B; ***Legal Profession Complaints Committee and in de Braekt*** [2013] WASAT 124 at [24]-[26]; ***New South Wales Bar Association v Hamman*** [1999] NSWCA 404 at [21] and [77]).

92 The dominant purpose of the disciplinary regulation of the medical profession is the protection of the public by the maintenance of proper standards within the profession. Hence, the impact which an appropriate penalty would have upon a practitioner guilty of misconduct, and personal hardship to a practitioner, are necessarily secondary considerations

(see ***Veettill*** at [15], citing ***Legal Profession Complaints Committee v Detata*** [2012] WASCA 2014 at [47] and ***Legal Profession Complaints Committee v Masten*** [2011] WASC 71 at [29]; ***Legal Profession Complaints Committee and Leask*** [2010] WASAT 133 at [54]).

93 There are circumstances in which a 'global' approach to sanction, rather than the imposition of separate sanction for each finding as to conduct, may be more appropriate in vocational disciplinary proceedings namely, where the facts of the case are so inextricably woven as to make it difficult to meet a clear standard of prescription (***Veettill*** at [16]). Alternatively, where the practitioner's conduct, if considered alone, would be subsumed in the more serious conduct, it is appropriate to impose a global penalty.

94 The appropriate sanction is to be considered at the time of the making of the sanction and not by reference to the date of the conduct (***Legal Profession Complaints Committee and A Legal Practitioner*** [2013] WASAT 37 (S) (***A Legal Practitioner (S)***) at [23]; ***Legal Profession Complaints Committee v Segler*** [2014] WASC 159 at [7]; ***A Solicitor v Council of the Law Society of NSW*** [2004] HCA 1; (2004) 216 CLR 253 (***A Solicitor [2004] NSW***) at [15]; ***Love*** at [16]).

95 It is the practitioner's conduct that attracts any sanction (***A Legal Practitioner (S)*** at [24]; ***Smith v New South Wales Bar Association*** [1992] HCA 36; (1992) 176 CLR 256 at 267-268 and 211-212; ***A Solicitor [2004] NSW***).

96 As the Tribunal explained in ***A Legal Practitioner (S)*** at [24]:

> ... [I]n determining the appropriate penalty, care needs to be taken that the penalty reflects the matters with which the practitioner is charged and not other conduct including the defence of the action by the practitioner which is ultimately held to be unsuccessful: *Smith v New South Wales Bar Association* [1992] HCA 36; (1992) 176 CLR 256 (*Smith*) at 267-268 and 271-272[.]

Cancellation of registration

97 The jurisdiction of the Tribunal to cancel a practitioner's registration is exercised not for the purpose of punishing the practitioner concerned, but for the protection of the public and the reputation and standards of the medical profession: ***Veettill*** at [18] citing ***Legal Practitioners Complaints Committee v Thorpe*** [2008] WASC 9 at [43].

98 Where an order for cancellation of a practitioner's registration is contemplated, the ultimate question is whether the material demonstrates that the practitioner is not a fit and proper person to remain a practitioner: ***Veettill*** at [19] citing ***A Solicitor [2004] NSW*** at [15].

99 A practitioner is not a fit and proper person to be a registered practitioner and should be removed from the register where the conduct is so serious that the practitioner is permanently or indefinitely unfit to practise (***Veterinary Surgeons Investigating Committee v Howe (No 2)*** [2003] NSWADT 159 at [27]; ***Barristers' Board v Darveniza*** [2000] QCA 253; (2000) 112 A Crim R 438 at [38]; ***Love*** at [17]-[18]; ***A Legal Practitioner (S)*** at [21]-[25]; ***Legal Profession Complaints Committee v Brickhill*** [2013] WASC 369 at [19] [20] (Thomas JA, McMurdo P and White J agreeing); ***New South Wales Bar Association v Cummins*** [2001] NSWCA 284; (2001) 52 NSWLR 279 at [26] and [28]); ***Love*** at [17]-[18]; ***Veettill*** at [19]).

100 The practical effect of an order cancelling registration is that if a practitioner wishes to resume practice he/she must persuade the relevant regulatory authority that he is truly reformed and that he is a fit and proper person to resume practice.

Suspension

101 Suspension is a less serious result and differs from cancellation of a practitioner's registration because suspension is for a specified limited period (***Myers*** at [20]).

102 The proper use of suspension is in cases where the practitioner has fallen below the high standards to be expected of such a practitioner, but not in such a way as to indicate that the practitioner lacks the qualities of character which are the necessary attributes of a person entrusted with the responsibilities of a practitioner (***A Legal Practitioner (S)*** at [26]; ***Re A Practitioner*** (1984) 36 SASR 590 at 593 per King CJ). That is, suspension is suitable where the Tribunal is satisfied that, upon completion of the period of suspension, the practitioner will be fit to resume practice (***A Legal Practitioner (S)*** at [27]; ***Myers*** at [21]).

103 The practical effect of an order suspending registration is that at the end of the period of suspension, the practitioner is entitled to resume practice without having to prove that he/she is a fit and proper person.

General principles in assessing a penalty

104 The considerations which apply to penalty in disciplinary cases were stated by this Tribunal in ***Myers***, and confirmed in ***Veettill***. The Tribunal set out 12 matters which may require consideration in determining penalty. Those matters are interrelated and are not mutually exclusive or exhaustive. The 12 matters are:

a) Any need to protect the public against further misconduct by the practitioner.

b) The need to protect the public through general deterrence of other practitioners from similar conduct.

c) The need to protect the public and maintain public confidence in the profession by reinforcing high professional standard and denouncing transgressions and thereby articulating the high standards expected of the profession such that, even where there may be no need to deter a practitioner from repeating the conduct, the conduct is of such a nature that the Tribunal should give an emphatic indication of its disapproval.

d) In the case of conduct involving misleading conduct, including dishonesty, whether the public and fellow practitioners can place reliance on the word of the practitioner.

e) Whether the practitioner has breached any:

(i) Act;

(ii) Regulations;

(iii) Guidelines or Code of Conduct, issued by the relevant professional body; and

(iv) whether the practitioner has done so knowingly.

f) Whether the practitioner's conduct demonstrated incompetence, and if so, to what level.

g) Whether or not the incident was isolated such that the Tribunal can be satisfied of his or her worthiness or reliability for the future.

h) The practitioner's disciplinary history.

i) Whether or not the practitioner understands the error of his ways, including an assessment of any remorse and insight (or a lack thereof) shown by the practitioner, since a practitioner who fails to understand the significance and consequences of misconduct is a risk to the community.

j) The desirability of making available to the public any special skills possessed by the practitioner.

k) The practitioner's personal circumstances at the time of the conduct and at the time of imposing the sanction. However, the weight given to personal circumstances cannot override the fundamental obligation of the Tribunal to provide appropriate protection of the public interest in the honesty and integrity of legal practitioners and in the maintenance of proper standards of legal practice.

(l) The Tribunal may consider any other matters relevant to the practitioner's fitness to practise and other matters which may be regarded as aggravating the conduct or mitigating its seriousness. In general, mitigating factors such as no previous misconduct or service to the profession are of considerably less significance than in the criminal process because the jurisdiction is protective not punitive.

Is there a need to protect the public against further misconduct by Dr Lal?

105 Dr Lal's conduct was so persistent that it demonstrates a clear need to protect the public against further misconduct.

106 It is of particular concern that Dr Lal was prepared to sacrifice his patient's interests to protect his reputation.

Is there a need to protect the public through general deterrence of other practitioners?

107 The penalty must make it clear to other practitioners how seriously the Tribunal views such conduct.

Is there a need to protect the public and maintain public confidence in the profession by reinforcing high professional standard and denouncing transgressions?

108 There is a clear public interest in the imposition of a penalty which reflects the high standards of the profession of medicine.

109 In this case, Dr Lal's conduct is so serious that nothing short of an order cancelling his registration would achieve that objective.

110 A patient should be able to attend his/her medical practitioner without professional boundaries being crossed or the risk of sexual misconduct.

111 A patient should also expect his/her medical practitioner to be honest.

Dishonesty, and whether the public and fellow practitioners can place reliance on the word of Dr Lal

112 Public confidence in the profession, and patient safety, both demand that only scrupulously honest people are allowed to practise in professions. The public expects health practitioners to be 'scrupulously honest' ***Medical Board of Western Australia and Bham*** [2006] WASAT 190 (***Bham***) at [54].

113 Honesty is fundamental to the concept of professionalism. Calculated dishonesty of this magnitude, in such a range of contexts, would seem to be inimical to membership of a profession.

114 It is critical that doctors, and other health practitioners, employers and institutions be able to rely upon the honesty of their colleagues: ***Chan and The Nurses Board of Western Australia*** [2005] WASAT 115 at [89]. This is important both to patient safety and the standing of the profession in the eyes of the public.

115 Registration boards must be able to rely upon the veracity of practitioners, in relation to disciplinary matters.

116 If a professional person is prepared to be dishonest with his/her professional body, the public is entitled to be concerned whether she/he is committed to or capable of honesty with them: ***Psychologists Registration Board of Victoria v Ferriere*** (2000) PRBD (Vic) 3 at [23] and ***Bham*** at [54].

117 Neither the public, other practitioners or institutions, AHPRA nor the Board could comfortably rely upon the word of a practitioner who has behaved as Dr Lal has done.

118 Dr Lal's course of conduct demonstrated the most appalling and self-serving dishonesty.

119 Further, Dr Lal attempted to cover his dishonesty by relying on events, the demand for money and the assault on him by the Patient's partner, that occurred after his course of dishonesty had commenced on 18 November 2013.

120 Had another practitioner had to rely on Dr Lal's misleading medical notes, they would have found a totally incorrect view of the Patient's medical condition.

121 Dr Lal misled AHPRA, the Police and the Board. Had the prosecution against the Patient, initiated by Dr Lal, been successful, the Patient could have faced a term of imprisonment.

122 Dr Lal came only grudgingly to disclose the truth.

Breach of Act, Regulation, Code or Guideline, and whether Dr Lal has done so knowingly

123 In failing to maintain proper professional boundaries and having sexual contact with the Patient, Dr Lal:

a) breached section 8.2 of the Board's Code of Conduct ; and

b) contravened the Board's Guidelines.

124 In being dishonest, Dr Lal has failed to be 'ethical and trustworthy' or display 'integrity' and 'truthfulness' as required by section 1.4 of the Board's Code of Conduct.

Incompetence

125 Dr Lal's conduct does not demonstrate incompetence.

Was the incident isolated?

126 Dr Lal's admitted conduct involves two very different types of conduct: sexual misconduct and serious dishonesty.

127 The sexual misconduct occurred after a long process of breaching professional boundaries. Whilst the agreed facts relate to a single act, that act needs to be seen in the context of the long process that led to it.

128 The dishonesty occurred between 18 November 2013 and 15 April 2015. Dr Lal did not make full admissions in relation to either sexual misconduct or dishonesty until some 11 months after the Patient's trial on charges of extortion, and almost nine months after the commencement of these proceedings.

129 Although Dr Lal's dishonesty arises from and is related to his sexual misconduct of 18 November 2013, they are very different types of misconduct. The Tribunal regards Dr Lal's conduct as a sustained course of dishonesty and not as isolated.

Dr Lal's disciplinary history

130 On 20 November 2012, the Board decided to caution Dr Lal pursuant to s 178(2)(a) National Law because the standard of care and judgment possessed with regards to maintaining sufficient medical records and prescribing a weight loss medication without consulting with the patient in person or completing a thorough examination, falls below the standard reasonably expected.

131 The circumstances leading to the caution have not been taken into account by the Tribunal in imposing a penalty.

Whether or not Dr Lal understands the error of his ways, including an assessment of any remorse and insight (or a lack thereof)

132 The onus of proof in relation to insight is on Dr Lal. see, for example, ***HCCC v King*** [2011] NSWMT 5 at [61].

133 Dr Lal submitted that his partial correction of the facts reflects well on his character. The Tribunal does not accept that submission. That fact that Dr Lal failed to admit fully the events that he now admits reflects adversely on his character. His revised statement would have suggested to the Police and the DPP that he was now telling the whole truth. He maintained his deception right through the trial, that is, in the most serious of circumstances.

134 Dr Lal is not entitled to any credit for correction of his statements to the Police. That conduct does not show any remorse. His conduct showed continuing dishonesty.

135 Dr Lal made full admissions in relation to his sexual misconduct and dishonesty only when the hearing of this matter before the Tribunal was imminent.

136 Dr Lal's admissions, whilst late, do indicate a degree of insight and remorse and he is entitled to some credit for that. His admissions have made it unnecessary for the Patient to give evidence.

137 Dr Lal's admitted dishonesty must affect the weight which the Tribunal can give to assertions of remorse by Dr Lal: see ***HCCC v Fraser (No. 2)*** [2014] NSWCATOD 84 at [110].

Are there any special skills possessed by Dr Lal?

138 There is no evidence that Dr Lal possesses any special skills which would influence any penalty to be imposed.

139 The Tribunal has taken into account that he is in an area of GP shortage. However, that does not outweigh the seriousness of his conduct.

Dr Lal's personal circumstances

140 Any penalty which prevents Dr Lal from practising will plainly have a very adverse impact on Dr Lal. His practice is heavily mortgaged (Exhibit B Tabs 29-30). He is the sole income earner.

Any other matters relevant to Dr Lal's fitness to practise and other matters which may be regarded as aggravating the conduct or mitigating its seriousness?

141 Dr Lal's active dishonesty with police and in a witness statement for the criminal prosecution of his patient was calculated. Though not the subject of an allegation in these proceedings, that dishonesty persisted even when Dr Lal gave evidence at the criminal trial of the Patient that the sexual contact with the Patient was initiated by her and was not consensual.

142 At the Patient's criminal trial, Dr Lal was content to continue to paint the Patient as a liar, and as the instigator of an unwanted sexual advance upon him, an unwilling victim. The impact of his conduct upon the Patient may be inferred.

143 Although Dr Lal was assaulted by the Patient's partner, that is not relevant for the purposes of fixing a penalty which is based on the protection of the public.

144 Dr Lal was the subject of an immediate action in January 2014 in that he was subject to an undertaking relating to a chaperone and his completion of a log when treating female patients. However, he has continued to practise since then. This is not a factor which is related to penalty.

Costs

145 The Tribunal may make any order about costs it considers appropriate for the proceedings, pursuant to s 195 of the National Law, and s 87(2) of the *State Administrative Tribunal Act 2004* (WA) (SAT Act).

146 The Tribunal's approach and practice in relation to costs in vocational disciplinary proceedings costs was summarised in ***Legal Profession Complaints Committee and in de Braekt*** [2012] WASAT 58 (S) ; (2012) 80 SR (WA) 194 (***in de Braekt (S)***) at [51] and [53] as follows:

> Although s 87(1) of the SAT Act contemplates that, generally, parties bear their own costs in proceedings before the Tribunal, s 87(2) of the SAT Act confers a discretion on the Tribunal to make an order for the payment by a party of all or any of the costs of another party. The Tribunal's established practice in relation to the exercise of its discretion as to costs under s 87(2) of the SAT Act in vocational disciplinary proceedings is that a successful application by a vocational regulatory body, such as the Committee, will usually result in an order for costs being made in favour of the vocational regulatory body: *Medical Board of Western Australia and Roberman* [2005] WASAT 81 (S); (2005) 39 SR (WA) 47 (*Roberman*) at [30] referred to with approval in *Paridis v Settlement Agents Supervisory Board* [2007] WASCA 97; (2007) 33 WAR 361 at [35]. The policy basis behind this practice is that vocational regulatory bodies 'perform a function which promotes the public interest, and usually with limited resources' and '[t]he financial burden of bringing disciplinary action if the body had no capacity to recover some or all of its costs may be such as to provide a disincentive to bring disciplinary action, or when brought, to ensure that the allegations against the practitioner concerned are properly and thoroughly presented': *Roberman* at [30].

147 Despite what the Tribunal stated in ***in de Braekt (S)***, every case must be considered individually on its merits bearing in mind s 87 of the SAT Act. There is no presumption that a disciplinary body will be awarded costs if successful.

148 On that basis, the Board submits that it should be entitled to an order that Dr Lal pay its costs of the proceedings.

149 Had Dr Lal been honest with AHPRA and with the Police, then it is probable that the Board would not have had to incur the costs of the proceedings.

150 In the particular circumstances of this case, it is appropriate that Dr Lal pay the Board's costs to be assessed on the Tribunal Scale.

Conclusion

151 The Tribunal has concluded that Dr Lal's conduct is serious. The proper penalty in this case is cancellation of registration with an order disqualifying Dr Lal from reapplying for registration for five years from the date of this order.

152 Imposition of a suspension would not be adequate to protect the standing of the profession in the eyes of the public. Nor would it provide adequate specific or general deterrence, or adequately protect the public.

153 The onus should be on Dr Lal to establish to the satisfaction of the Board that he is fit to resume practice.

154 The Tribunal has concluded that it is appropriate to impose a global penalty because Dr Lal's dishonest conduct subsumes any penalty for his sexual misconduct.

155 If Dr Lal is merely suspended, he will be allowed to return to practice as of right after the conclusion of the term of suspension.

156 No penalty short of removal from the register is sufficient to mark the disapproval of the conduct, or bring home to Dr Lal, the magnitude of his failings, or adequately protect the public. Only cancellation of registration will protect the standing of the profession, and adequately deter Dr Lal and others from the abuse of the position of medical practitioner to sexually and legally exploit their patients.

Orders

1. Dr Vipin Lal's registration as a medical practitioner is cancelled.

2. Dr Vipin Lal is disqualified from applying for registration as a medical practitioner for five years from the date of this order.

3. Dr Vipin Lal is to pay the Medical Board of Australia's costs of the proceedings to be assessed by the State Administrative Tribunal Scale.

I certify that this and the preceding [156] paragraphs comprise the reasons for decision of the State Administrative Tribunal.

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JUSTICE J C CURTHOYS, PRESIDENT