

## NOTICE OF DETERMINATION

A notice made under s318 of the *Legal Profession Uniform Law (Victoria)*.

**Complainant:** Victorian Legal Services Commissioner  
**Respondent Lawyer:** [REDACTED]  
**Ref:** [REDACTED]

### ORDERS

Pursuant to s299(1) of the *Legal Profession Uniform Law (Victoria)* ("the Uniform Law"), I have decided that [REDACTED] has engaged in unsatisfactory professional conduct and I make the following order –

That the Lawyer is cautioned pursuant to s.299(1)(a) of the Uniform Law.

### STATEMENT OF REASONS

#### BACKGROUND

1. The Lawyer is an Australian Legal Practitioner and engages in legal practice as a barrister.
2. The Lawyer acted on behalf of the defendant in the County Court criminal trial of *DPP v [REDACTED]* (Unreported, County Court of Victoria, [REDACTED]).
3. The complaint arose out of comments made by the Court of Appeal in [REDACTED] *v The Queen* [2016] VSCA [REDACTED] ("the judgment"), in which the Court criticised the conduct of the Lawyer in *DPP v [REDACTED]*.
4. The Court of Appeal raised the following concerns:
  - (a) During the trial, the Lawyer advanced a defence that the alleged victim (a minor) had colluded with her mother to make false allegations of sexual impropriety against the Lawyer's client even when the Lawyer was warned by the judge that this would likely result in the introduction of prejudicial bad character.
  - (b) During cross-examination, the Lawyer determined to put to the alleged victim's mother a positive assertion of collusion.
  - (c) During the Lawyer's cross-examination of the alleged victim's mother, evidence was adduced that the Lawyer's client had previously been involved in discreditable conduct of a serious nature (assault and imprisonment for serious offences). The evidence was inflammatory and highly prejudicial with little or no probative value.
  - (d) The Lawyer had neither instructions nor evidence to support a positive assertion of collusion and the assertion should not have been made.

- (e) The Lawyer failed to adequately resist the admission of irrelevant and highly prejudicial evidence and the Trial Judge permitted the introduction of this evidence, a combination of which resulted in a substantial miscarriage of justice.
- (f) The Lawyer's conduct in pursuing the defence was, as put by the judge, "...an attack...basically accusing her of procuring perjury" [para 27].
- (g) The Lawyer's allegation of collusion by the alleged victim and her mother to make false allegations on oath was held by the Court to amount to "an allegation of a conspiracy to pervert the course of justice and conspiracy to commit perjury" [para 40]. The Court went on to say that "When there is no factual basis for such allegations, it constitutes a serious dereliction of duty and misconduct by counsel" [para 40].
- (h) The Court said that "[the Lawyer] should not have made a positive assertion of collusion. Further, once he was cognisant of the judge's views, it was inexcusable for [the Lawyer] to have advanced collusion (a strategy which was without merit)". Further, the Court said that "there was no forensic advantage, large or small, in his client being subjected to highly prejudicial evidence painting him as a violent and abusive drunk" [para 85].
- (i) The Court characterised the Lawyer's conduct as incompetent and highly unsatisfactory.

## ISSUES UNDER INVESTIGATION

- 5. Some of the above concerns relate to whether or not the Lawyer's conduct was competent. Ultimately the appeal was allowed on the basis that it was not and as such, the only issue under investigation was whether the Lawyer breached Rule 38 of the Victorian Bar Incorporated Practice Rules 2005 ("the Bar Rules") in advancing a defence that the alleged victim had colluded with her mother to make false allegations of sexual impropriety against the Lawyer's client.

## INVESTIGATION

- 6. On 3 May 2016 the Victorian Legal Services Commissioner ("the Commissioner") was made aware of the judgment in the Court of Appeal in ██████ v *The Queen* [2016] VSCA ██████.
- 7. On 19 May 2016 the Commissioner sent a letter to the Lawyer that gave notice of the Commissioner initiated complaint and informing him that pursuant to section 56(1)(b) of the Uniform Law the Commissioner was delegating the power to investigate the matter to the Victorian Bar Ethics Committee ("the Ethics Committee").
- 8. On 9 June 2016 the Ethics Committee wrote to the Lawyer informing him that they were investigating the matter and requested that the lawyer provide a full written response to the letter from the Commissioner dated 19 May 2016. The request was made pursuant to section 371(1) of the Uniform Law.
- 9. On 30 June 2016 the Ethics Committee received a detailed written response from the Lawyer. In his response the Lawyer conceded that he improperly advanced the case of collusion in that, upon reflection, he did not have a proper basis to put the proposition.

The Lawyer also raised the fact that the Trial Judge had directed him to put the assertion of collusion to the witnesses when he did not want to.

10. On 30 August 2016 the Ethics Committee considered the Lawyer's conduct and prepared a report in relation to their decision.
11. On 7 September 2016 the Commissioner received the detailed report dated 30 August 2016 from the Ethics Committee outlining the outcome of their investigation.
12. On 28 September 2016 the Commissioner sent a *Murray* letter to the Lawyer outlining the outcome of the investigation to date and inviting the Lawyer to make further written submissions.
13. On 21 October 2016 the Commissioner received a response to the *Murray* letter from the Lawyer. In his response, the Lawyer relied on his letter to the Ethics Committee dated 30 June 2016 and made submissions that the matter should be closed pursuant to s277(1)(h).
14. On 7 November 2016 the Commissioner sent a letter pursuant to section 299(2) of the Uniform Law outlining the proposed determination and order and invited written submissions from the Lawyer about the proposed order.
15. By telephone on 1 December 2016 counsel acting for the Lawyer advised that he did not intend to make any further submissions in relation to the proposed order.

#### **FINDINGS OF FACT ON ISSUES UNDER INVESTIGATION**

16. On the basis of the available evidence, including the Lawyer's admissions, I find the following proved:
  - On 23 January 2014 during cross examination of the mother of the alleged victim in the matter of ██████ the Lawyer put a positive allegation of collusion to the mother by saying:

*Either you, or [the alleged victim], or both of you decided to make these allegations basically to get rid of him?*

...

*What I'm putting to you is that you've assisted her in writing a journal and making these allegations?*
  - During cross-examination of the alleged victim in the matter of ██████ the Lawyer put to the alleged victim that she had made up the allegations against the accused and that she had created false entries in her journal to support those allegations.
  - That the lawyer advanced the case of possible collusion because his view was that without it, conviction was likely. His client instructed the lawyer to defend the matter on the basis that he was innocent and as such the defence was conducted in that way.

- The Lawyer did not have any instructions that there *had* been collusion between the alleged victim and her mother. Rather, his instructions were that the alleged victim and her mother may have colluded.
- The Lawyer did not elicit any material capable of supporting an allegation of collusion during the trial.
- The Lawyer should have sought to elicit further evidence to ground the assertion of collusion prior to putting the positive assertion of collusion to the witnesses.
- During the course of the proceedings the Trial Judge indicated to the Lawyer that he would not be permitted to go to the jury in his closing address with an argument that the alleged victim and her mother had colluded in the making of false allegations, unless that was put to them in cross-examination.
- The Lawyer wanted to put to the mother that she had tried to have the accused imprisoned for a breach of his parole, without making any explicit connection to the falsity of the alleged victim's allegation, or directly alleging collusion. The transcript of the proceedings indicates that the Lawyer was directed by the Trial Judge to put the allegation of collusion to the mother despite the Lawyer indicating to the Trial Judge that he would rather not put it.

## RELEVANT LAW

17. The conduct the subject of this determination occurred on 23 January 2014. At the relevant time, the *Legal Profession Act 2004* and the *Victorian Bar Incorporated Practice Rules 2005* ("the Bar Rules") were in force.
18. Rule 38 of the Bar Rules prescribes that a barrister must not cross-examine so as to suggest criminality, fraud or other serious misconduct on the part of any person unless:
  - (a) the barrister believes on reasonable grounds that the material already available to the barrister provides a proper basis for the suggestion;
  - (b) in cross-examination going to a fact in issue, the suggestion is part of the case for the client; or
  - (c) in cross-examination going to credit alone, the barrister believes on reasonable grounds that affirmative answers to the suggestion would diminish the witness's credibility.

## **DETERMINATION**

19. Having considered all of the evidence and relevant law, and having made the above findings on the issues under investigation, I determine that it is fair and reasonable in all the circumstances to make the orders detailed above.
20. The seriousness of the conduct is mitigated by the fact that the Trial Judge directed the Lawyer to put the allegation of collusion to the witness in circumstances where the Lawyer indicated to the Trial Judge that he would rather not put it.

## **APPEAL**

21. Pursuant to Section 314 of the Uniform Law, a respondent lawyer or a legal practitioner associate of a respondent law practice may, in accordance with the applicable legislation appeal to the Victorian Civil and Administrative Tribunal (VCAT), or seek a review by the VCAT, of this determination made under s299 of the Uniform Law.



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**Michael McGarvie, Victorian Legal Services Commissioner**

**Date:** 8 March 2017