Dr John Owen Honey

By Application for Review dated 27 September 2006 and filed with the Victorian Civil and Administrative Tribunal ("VCAT") on that date, Dr John Owen Honey sought review of the determination made on 11 September 2006 by the majority of a Panel appointed by the Medical Practitioners Board of Victoria that:

(1) his registration is cancelled effective from 9 October 2006; and
(2) he is disqualified from applying for registration for a period of two years.

The Application for Review was heard on 13 March 2007.

On 30 March 2007 the VCAT handed down its decision, varying the above determination. The Tribunal ordered that Dr Honey's registration be suspended until 9 April 2008 and that he be reprimanded.

The VCAT determined that the appropriate period of suspension is 18 months. However in setting the period of suspension, the Tribunal took into account the fact that Dr Honey's registration has been cancelled since October 2006 and deducted this period from the period that it would otherwise have imposed.

See VCAT Administrative Division, Occupational and Business Regulation List, VCAT Reference No. B72/2006.

The Reasons for Decision of the Panel appointed by the Board follow this page.

MEDICAL PRACTITIONERS BOARD OF VICTORIA

Re: Dr John Owen Honey [2006] MPBV 14

Reasons for Decision

Before: Dr J M Flynn (Chair)
Dr J M McNamara
Ms J Dwyer

Appearances:

Assisting the Panel: Ms M Young of Counsel instructed by Minter Ellison, Lawyers

For the Practitioner: Mr J Noonan SC instructed by John W Ball & Sons, Solicitors

Dates of Hearing: 29 May 2006, 30 May 2006 & 29 August 2006

Date of Decision: 11 September 2006

Findings:

1. The Panel finds pursuant to section 45A(1)(a) of the *Medical Practice Act 1994* ("the Act") that in respect of allegations (a), (b) and (c), Dr Honey has engaged in unprofessional conduct as defined in paragraphs (a), (b) and (c) of the definition of "unprofessional conduct" in section 3(1) of the Act, and that such conduct is of a serious nature.

2. The Panel finds pursuant to section 45A(1)(b) of the Act that in respect of allegations (d) and (e) Dr Honey has engaged in unprofessional conduct as defined in paragraphs (a) and (b) of the definition of "unprofessional conduct" in section 3(1) of the Act, and that such conduct is not of a serious nature.

Determination:

By majority (Ms Dwyer dissenting) the Panel determines that:

1. Pursuant to section 45A(2)(h) of the Act, Dr Honey's registration is cancelled, effective from 9 October 2006.

2. Pursuant to section 45A(2)(i) of the Act, Dr Honey is disqualified from applying for registration under section 5 for a period of two years.

Reasons for Decision

[1] This was a formal hearing held under the *Medical Practice Act 1994* ("the Act") into the professional conduct of Dr John Owen Honey, a medical practitioner registered under the Act.

[2] Ms M Young of Counsel appeared as Counsel assisting the Panel. Mr J Noonan SC appeared for Dr Honey. The notifier, Ms MB, and Dr Honey gave evidence. The Panel received in evidence a folder, described as the Book of Evidence, containing a number of documents which were individually marked as exhibits. We also received in evidence exhibits tendered by the parties during the hearing.

[3] A finding as to "unprofessional conduct" under the Act is a significant matter for any professional person, particularly where, as here, there is a statutory requirement of registration, and such a finding may affect a person's entitlement to practise his or her profession. We therefore accept, as Boards and professional disciplinary bodies generally do, that, in making our findings as to issues which are in dispute, it is appropriate to adopt the approach explained by Dixon J, as he then was, in *Briginshaw v Briginshaw*[1]. His Honour said:

> The truth is that, when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality. No doubt an opinion that a state of facts exists may be held according to indefinite gradations of certainty; and this has led to attempts to define exactly the certainty required by the law for various purposes. Fortunately, however, at common law no third standard of persuasion was definitely developed. Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony or indirect inferences.

[4] Following *Briginshaw v Bringshaw*, we consider that a finding of unprofessional conduct should not be made against Dr Honey unless we feel an actual persuasion of the truth of the facts on which such a finding would be based.

[5] The Amended Notice of Hearing in this matter, dated 16 May 2006, alleged:

> 1. That you engaged in unprofessional conduct as defined in paragraphs 3(1)(a) and/or (b) and/or (c) and/or (d) of the definition of "unprofessional conduct" in section 3(1) of the Act in that:

[1] (1938) 60 CLR 336 at 361-362

(a) In or around 16 September 1997 you transgressed professional boundaries by commencing an inappropriate personal and/or sexual relationship with your former patient, Ms MB, after the termination of your professional relationship with Ms MB as her psychiatrist on 12 August 1997.

(b) Between on or around 16 September 1997 and June 2004 (save for the period in or around between January to September 2000) you continued to engage in an inappropriate sexual relationship with Ms MB.

(c) In accordance with an agreement signed on 20 September 2000 by yourself and Ms MB you paid Ms MB $100,000 in return, in part, for her undertaking not to lodge a complaint with the Medical Practice Board [sic] or any other relevant body.

(d) Between on or around 16 September 1997 to June 2004, after your professional relationship with Ms MB ceased on 12 August 1997, on at least four occasions, you provided and/or prescribed medication to Ms MB, including anti-depressant medication.

(e) Between on or around 16 September 1997 to early 2004 you breached patient confidentiality of two of your patients, namely patient X and patient Y by discussing personal information about these patients with Ms MB.

(f) Following the cessation of the sexual relationship between you and Ms MB on or around June 2004, and despite you being informed on or around March 2005 that Ms MB had notified the Board of allegations against you of unprofessional conduct, you continued to see Ms MB on an infrequent basis up until 7 March 2006 (with more frequent contact occurring on 24 January 2006, 6 February 2006, 13 February 2006, 27 February 2006 and 7 March 2006) and this contact, at times, included kissing and discussions about Ms MB providing an affidavit to the Board as part of the preparations for the Formal Hearing into your professional conduct.

[6] At the commencement of the hearing, Mr Noonan advised the Panel that many of the matters raised in those allegations were not contested by Dr Honey, but that there were significant issues of dispute in relation to allegations (c) and (f) and less significant issues in relation to allegations (b), (d) and (e).

[7] The Panel decided, at the end of the first two days of hearing after having heard evidence from Ms MB and Dr Honey, to deliver its findings on the facts, and then to resume the hearing to hear further evidence and submissions as to whether Dr Honey engaged in unprofessional conduct as defined in paragraphs (a) and/or (b) and/or (c) and/or (d) of the definition of "unprofessional conduct" in section 3(1) of the Act, and as to the making of any determination under section 45A of the Act.

Allegation (a)

> In or around 16 September 1997 you transgressed professional boundaries by commencing an inappropriate personal and/or sexual relationship with your former patient, Ms MB, after the termination of your professional relationship with Ms MB as her psychiatrist on 12 August 1997.

[8] Dr Honey did not contest this allegation, but in order to give some context to our findings and the determination made, we consider it necessary to make findings as to the background and commencement of the inappropriate personal and sexual relationship between Dr Honey and his former patient, Ms MB. Except in one respect, which we will explain in these reasons, there was no dispute between Ms MB and Dr Honey as to these matters.

[9] As explained by Ms MB in her affidavit affirmed on 9 February 2006[2], she was first referred to Dr Honey for psychiatric treatment in about 1982. At that time she was a university student, her mother had died the previous year, and she had taken an overdose after a traumatic relationship break up. We find from Dr Honey's clinical notes[3] that Ms MB attended him from about August 1982 to November 1984. She married shortly after her treatment concluded.

[10] In 1987 Ms MB was referred back to Dr Honey. She attended him for a short period only.

[11] In March 1997 Ms MB was referred back to Dr Honey for the third time. The presenting problems she mentioned on her first visit were a gambling compulsion and the fact that the marriage was not going well. Ms MB's marriage broke down in 1997, and her husband moved out of the family home in May or early June that year.

[12] Ms MB said in her affidavit that she became infatuated with Dr Honey during her first period of attending him between 1982 and 1984, but "did not tell him this directly at the time"[4] However, in about July 1997, she told Dr Honey that she was infatuated with him and that she had lied to him the previous week "to give him a more attractive impression of myself".[5] She said in her affidavit:

> Dr Honey responded by saying that he was flattered but that the relationship could only be a doctor/patient relationship. He explained to me about transference, which was me projecting feelings and desires onto him as my psychiatrist. I think I just nodded in response.[6]

[13] Ms MB said in her affidavit that a few weeks later she succeeded in obtaining a position for which she had applied. She was really happy and took a bottle of champagne in to her next session with Dr Honey and they each drank some.[7] She acknowledged in her affidavit that she had difficulty in pinpointing the exact sequence of events at this time.[8]

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[2] Exhibit D Paragraphs 12 to 30
[3] Exhibit J
[4] Paragraph 14 of her affidavit
[5] Paragraph 30 of her affidavit
[6] Paragraph 30 of her affidavit
[7] Paragraph 36 of her affidavit
[8] Paragraph 31 of her affidavit

[14] Dr Honey gave evidence that the occasion when Ms MB took the champagne into his rooms to celebrate obtaining the position was not while they still had a professional relationship. He said it was on 16 September 1997, which was just over a month after they had terminated their professional relationship and after his return from holidays.

[15] We prefer Dr Honey's evidence on this point, partly because Ms MB acknowledged that she had difficulty remembering the exact sequence of events, and partly because Dr Honey's evidence is consistent with a letter he wrote to Ms MB[9], which she said she received in early 2000. He wrote on Pages 1-2:

> I can't excuse not refusing to see you, after we had stopped therapy because of mutual attraction--I remember that before that I'd spoken to you about transference and given you that book to read. Despite that attraction on my part, because I had been your psychiatrist and because I was married I would not have followed it up, not have pursued you.
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> When you rang and asked to see me to celebrate your success I was happy for you and wanted to share that with you and then it seemed that our relationship developed so quickly, I was swept up in it without thinking and certainly without thinking as a psychiatrist.

[16] Although Dr Honey, in that letter referred to "mutual attraction", he gave evidence that he had not acknowledged that mutual attraction to Ms MB, while she was a patient.

[17] It is not in dispute that very soon after the professional relationship ceased, Dr Honey met Ms MB at a pub, where he just had a soft drink, and refused her suggestion that they "have a fling", explaining that he could not do so because he was married and because she was a former patient.

[18] We find that shortly after that occasion Dr Honey went away on holiday. He said in evidence that he did not expect to have further contact with Ms MB, but she left a phone message for him at his rooms when he arrived back and he returned her call. We find that they met on 16 September 1997 after work at his rooms, which was when she brought the bottle of champagne to celebrate obtaining her position, and they commenced an inappropriate personal relationship. We find that it became a full sexual relationship during October 1997.

[19] As we have already set out, Dr Honey did not contest allegation (a). We find that on 16 September 1997 he transgressed professional boundaries by commencing an inappropriate personal relationship with Ms MB, a former patient. We find that the relationship became a full sexual relationship within two months of the cessation of the professional relationship. Allegation (a) is made out.

Allegation (b)

> Between on or around 16 September 1997 and June 2004 (save for the period in or around between January to September 2000) you continued to engage in an inappropriate sexual relationship with Ms MB.

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[9] Attachment 16 of her affidavit

[20] Dr Honey did not contest the substance of allegation (b), although he did not believe that the alleged dates were quite accurate. He did not deny that the relationship, which commenced in September 1997, continued, with only two significant breaks, until, he said, about March 2004.

[21] It was not in dispute that the first break in the relationship occurred from January 2000, after Ms MB telephoned Dr Honey's wife and said something to her like, "I am the woman your husband has been having an affair with for the last two years"[10]

[22] From that time the sexual and face to face relationship ceased, although there was still telephone contact between Ms MB and Dr Honey. It was during this period that the payment Dr Honey made to Ms MB (the subject of allegation (c)) was negotiated. On 10 November 2000 Ms MB's solicitors wrote advising her that the agreed figure had been paid and enclosing a cheque in her favour together with their memorandum of costs.

[23] Ms MB, in her affidavit, stated that Dr Honey recommenced visiting her before she had received the payment, and that shortly afterwards the relationship resumed. She stated in her affidavit that the relationship resumed in September 2000. In her evidence Ms MB said that she now believed it was in August 2000. Dr Honey said that the relationship resumed in November 2000.

[24] We accept that both Dr Honey and Ms MB were doing the best they could, in trying to give evidence as to a date neither precisely recollected. We are satisfied and find that the relationship had resumed by November 2000. We find the evidence of an earlier resumption less likely, and do not feel satisfied of it to the standard required to make that finding.

[25] Both Dr Honey and Ms MB said, and we find, that there was also a break in their relationship for some months in the first part of 2003, while Ms MB was involved with another man. After she broke up with that man, she and Dr Honey resumed their relationship.

[26] In January 2004, Ms MB said in her affidavit, she became aware that Dr Honey was choosing not to spend time with her. On 18 June 2004, in the evening, she drove to Dr Honey's home. As Dr Honey and his wife were out, she waited until they arrived home and then told his wife that the affair had been continuing. Immediately afterwards she took an overdose of tablets and drove her car into a tree.

[27] Dr Honey and his wife put Ms MB to sleep on a couch in their home that evening and next morning drove her home in their car. Ms MB and Dr Honey agreed that was the last time he attended Ms MB's home.

[28] Ms MB said she and Dr Honey had ceased to have sexual relations shortly prior to 18 June 2004, and sexual relations have not resumed since then. Dr Honey said their sexual relations ceased about six weeks prior to 18 June. It is very difficult to make a finding as to which of the dates is more likely to be correct. We find that sexual relations continued until the beginning of May

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[10] Paragraph 46 of her affidavit

2004, but we cannot be reasonably satisfied that they continued beyond that date.

[29] We find that Dr Honey continued to engage in an inappropriate sexual relationship with Ms MB from 16 September 1997 until January 2000, and from November 2000, except for some months in early 2003, until approximately early May 2004. Allegation (b) is made out.

Allegation (c)

> In accordance with an agreement signed on 20 September 2000 by yourself and Ms MB you paid Ms MB $100,000 in return, in part, for her undertaking not to lodge a complaint with the Medical Practice Board [sic] or any other relevant body.

[30] For a period from January 2000, after Ms MB told Dr Honey's wife about their affair, all face to face contact between them ceased, but they continued to speak on the phone. Ms MB agreed, in cross-examination, that she was anxious for Dr Honey to leave his wife and continue the relationship with her. She said that once she realised that Dr Honey did not intend to leave his wife, although he professed to having deep feelings for her, she began to see herself as "badly treated" and him as "just another married man" having an affair.[11]

[31] Ms MB, in cross-examination, explained how the discussion about Dr Honey paying her money arose. She said that she thought that if she could not have the ongoing relationship she wanted, he should recognise and acknowledge that he had done "the wrong thing". She suggested that he pay her money to show he acknowledged his wrongdoing. It was during this time that Ms MB, on her evidence, first told Dr Honey that she was thinking of reporting him to the Board. She accepted, when it was put to her in cross-examination, that she also told Dr Honey at the time that she was thinking of suing him and claiming damages for emotional injury. Dr Honey said that Ms MB threatened that it would all be terribly public.

[32] At some stage during their discussions in mid 2000, Dr Honey asked Ms MB if there was some way, other than by her reporting him to the Board, that they could resolve the issues arising from her feelings about the cessation of their relationship. She said in her affidavit that she replied, "then pay me $100,000".[12] As she put it, the money was not really what she wanted. She explained, "I am not saying that I didn't sort of want the money or didn't think that … it would be a good thing, it was certainly attractive, but it is not what I wanted. I wanted him."[13]

[33] Ms MB said, and we find, that, as one would expect, Dr Honey did not want her to report him to the Board. There is evidence that Dr Honey was so concerned about Ms MB's threat that he rang her father, who was known to him, about it. Further, while Dr Honey and his wife were away at the beach, his wife rang Ms MB, and said that Dr Honey was talking of throwing himself over a cliff, and asked her not to go ahead with her threat to report him to the Board.

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[11] Transcript 55-56
[12] Paragraph 54 of her affidavit
[13] Transcript 56

[34] Ms MB explained in her evidence that the reasons she asked Dr Honey for the money included a feeling that if she could not have what she wanted, namely that her relationship with Dr Honey continue and that he leave his wife, then she had been badly treated and emotionally distraught. She felt that the payment of $100,000 would be a consequence for Dr Honey. Ms MB said that another factor operating in her mind was that she had sometimes considered that, if she were not stretched for money, maybe she would not feel the need to gamble. She said this was an idea that had been discussed between her and Dr Honey when she was seeing him in his professional capacity.

[35] Ms MB said that Dr Honey said he would talk to his wife about her proposal. He also asked her if she would reduce the amount of money, but she refused to do so. Eventually, Dr Honey agreed to her proposal. Dr Honey did not dispute Ms MB's evidence on this issue.

[36] At some time while the issues between them were being discussed, Ms MB attended a solicitor for advice. She was advised that she could take legal action against Dr Honey for damages for her emotional suffering. Her solicitors drew up a draft agreement[14], which stated that the money was to be paid to resolve the parties' differences and avoid the costs and risks of litigation.

[38] The draft agreement contained a release clause. Ms MB agreed, upon payment of the agreed amount, "to forever release and discharge Dr Honey from all claims, actions, suits, demands, costs and expenses of any description which she has [all] but for the execution of this agreement may have had against Dr Honey whether at Common Law or pursuant to Statute" in respect of injury to her arising out of Dr Honey's breach of fiduciary duty, and his acting improperly in the context of their doctor and patient relationship.

[39] The draft agreement also contained an undertaking by Ms MB not to institute proceedings against Dr Honey, or to lodge a complaint with the Board or any other relevant body.

[40] The draft agreement was sent to Dr Honey for approval. He requested that the solicitors add a clause providing for the repayment of the money to him, plus interest, if Ms MB should breach the agreement. The solicitors advised Ms MB that the request was reasonable[15].

[41] The repayment clause requested by Dr Honey was added to the agreement, omitting the interest, and the agreement was signed by both parties, with Dr Honey's wife witnessing his signature. The agreement is dated 20 September 2000.[16].

[42] In his evidence Dr Honey was reluctant to acknowledge that one of the reasons he paid Ms MB $100,000 was, as alleged against him, for her undertaking not to lodge a complaint against him with the Board or any other relevant authority.

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[14] Attachment 7 to her affidavit
[15] Attachment 8 to her affidavit
[16] Attachment 9 to her affidavit

[43] Dr Honey said that he did not believe that Ms MB could give away her right to make a complaint to the Board. He said, in cross-examination, that he agreed to pay her the $100,000 to help her "get on with her life"[17], and put the pain of the break up of the relationship behind her, and to settle her claim to damages in any potential legal proceedings. He said he also thought that it was possibly true, that if Ms MB had a lot of money, she might be better able to control her gambling. He said he saw that Ms MB was humiliated by the ending of the relationship, and he was paying the money to acknowledge that he had been wrong in what he had done.

[44] Dr Honey did not deny that he was very concerned about Ms MB reporting him to the Board, and that he was desperate to avoid her doing so. He said that although he thought Ms MB's undertaking not to do so was not enforceable, he did think that if she felt satisfied that the distress she had suffered was appropriately acknowledged, with him admitting his wrongdoing and paying a heavy financial penalty, she might not go through with reporting him.

[45] As Ms Young pointed out in cross-examination, Dr Honey had expressed his concern about being reported to the Board in a letter he wrote to Ms MB in about July 2000.[18] In that letter he explained that, as he saw it, if he stayed with his wife, Ms MB would report him, and if he left his wife, she would report him. He suggested that perhaps they had all suffered enough, and assured Ms MB that there was not the slightest chance that he would fall in love again ever. He concluded:

> I don't wish to try to stop you doing what you must if it will help you overcome your distress, but I beg you to reconsider whether, in the end, reporting me will be for your good or not.

[46] On the evidence we find that Dr Honey had a number of reasons for making the payment requested of him by Ms MB. He had chosen to remain with his wife and terminate his relationship with Ms MB. He was conscious that he had done wrong by Ms MB and felt that he should do what he could to ease her distress as a result of his wrongdoing towards her. He also hoped that the payment might help Ms MB manage her gambling addiction. But we find he also hoped that if Ms MB felt that she was vindicated by the payment acknowledging her distress, she would be less likely to make a report to the Board. We accept his evidence that he doubted if Ms MB could be held to the undertaking in the agreement that she not report him to the Board, but we find that his request for a repayment clause in the agreement was an attempt to discourage Ms MB making such a report. We note that there is no evidence that Dr Honey sought repayment of the money, once Ms MB made her complaint to the Board.

[47] We find that Dr Honey paid the amount of $100,000 to Ms MB, in part, because of her undertaking not to report him to the Board. Allegation (c) is made out.

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[17] Transcript 223
[18] Attachment 11 to her affidavit

Allegation (d)

> Between on or around 16 September 1997 to June 2004, after your professional relationship with Ms MB ceased on 12 August 1997, on at least four occasions, you provided and/or prescribed medication to Ms MB, including anti-depressant medication.

[48] Ms MB said, in her affidavit and in evidence, that while she was Dr Honey's patient he prescribed anti-depressants for her, and that after their professional relationship ceased, he continued to prescribe anti-depressants. She said he also gave her samples of Xanax from 3 June 2004, until a psychiatrist she was attending prescribed her Diazapam, later that year. Ms MB said that on one occasion Dr Honey prescribed her Cipramol and she suffered unpleasant side effects. She said that he had also at some stage prescribed her Prozac, Cilamox and Lexapro.

[49] Dr Honey agreed that he had given Ms MB samples of Xanax, but he said this had happened only once. He said he had also given her samples of Luvox, and had once given her a prescription for Lexapro.

[50] The documents received in evidence include scripts written by Dr Honey for Ms MB for Luvox dated 14.5.04, for Cilamox dated 2.11.98 and for Prozac dated 1.2.99. There is also an earlier script for Prozac, but it was written while Dr Honey was still treating Ms MB. The scripts received in evidence were retained and not used by Ms MB. Ms MB said that she did not think Dr Honey had written more scripts than the ones she had retained, but if he had, it was not many.

[51] We find that on at least four occasions (three scripts and the Xanax samples) after their doctor-patient relationship had ceased, Dr Honey provided and/or prescribed medication, including the anti-depressants Luvox and Prozac to Ms MB. Allegation (d) is made out.

Allegation (e)

> Between on or around 16 September 1997 to early 2004 you breached patient confidentiality of two of your patients, namely patient X and patient Y by discussing personal information about these patients with Ms MB.

[52] Ms MB alleged that, during their relationship, Dr Honey had told her the names of two women who were seeing him as patients, and had told her various personal details about those two patients. Dr Honey did not deny that he had told Ms MB that those two people were seeing him as patients, but he denied that he had told Ms MB the personal details as to which she gave evidence.

[53] As to the first patient, referred to in the hearing as patient X, Dr Honey had become aware that Ms MB was likely to meet patient X in the near future, and he warned Ms MB to be careful not to reveal her relationship with Dr Honey to patient X, as she was his patient. There is a conflict between Dr Honey and Ms MB as to whether he also told Ms MB something of patient X's history.

[54] We considered the account Ms MB gave of this discussion to be credible, and are not confident that Dr Honey was giving a full account of the discussion.

[55] We prefer Ms MB's evidence on this issue, but we did not test its reliability by asking to see Dr Honey's notes in respect of patient X. We could have done so, by asking to have all identifying details deleted, but as this was not a central allegation in the matter, and as Dr Honey admitted the substance of the allegation, it seemed more important to respect patient X's privacy, and the confidentiality of her communications with her psychiatrist, than to make findings as to the precise content of Dr Honey's inappropriate breach of patient confidentiality. On the evidence of Ms MB and Dr Honey, we find that the allegation that Dr Honey breached patient confidentiality in respect of patient X is established.

[56] In respect of patient Y, Ms MB said that by chance she saw Dr Honey driving in his car, and that when she mentioned this to him, he asked whether she had seen his passenger, and told her that he had been driving a patient home, and also the name and some details about that patient.

[57] Dr Honey said that the incident was slightly different. He said that Ms MB had not only seen him, but had also seen that he had a female passenger in the car, and had asked him who it was. He told her the person's name and that she was a patient he was treating for depression, and why he was driving her home. On this issue we find that Dr Honey's recollection of the event was probably more accurate.

[58] Once again, Ms MB knew some details of the patient's history. Dr Honey did not claim those details were inaccurate, but he said Ms MB did not learn them from him. He suggested other possible ways in which Ms MB could have learnt those details. We did not ask to see the patient's history for the reasons set out in the preceding paragraph. Even on Dr Honey's evidence, the allegation is made out. Bearing in mind the standard of proof in a matter such as this we do not make findings as to the precise extent of the breach of confidentiality beyond that admitted by Dr Honey.

[59] We find that Dr Honey breached patient confidentiality of two of his patients by discussing personal information about these patients with Ms MB. Allegation (e) is made out.

Allegation (f)

> Following the cessation of the sexual relationship between you and Ms MB on or around June 2004, and despite you being informed on or around March 2005 that Ms MB had notified the Board of allegations against you of unprofessional conduct, you continued to see Ms MB on an infrequent basis up until 7 March 2006 (with more frequent contact occurring on 24 January 2006, 6 February 2006, 13 February 2006, 27 February 2006 and 7 March 2006) and this contact, at times, included kissing and discussions about Ms MB providing an affidavit to the Board as part of the preparations for the Formal Hearing into your professional conduct.

[60] A few days before this hearing commenced, Ms MB made a supplementary sworn affidavit, dated 26 May 2006,[19] in which she stated that paragraph 95 of her original affidavit, affirmed on 9 February 2006, was not correct. In the earlier affidavit, she had stated that she had not seen Dr Honey since March 2005. In the supplementary affidavit Ms MB stated that she had continued to

[19] Exhibit E

see Dr Honey since that date, approximately once every six to eight weeks, and that the contact had been more frequent from 24 January to 7 March 2006. Ms MB said that she had met with Dr Honey on five occasions this year and that on some of those occasions there had been intimate kissing. At times Ms MB's evidence as to this allegation moved beyond the matters alleged. We consider it appropriate to confine our consideration to the matters alleged.

[61] Ms MB gave the dates of the occasions when she saw Dr Honey in 2006 as:

- 24 January 2006
- 6, 13 and 28 February 2006
- 7 March 2006.

[62] Ms MB did not claim that there had been any intimacy on the last occasion, and she said that she has not seen Dr Honey since that day, 7 March 2006. She attached a number of copy email messages to her supplementary affidavit as evidence of contact between her and Dr Honey.

[63] Dr Honey did not deny the meetings but he said he had not initiated or sought those meetings. He emphatically denied that there had been any form of physical intimacy, other than perhaps him putting an arm around Ms MB's shoulders, on any of those occasions.

[64] Ms MB acknowledged that since the cessation of the sexual relationship between her and Dr Honey, he had not initiated any contact with her, and that she had persisted in making determined attempts to see him. She said she would usually try to see him at his rooms, either early in the morning when he arrived for the day or at the end of the day. She described having waited for him on two occasions as he arrived at the post office to empty his mailbox before attending his rooms.

[65] In her evidence Ms MB described the lengths she had gone to in endeavouring to see Dr Honey, even when he made it quite clear that he was not willing or comfortable about seeing her. She said, that on one occasion she saw his car parked at his surgery really early in the morning. She knocked on the window of his room, which she knew was at the front of the building, but he did not answer. She rang the bell and once again he did not answer. She then left a message on his answering service saying that she had taken the keys of his car and if he wanted them back, he had to speak to her.[20]

[66] Ms MB acknowledged that after March 2005, she had only seen Dr Honey perhaps once every six or eight weeks, "in one of these raids". She agreed with Mr Noonan that when she succeeded in talking with Dr Honey, he endeavoured to explain the position between them, and denied her suggestion that he had been seeing another woman, and explained that they could not have an ongoing relationship because of his inability to leave his wife.

[67] Ms MB suggested, as Dr Honey said his wife had done, that Dr Honey "should have had an intervention order put on me"[21]. He gave evidence that

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[20] Transcript 68-69
[21] Transcript 70

he decided not to do so because he did not want to make things more difficult for Ms MB.

[68] Ms MB also agreed that, in late January this year, she offered to not sign her affidavit, as to the matters alleged against Dr Honey in this proceeding, in return for Dr Honey resuming their intense relationship. She agreed that he refused her proposition.

[69] Ms MB agreed that since January 2006, Dr Honey had consistently said that whether she did or did not sign her affidavit, was simply a matter for her to decide. He told her that he believed that the proceeding would still go on because of the admissions he had made in his letter to the Board dated 11 May 2005, but it may be less bad for him without her affidavit.

[70] In spite of Dr Honey's response to her suggestion, Ms MB rang the solicitor acting for the Board on or about 2 February 2006, to ask what would be the effect of her not signing the affidavit. Ms MB said the solicitor confirmed that, as Dr Honey had told her, the proceeding would still go on, but the solicitor said that if the affidavit was not signed, Ms MB would not be called to give evidence, and that could be helpful to Dr Honey. Ms MB passed on that advice by email to Dr Honey.[22]

[71] Ms MB said that she saw Dr Honey at his consulting rooms on 6 February and they discussed the possibility of her enrolling in a law course, her signing the affidavit, and whether she would be able to avoid disclosing their meetings after March 2005, if she gave evidence. She told Dr Honey that she felt she had to sign the affidavit because otherwise it may be inferred that what she said in the affidavit was not true. She stated in the affidavit that she and Dr Honey kissed that day. Dr Honey denied that there was any physical intimacy that day or any other time in 2006.

[72] On 13 February 2006 Ms MB emailed Dr Honey asking if she could call in or if he could ring her. Dr Honey responded, "not sure about dropping in - Kim has car trouble."[23] He explained in his evidence that Kim is his secretary and that his message was telling Ms MB that he could not see her that day as he would be driving his secretary home. Ms MB said that she and Dr Honey did ultimately meet that evening. She did not explain how the meeting was arranged.

[73] The following day Dr Honey again sent an email explaining that he would not be seeing Ms MB. The next day Ms MB sent a message, which she said referred to some intimacy the previous evening.[24]

[74] Dr Honey denied absolutely that there had been any sexual intimacy at all. He said that he understood the message to be suggesting a reason why he had refused to see Ms MB.

[75] The following day Ms MB sent Dr Honey a message asking him to take her sailing. He responded, "love to but can't".[25]

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[22] Attachment 4 to supplementary affidavit
[23] Attachment 9 to supplementary affidavit
[24] Attachment 10 to supplementary affidavit
[25] Attachment 11 to supplementary affidavit

[76] On 16 February 2006 Ms MB sent a message asking if she could call in at five or earlier. Dr Honey did not respond till after 5pm, when he explained that he had been away from his rooms all day. Later that evening Ms MB sent another message asking Dr Honey to ring that night.[26] Ms MB said Dr Honey did ring her from his home. He denied that he did so, and explained that he never rang Ms MB from home because his wife checked their telephone account, and his mobile did not work from his home.

[77] On 21 February Ms MB sent Dr Honey another message asking him to think about a rendezvous. She asked him, "Could you manage to sound at least vaguely affectionate please". [27]

[78] Although Dr Honey refused to arrange the requested meeting, he did so in terms which were affectionate[28]. Dr Honey said that this was because he still cared for Ms MB, and because of her history of responses when she felt rejected by him.

[79] Dr Honey explained that from 25 August 2004, when Ms MB graffitied the building in which he had his rooms, with a message referring to their relationship, he had not voluntarily made contact with her. He explained that Ms MB would send him SMS messages demanding to see him. He said that at first he told his wife what was going on and insisted that if he was to see Ms MB, his wife should also be present. He said he had to stop that arrangement because everybody found it very stressful, his wife in particular.

[80] It was not in dispute that Ms MB continued to send Dr Honey messages and started simply arriving at his rooms or at the post office, as she described in her evidence. He said he took to trying to arrive at work and finish at different times to try to avoid her.

[81] It was not disputed that on one occasion, in February 2005, Ms MB had broken a window to gain entry into Dr Honey's home at about 6am, while he and his wife were in bed asleep, and had been discovered just outside their bedroom. Dr Honey said, "I didn't at all costs want her turning up at my house again and scaring my wife. So I didn't think I had much choice but to talk to her and at the same time she was still asking for explanations as to why I hadn't left my wife and was there another woman and I felt - up until not long before the end that I owed her that."[29]

[82] In order to explain the predicament in which he found himself, Dr Honey described one occasion when he arrived at work to find Ms MB in his car park, in a very dishevelled state. He said he had rung her solicitor to say he was worried that she was a danger to herself. Her solicitor had rung the Board to ask what Dr Honey should do. The solicitor passed back a message from the Board's representative that, if he felt Ms MB was at risk, he should take appropriate action, without suggesting what action would be appropriate. Dr Honey said he did not know who Ms MB's psychiatrist was at the time, so he rang the CAT (Crisis Assessment Team).

[83] Dr Honey said he tried to respond as little as possible to Ms MB's email messages, but he was aware that if he did not speak to her at all, going on

[26] Attachment 12 to supplementary affidavit
[27] Attachment 13 to supplementary affidavit
[28] Attachment 14 to supplementary affidavit
[29] Transcript 144

past history, she was likely to "take steps to an extreme degree", so he did sometimes agree to see and speak to her.

[84] Dr Honey said that in 2006 he saw Ms MB on some occasions (on her evidence this was probably three times) at his rooms at the end of the day, and once in a park. He said the last time he saw her before the hearing was on 7 March 2006, when they talked by the side of the road.

[85] On that day, Dr Honey said Ms MB came to his rooms and knocked on his window. He came to the front door and she said she wanted to talk with him. He said he did not want to talk to her but she said, "You must talk to me". He said she would not give up, so he told her that he was leaving work at 4.30pm and that if she followed him, he would pull up and they could talk.

[86] Dr Honey said that Ms MB followed him when he left work on 7 March 2006, as he had suggested, and they spoke after he pulled up at the side of the road. By that time he had read her affidavit in these proceedings, and he was very disappointed, not because she had signed the affidavit, but because he noted that it had already been affirmed at the time she had been offering not to sign it, and because he believed that it was inaccurate in some respects. He explained this to Ms MB. He said, "it was actually the first time I had spoken in an angry manner to [her]". He said, "Don't contact me again."[30] It is agreed that Ms MB has not contacted Dr Honey since 7 March 2006.

[87] Dr Honey gave evidence, which we accept, that, in their discussions in 2006, he refused every suggestion Ms MB made that they rekindle their relationship, and said repeatedly that he was not going to put his wife through the same thing again, and there was no chance of them having a relationship in the future.

[88] There is a conflict in the evidence on this issue. It relates to recent events, so there can be no fading of memory due to elapse of time. There could be a number of reasons why Dr Honey and Ms MB may each present a slightly different picture of events during those six weeks early this year. Those reasons were not pursued in the hearing and so we cannot speculate as to them. It may also be that the two individuals involved perceived things rather differently. On the whole we found each of them to be frank and credible witnesses, but there were some points on which each gave evidence, which we found not persuasive.

[89] We have carefully considered the emails Ms MB attached to her supplementary affidavit to see whether they help us ascertain where the truth lies in regard to the disputed events at the meetings in February this year. We have concluded that they do not provide any evidence favouring the account of either Ms MB or Dr Honey.

[90] The messages show Ms MB determinedly trying to arrange meetings with Dr Honey. They show him sending only the briefest of messages, but twice ending "lol", which he acknowledged meant "lots of love", and once saying of her suggestion that they meet "love to but can't", and another time saying "can't do it for reasons you know. I wish I could".

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[30] Transcript 146

[91] We find that Dr Honey felt himself to be in an extremely difficult position, and that he believed, until the last meeting, that the best course to adopt was to see Ms MB when she was most insistent that he do so, and to respond briefly, but with some affection to her messages. We find that he did so to avoid her "taking steps to an extreme degree". He did not seem to realise that by doing so he was in fact sending mixed messages, which gave Ms MB hope of a more significant relationship in the future.

[92] We are conscious that the allegations in paragraph (f) are serious and could have grave consequences. Bearing that in mind, we are not satisfied that the allegation of kissing is established to the required degree. We find that Dr Honey did discuss with Ms MB the provision by her of an affidavit, as part of the preparations for this formal hearing, but only when Ms MB raised the issue. We find further, on the basis of Ms MB's evidence, that whenever Ms MB raised the issue, Dr Honey insisted that whether or not she signed the affidavit was a matter for her to decide. Ms MB also agreed that Dr Honey refused her suggestion of a rekindling of the relationship, in exchange for her not signing the affidavit. The substance of those discussions must be considered in deciding whether or not they constituted unprofessional conduct. We find that since June 2004 meetings and discussions did take place as alleged in paragraph (f), but we do not find that the meetings included kissing as alleged.

Findings as to Unprofessional Conduct and Determinations

[93] This hearing resumed on 29 August 2006. The Panel heard submissions in respect of the findings it should make as to whether Dr Honey had engaged in unprofessional conduct, as defined in the Act, and, if so, as to the determinations it should make. The Panel heard evidence from three psychiatrists who know Dr Honey well, and from the widow of one of his patients. Dr Honey's treating psychiatrist, Professor Ball was unable to attend the hearing due to prior commitments, but the Panel received in evidence a report from him dated 22 August 2006, together with related correspondence.

Unprofessional Conduct

[94] The Act defines "unprofessional conduct" in section 3(1). The Amended Notice of Formal Hearing in this matter referred to and relied on paragraphs (a), (b), (c) and (d) of the definition. Those paragraphs are as follows:

(a) professional conduct which is of a lesser standard than that which the public might reasonably expect of a registered medical practitioner; or
(b) professional conduct which is of a lesser standard than that which might reasonably be expected of a medical practitioner by her or his peers; or
(c) professional misconduct; or
(d) infamous conduct in a professional respect.

[95] We have found that Dr Honey did transgress professional boundaries by commencing an inappropriate personal relationship with a former patient a little more than a month after the termination of their professional relationship, and that the relationship became a full sexual relationship within two months of the cessation of the professional relationship (allegation (a)). We have also found that Dr Honey continued to engage in an inappropriate sexual

relationship with his former patient from September 1997 until January 2000 and from November 2000, except for some months in early 2003, until approximately early May 2004 (allegation (b)).

[96] We have further found that Dr Honey made a payment of $100,000 to his former patient, and that it was paid, in part, because of her undertaking not to report him to the Medical Practitioners Board of Victoria ("the Board") (allegation (c)).

[97] Further we have found that after their doctor/patient relationship ceased, Dr Honey on at least four occasions (three scripts and some Xanax samples) provided and or prescribed medication, including the anti-depressants Luvox and Prozac, to his former patient (allegation (d)). Finally, we have found that Dr Honey breached patient confidentiality of two of his patients by discussing personal information about those patients with his former patient (allegation (e)).

[98] Mr Noonan SC, for Dr Honey, conceded that the totality of his conduct as found by the Panel did constitute unprofessional conduct within the meaning of paragraphs (a) and (b) of the definition in section 3(1) of the Act. We agree with that submission in respect of the conduct found in respect of allegations (a), (b), (c), (d) and (e). We reject Mr Noonan's submissions that the conduct in respect of allegation (d) should not be characterised as unprofessional conduct in view of the comments of Morris J in *Vissenga v. Medical Practitioners Board of Victoria*[31]. We consider that the giving and prescribing of medication by Dr Honey to a person who was not his patient was unprofessional conduct, although we do accept that, on its own, it was not of a serious nature. Our concern is that the fact that Ms MB could obtain medication from Dr Honey, may have played a part in preventing her seeking appropriate treatment from another medical practitioner, or if she was attending another medical practitioner, could have interfered with the treatment being undertaken by that practitioner.

[99] Mr Noonan also submitted that no part of Dr Honey's conduct should be characterised as professional misconduct, within paragraph (c) of the definition of unprofessional conduct in section 3 of the Act. He pointed out that in 1997, when the inappropriate relationship commenced, the Guidelines of the Royal Australian and New Zealand College of Psychiatrists (RANZCP) did not clearly forbid sexual relationships between psychiatrists and former patients. It described such relationships as "generally improper…unless the circumstances of the professional relationship have not rendered the patient vulnerable to a subsequent approach".[32]

[100] Mr Noonan acknowledged that by 2004 the RANZCP had published Guidelines, which clearly stated, "Sexual relationships between psychiatrists and their former patients are always unethical". He also acknowledged that the change in the profession's and the College's view of such relationships had been gradually evolving between 1997 and 2004. But he pointed out that Dr Honey had not entered into the relationship with indifference to issues of transference, but had considered those matters and decided, incorrectly as he now recognises, that Ms MB's feelings towards him, and his towards her were not explained by transference and counter transference. Mr Noonan

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[31] [2004] VCAT 1044 at paragraph 33
[32] Paragraphs 12-14 of his submission

also pointed out that Dr Honey's clinical judgement was clouded by his own feelings towards the former patient, and by the fact that, as pointed out by his treating psychiatrist, Professor Ball, he was himself particularly vulnerable at that time due to personal problems in his own life.

[101] Ms Young submitted that the appropriate test in deciding whether Dr Honey's conduct in respect of his sexual relationship with his former patient constituted professional misconduct, was that suggested in *Campbell v The Dental Board of Victoria*,[33] namely, whether the conduct violated or fell short of, to a substantial degree, the standards of professional conduct observed or approved by members of the profession of good repute and competency. We are satisfied that the commencement of the emotional and sexual relationship, within two months of the termination of the professional relationship, did fall short to a substantial degree of the standards of professional conduct observed or approved by members of the profession of good repute and competency. That finding is consistent with a long line of decided cases, which have emphasised the inappropriateness of sexual relationships between medical practitioners and their patients or former patients.

[101] Sexual impropriety by medical practitioners has long been recognised as having the potential to constitute both professional misconduct and infamous conduct in a professional respect. Over 40 years ago, Lord Denning in *de Gregory v General Medical Council*[34] said:

> A doctor gains entry to the home in the trust that he will take care of the physical and mental health of the family. He must not abuse his professional position so as, by act or word, to impair in the least the confidence and security which should subsist between husband and wife. His association with the wife becomes improper when by look, touch or gesture he shows undue affection for her, when he seeks opportunities of meeting her alone, or does anything else to show that he thinks more of her than he should. Even if she sets her cap at him, he must in no way respond or encourage her. If she seeks opportunities of meeting him, which are not necessary for professional reasons, he must be on his guard. He must shun any association with her altogether rather than let it become improper. He must be above suspicion.

[102] At much the same time, Hudson J in *Hobart v The Medical Board of Victoria*,[35] in the context of a relationship between a former patient and her general practitioner, in the course of which the former patient's family continued to attend upon the practitioner, affirmed that:

> …it is of course of the utmost importance that medical practitioners should not abuse the position of trust and confidence which they enjoy by virtue of membership of their profession and the privileges which it confers.

[103] In the 1990's, Dowsett J, in *Re a Medical Practitioner*[36], made a number of observations relevant to the consideration of misconduct of medical practitioners as follows:

1. The practice of medicine involves intimate access to the body and the

[33] [1999] VSC 113
[34] [1961] AC 957 at 965
[35] [1966] VR 292 at 297
[36] [1995] 2 Qd R 154 at 163-166

psyche of the patient.

2. Such practice may also involve access to the patient's home.
3. A medical practitioner is therefore in a position of special trust toward and power over a patient.
4. The need for medical care and the sympathetic way in which such care is likely to be provided render the recipient at risk of becoming emotionally involved with and/or dependent upon the provider.
5. In some circumstances, exposure to such risk may extend to persons close to the patient, for example to a parent of an infant patient or the spouse of a patient.
6. A medical practitioner must be aware of these risks and ensure that his or her conduct does not aggravate the position, that no advantage is taken of any such susceptibility, and that there is no abuse of the practitioner's special position.
7. A medical practitioner who becomes aware that a patient has developed a romantic attachment to him or her must take steps to sever that attachment. Normally, the doctor and patient relationship should be terminated.
8. A medical practitioner who becomes romantically attached to a patient should realise that his or her own objectivity and capacity to provide appropriate treatment have been impaired and terminate the doctor and patient relationship.
9. Where the romantic attachment is solely on the patient's side, whilst it will be unwise to continue treating the patient, it will not necessarily be professional misconduct to do so, save where the efficacy of continued treatment may be impaired by the attachment, or where the patient may suffer further harm.
10. Where there is romantic attachment on the part of the practitioner, it may be professional misconduct not to terminate the doctor and patient relationship, even in the absence of acts of intimacy. Each case must be considered on its merits. The considerations referred to in paragraph 9 will again be relevant.
11. It is professional misconduct to engage in acts of intimacy with a patient whilst the doctor and patient relationship continues.
12. It is professional misconduct to exploit a discontinued professional relationship. Thus a medical practitioner should only commence or continue an association with a former patient if there can be no suggestion that he or she is exploiting a dependency created in the course of the professional relationship.
13. From the point of view of the profession as a whole and from the public viewpoint, it is as important that the appearance of propriety be maintained in each doctor and patient relationship as that such propriety actually exist. Thus it will be professional misconduct for a medical practitioner to permit the appearance of a romantic relationship with a patient or to lead a patient to believe that he or she has an interest in establishing such a relationship.
14. As with all misconduct, individual examples may vary in severity. The more serious the misconduct, the more likely it will be that the interests of the public will dictate removal from the register. In cannot be said that every case of misconduct o this kind will dictate such removal.
15. These comments apply to male and female practitioners, both general practitioners and specialists. The nature of a particular specialty may render the misconduct more serious (e.g. psychiatrists and gynaecologists).

16. These observations apply to both heterosexual and homosexual relationships and conduct.
17. Whilst these observations generally refer to relationships with a patient, they also apply to relationships with persons closely associated with patients, particularly parents of infant patients and spouses of patients.
18. The gravamen of this misconduct is breach of trust, misuse of power and exploitation of vulnerability. Sexual misconduct is only an example of such misconduct.

[104] The decision of the New South Wales Court of Appeal in *Richter v Walton*[37] provides further analysis of the issues. Kirby P and O'Keefe AJA commented:

> All patients are entitled to approach their medical practitioners secure in the belief that their ills will be treated to the best of the skill and ability of their medical practitioners and without any interference of an improper kind with their persons or in relation to their affairs. Respecting the vulnerability of those who attend upon them when in need is fundamental to the practice of medicine.

[105] In the same case Priestley JA said:

> The doctor's power in regard to the patient in such cases is also very great. I do not mean power in an abstract way but as a matter of fact: the extent of their power will vary according to the temperament of the patient, but the doctor with some patients and for limited periods, because of the relationship in which they are temporarily placed, is in a position to do whatever the doctor wants with the body of the patient. This is one of the reasons why doctors are subject to correspondingly great obligations and are expected to maintain very high standards; all this being very much in the public interest.

[106] Marks J noted in *Peeke v Medical Board of Victoria* [38]:

> A doctor who takes advantage of the patient being in the servient position is or may be guilty of very reprehensible conduct if he turns that relationship to his own advantage. It is certainly an act of serious misconduct to exploit a female patient.

[107] In 1997, in *Morris v Psychologists Registration Board*,[39] Harper J was called upon to evaluate whether a psychologist who had entered into an intimate relationship with an ex-client was guilty of professional misconduct. His Honour stated:

> In my opinion the fact that the professional relationship had ended at the time the sexual relationship commenced is not, of itself, determinative. The appropriate test must be whether a sexual relationship would exploit the client, or put the health of the client "at risk.

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[37] Unreported, NSW Court of Appeal, 15 June 1993 at 2
[38] Unreported, Supreme Court of Victoria, 19 January 2004 at 5
[39] Unreported, Supreme Court of Victoria, 19 December 1997 at 15

He went on to say at 16 -17:

> In my opinion to confine the concept of exploitation to duress, manipulation, coercion or pressure would be to abrogate the therapist's responsibility to make a professional decision to refrain from submitting to the wishes of the client or even a former client. A member of a profession who for purely personal reasons accedes to a client's request, and thereby obtains a personal benefit, knowing that to do so will jeopardise the client's objectively and professionally ascertained interests, exploits the professional relationship, and therefore exploits the client: on this hypothesis, the opportunity to obtain the personal benefit arises from the fact of the professional relationship. A psychologist who enters into a sexual relationship with a client or former client at that person's request, and who does so when he knows or ought to know that he is thereby putting the other's health (mental or otherwise) at risk, acts unprofessionally. This is particularly so where transference may still operate so as to induce the client to seek the intimacy. It seems to me that consent in these circumstances cannot be an answer to an allegation of misconduct.

In relation to the question of the responsibility the patient had for the development of the relationship, Harper J said at 28-29:

> As I see it, for present purposes their question is of little relevance. The standard of conduct with which I am concerned is as much designed to protect a vulnerable patient from himself or herself as from unwelcome advances of an amorous medical practitioner. The profession has long recognised that a patient may well be in a vulnerable position in which he or she is likely to develop a dependence upon or attachment to a care-giver. Therefore it is not correct to seek to apportion blame between the patient and the practitioner.
>
> Further, these rules are designed for the good of the profession as a whole and for the benefit of the general public, which must be able to rely upon the availability of the profession's expertise. The continued delivery of high quality health care by the profession can only be ensured by the maintenance of confidence in care-givers on the part of patients and patients' families. Thus in proceedings such as this, I am concerned with the duty of the practitioner to the profession and to the public as a whole as well as to the particular patient. That duty proscribes doing anything likely to undermine public confidence in the individual practitioner or in the profession. There can be no question of blame attaching to the patient who owes no relevant duty to the doctor, the profession or the public. The applicant was in a position recognised as being vulnerable. That she should have succumbed to that vulnerability is not a matter for criticism.

[108] The standards required of medical practitioners, and in particular of psychiatrists, have been considered by the Board, and by medical boards in other jurisdictions, as well as by the RANZCP.

[109] From 1992 onwards, this Board has provided clear advice to the profession on the issue. A Medical Board Bulletin published in July 1992 quoted, with permission, the NSW Medical Board Policy Statement, which stated in part:

1. It is an absolute rule that a medical practitioner who engages in sexual activity with a current patient is guilty of professional misconduct.
2. While not detracting from the fundamental impropriety of such activity, the sanction applied, as a result of a finding of misconduct, may vary according to the circumstances of each case.
3. Factors to be considered include the degree of dependence in the doctor-patient relationship, evidence of exploitation, the duration of the professional relationship and the nature of the medical services provided.
4. The rule refers to current patients. The termination of the doctor-patient relationship prior to sexual activity may be raised as a defence, but its strength will be dictated by consideration of the factors referred to in paragraph 3, as well as by the time lapse after the end of the professional relationship.

[110] In February 1996, this Board issued a document called "Trust in the Doctor/Patient Relationship - Guidance for Patients and Doctors on Professional Sexual Boundaries". It stated in part:

> The doctor/patient relationship may…result in some patients becoming emotionally dependent upon their doctors.
>
> It is always wrong for a doctor and patient to enter into a sexual or an improper emotional relationship. It is also wrong for a doctor to enter into a relationship with a former patient…if this too breaches the trust that the patient has placed in the doctor or otherwise disrupts the patient's life…"

The document referred to possible investigation and discipline by the Board, if a doctor abuses a patient's trust by crossing proper professional boundaries.

[111] The Guidelines of the RANZCP current in 1997 stated, so far as relevant:

> 5. Furthermore it is generally improper for psychiatrists to have sexual relationships with former patients unless the circumstances of the professional relationship have not rendered the patient vulnerable to a subsequent approach. The more deeply the psychiatrist becomes involved in the patient's emotional life the more certain is the impossibility of a subsequent equal relationship. Mutual termination of a therapeutic relationship does not ensure the resumption of an equal relationship. Following long term psychiatric treatment, this is never possible.
>
> 6. However, recognizing the problems of formulating absolute rules, any psychiatrist contemplating an intimate relationship with a former patient is strongly advised to consult a properly constituted body of colleagues, bearing in mind that at all times the psychiatrist may be called upon to defend his/her conduct in the judicial context of a medical board/council hearing.

[112] Thus the guidelines and statements issued by professional bodies at the time Dr Honey's relationship with his former patient commenced, and while it lasted, emphasised the fundamental importance of trust in the doctor-patient relationship, the unequal nature of the relationship, the patient's possible

emotional vulnerability, disruption to a patient's life, and the responsibility the doctor has for maintaining appropriate boundaries. While sexual relationships with former patients were not forbidden by this Board's guidance document, or by the RANZCP Guideline current in 1997, both documents contained warnings about such relationships being or being seen to be wrong or improper.

[113] We find in relation to allegation (a) that Dr Honey's conduct in entering into an emotional and sexual relationship with his former patient, within two months of the termination of the professional relationship, was professional misconduct within the meaning of paragraph (c) of the definition of "unprofessional conduct" in section 3(1) of the Act. We also find in relation to allegation (b) that Dr Honey's conduct in continuing to engage in an inappropriate relationship with his former patient was professional misconduct within the meaning of paragraph (c) of the definition of "unprofessional conduct" in section 3(1) of the Act. We make that finding on the basis of the guidelines of the RANZCP, and of this Board and on the evidence of the psychiatrists who gave character evidence for Dr Honey. Although they all spoke extremely highly of Dr Honey, both as a psychiatrist and as a person, they expressed the view, or gave the clear impression, that they were shocked when they learnt that he had been having an affair with a former patient, because they knew that was wrong.

[114] Dr Millard explained that it was his understanding that Dr Honey had not raised the matter with his peer group earlier, "for fear of what we might think and our judgement about the situation"[40]. Dr Millard said that personally he had always had a fairly judgmental view of boundary violation in the past, and he had had a lot of difficulty dealing with the knowledge of Dr Honey's affair with a former patient, because he regards Dr Honey as a close friend.

[115] Dr Hucker spoke of the devastating effect of Dr Honey's actions on himself, the family and all his friends[41].

[116] Dr Entwisle said:

> [T]his is a tragedy it's been a source of considerable distress for me and for the others in that perhaps of all the people that we thought this might happen to, John would be the last. I've always regarded him as a superior being to what I am[42].

[117] We have decided that a finding of professional misconduct must also be made in respect of allegation (c). While we have found that Dr Honey had mixed motives in making the payment of $100,000 to his former patient, and that some of his reasons were to show recognition that he had done wrong by her, and to do what he could to ease her distress, and compensate her for her injury, and perhaps help her deal with her gambling addiction, we have also found that another reason was because of Ms MB's undertaking not to report him to this Board.

[118] The Board has disciplinary powers to protect the public and to uphold the public image of the profession by ensuring that high standards are maintained by medical practitioners. It is not a civil court where it is quite appropriate to

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[40] Transcript 323
[41] Transcript 338
[42] Transcript 344-345

settle a claim for damages by making an agreed payment to a person who has a claim against a defendant or prospective defendant. The payment of a sum of money to discourage a patient or former patient from notifying the Board of unprofessional conduct tends to defeat the purposes of the Board by hiding the unprofessional conduct from scrutiny by the Board. It provides another instance of unprofessional conduct. It is our view that, although not related to clinical judgment, it falls within the description of professional misconduct given by Kirby P, as he then was, in *Pillai v Messiter*[43], being "a deliberate departure from accepted standards…and an abuse of the privileges [and responsibilities] which accompany registration as a medical practitioner".

[119] For the reasons set out in paragraphs 3, 4 and 11 of Mr Noonan's submission, we find that none of the unprofessional conduct we have found in this matter is "infamous conduct in a professional respect" within the meaning of that term in paragraph (d) of the definition in section 3(1) of the Act. We find that Dr Honey's conduct did not display the "reckless indifference to the possible harmful consequences of his acts"[44], which would lead to such a finding. We find that he thought about the relevant issues and, as he now acknowledges, made an incorrect assessment of the harm his acts might cause to his former patient. We do not find that he entered into the relationship with reckless indifference to its consequences. Further, although we have found that Dr Honey's conduct fell short of accepted standards to a substantial degree, we do not find that it was so reprehensible, shameful, disgraceful or dishonourable as to be characterised as "infamous". We consider that terminology to be appropriate where a medical practitioner's sexual conduct can be characterised as "predatory or coercive" as stated by a panel of the Board in *Re Freund* [2005] MPBV 2.[45]

[120] The next issue is to decide which of the unprofessional conduct, which we have found was engaged in by Dr Honey, is to be characterised as "of a serious nature" under section 45A(1)(a) of the Act. We have decided, as conceded by Mr Noonan[46] that the conduct covered by our findings in respect of allegations (a), (b) and (c) constitutes unprofessional conduct of a serious nature. We find that the unprofessional conduct referred to in allegations (d) and (e) is not of a serious nature pursuant to section 45A(1)(b) of the Act.

Determination

[121] It is quite clear, as agreed by Counsel appearing, that a determination to be made by this Panel is not concerned with punishment. As explained by Doyle CJ in *Craig v Medical Board of South Australia*[47], by Gillard J in *Mullany v Psychologists Registration Board* of Victoria[48] (*"Mullany"*) and by Harper J in *Morris v Psychologists Registration Board of Victoria*[49] *("Morris"),* the purpose of any determination made by a Board in proceedings such as this is to protect the public, by preventing persons who are unfit to practise from practising a profession, and by maintaining proper professional standards. A determination should also protect the reputation of the profession, by

[43] (1989) 16 NSWLR 197 at 200
[44] *Basser v Medical Board of Victoria* [1981] VR 953 at 968
[45] Paragraph 54
[46] Paragraphs 11(d) of his submission
[47] (2001) 79 SASR 545
[48] Unreported, Supreme Court of Victoria, 22 December 1997
[49] Unreported, Supreme Court of Victoria 19 December 1997

ensuring the maintenance of high standards. In that way public confidence in the profession will be maintained and people seeking medical treatment will receive competent treatment, and their vulnerability will not be exploited, nor will their health and well-being be unnecessarily placed at further risk.

[122] The cases establish that the first question we must consider is whether the public needs protection from Dr Honey. The public interest in Dr Honey continuing to practise, must be weighed against the public interest in protecting patients from any repetition of the unprofessional conduct in which he engaged, and also against the "need to signal to the practitioner and to the public the seriousness of the practitioner's departure from professional standards, and the need to signal to other practitioners and to reassure the public that a certain type of conduct is not professional conduct", as stated by Davis J, Vice President and Dr M Dudycz in *Traill v Medical Practitioners Board* of Victoria[50] *("Traill").*

[123] Dr Honey gave evidence, and as we said in our findings on the facts, we found him generally to be a frank and credible witness, although there were some points on which we found his evidence not persuasive. We do, however, accept that his evidence was genuine and reliable when he said that he now recognised that it had been "a gross misjudgment on his part when he acceded to her requests to start a relationship.*"*[51] Dr Honey added that he had cared very much about his former patient and that what had happened to her was the exact opposite to what he wanted to happen to her.

[124] Dr Honey explained that he now thought it was very likely that there were issues of transference and counter transference operating at the time he decided to pursue the relationship with his former patient. He said that he considered it at the time, but felt that what he was feeling was, "in response to how I truly saw her as a person, as a brave woman recovering her life and getting back in charge of things. I missed her 'vulnerability'". There was evidence before the Panel as to a number of personal and domestic emotional issues, which were affecting Dr Honey at the time the relationship commenced. When his Counsel asked him to explain, looking back on the events that unfolded, what he saw as the likely reason that led him to misjudge the situation, he replied, "I think on reflection, and I didn't realise it at the time, I-I think that I was more vulnerable than I recognised*"* [52].

[125] When Dr Honey was asked as to the likelihood of such a thing ever happening again, he replied:

> Well apart from the fact that I now understand that one can never be assured that a relationship between a doctor and a patient can ever be free of taint of that fact, apart from my better understanding, greater understanding of all that, all that's happened since, all the pain and distress that everybody involved in this has suffered as a result of my misjudgment, is not something I ever will repeat or want to repeat[53].

[50] [2006] VCAT 1920 at [117]
[51] Transcript 149
[52] Transcript 125
[53] Transcript 149

[126] Dr Honey's evidence on these matters was supported by the evidence of Dr Millard, Dr Hucker and Dr Entwisle. Their evidence was impressive. Each of them has known Dr Honey well for many years. Dr Millard has known him well for about 20 years. The friendship between Dr Honey and Dr Hucker and Dr Entwisle has lasted 40 years since they all started medicine at Monash in 1966. They all know him personally, as a good friend, and professionally, as members of his peer review group. They have each discussed with him the conduct, which gave rise to this hearing. As we have already said they were shocked to learn that Dr Honey had conducted an affair with a former patient for some years, but each of them continues to hold him in high regard, and was confident that there would be no repetition of the conduct by Dr Honey.

[127] Mr Noonan asked Dr Millard what level of insight he considered Dr Honey had developed in regard to the errors he had made. Dr Millard replied:

> [J]ust as everybody in this court (sic) has been educated as it were, about the nature of what went on and its inappropriateness and how it occurred, John himself has been exposed to the educational process that's associated with this and he's taken steps like having personal therapy and being much more open with his friends and colleagues about what's happened so that the chances of it happening again, as I say, appear to me to be negligible.[54]

[128] Dr Millard also said that his understanding of Dr Honey's character is that he is the sort of person who is never involved in predatory behaviour in any sense. "He's a gentle person, he's very concerned about others' welfare, and most of his interactions involve kindness towards other people and interest in their welfare".[55]

[129] Dr Hucker explained that he saw the relationship as having occurred in the setting of the stresses Dr Honey was under, and said, "I can't see something like this ever occurring again*"*.[56] He said that when he saw Dr Honey and Ms MB together (not knowing that she was a former patient) it seemed to be a very equal relationship between two people who had a strong affection for one another. He said that it seemed to him that there was no sense at all of any power differential.[57] He said he did not perceive that Dr Honey had been predatory in any way.[58]

[130] Dr Entwisle made it clear that he had very strong feelings for Dr Honey. He said, "I think you love some people because of their virtues and their strengths and they were certainly in abundance, as far as I was concerned, with John."[59] He added:

> I don't think torture is too strong a word for what he has been experiencing. His obvious sense of care for his wife, the terrible guilt that he feels about that, the guilt that he feels in regard to the other person, the shame that he brought upon his family, all of these

[54] Transcript 327
[55] Transcript 327
[56] Transcript 337
[57] Transcript 336
[58] Transcript 338
[59] Transcript 343

elements I think do comprise a tragedy … I just knowing John, knowing the man that he is [know] that he would never wish to repeat this again either for himself or for anybody else. What's happened to each of the parties involved in this it's been a very terrible outcome.[60].

He said that he thought Dr Honey had been "remorseful" about the situation for a long time.[61]

[131] We were also assisted by the report of Professor Ball, who has been treating Dr Honey on a regular basis, having seen him on 19 occasions since March 2005. Professor Ball was unable to give evidence, because of prior commitments when the date for the resumed hearing was fixed, but his report dated 22 August 2006 was received without objection. He wrote that his role had been to help Dr Honey "understand what happened and, to some extent how it happened, and to help him deal with his associated depression, shame and humiliation, and to help him keep functioning…"[62]

[132] Professor Ball, in his report, referred to various personal problems, which arose in Dr Honey's life in 1997. He wrote, "In my view, these factors combined to make him vulnerable to a perceived attractive patient, who clearly expressed an interest in him. He was aware of the attraction, made arrangements to stop the clinical involvement, but unfortunately fell in love with her, and matters progressed…".[63] Professor Ball explained that in his opinion, although Dr Honey is a well-trained, competent and experienced psychiatrist, and well aware of matters of transference and counter transference, his clinical skills at the time were subverted by his grieving, in respect of the death of his father that year, and his depression.

[133] Professor Ball wrote that Dr Honey had demonstrated intense contrition and remorse about his behaviour, in relation to the initiation and continuation of the relationship. He concluded:

In my view, from long experience in these matters, and having seen a great number of colleagues in similar difficulties, I think it extremely unlikely that Dr Honey would re-offend in a similar fashion to that which has happened with this lady. He is well aware of the risks, has a much clearer understanding of the need for continuing peer support and the need for supervision with regard to any transference and related matters. His antennae are now very sensitive.

He is also acutely aware of the effects of this whole situation on [Ms MB] since it all began, and is very sorry about those consequences.[64]

Majority - Dr J M Flynn, Dr J M McNamara

[134] On the basis of the evidence of Dr Honey, Dr Millard, Dr Hucker, Dr Entwisle and Professor Ball, we find that Dr Honey is unlikely to engage in unprofessional conduct of the nature of a sexual relationship with a patient or

[60] Transcript 345
[61] Transcript 345
[62] Page 1 of his report
[63] Page 2 of his report
[64] Page 3 of his report

former patient again. There is no suggestion before us that he has ever engaged in unprofessional conduct of any nature apart from the matters giving rise to this hearing. However we note that some of factors in Dr Honey's personal background that formed the context within which this relationship developed remain unresolved. We also find that Dr Honey now has insight into his conduct, has acknowledged that it was a gross misjudgement on his part,[65] and has demonstrated remorse.

[135] There is strong evidence before us from Dr Millard, Dr Hucker, Dr Entwistle and Professor Ball, as to Dr Honey's reputation as a psychiatrist, his clinical skills, his participation in educational and professional activities of the RANZCP and his empathy with patients. There is evidence that he is one of a small number of psychiatrists in private practice in the western suburbs of Melbourne. Dr Honey has impressive curriculum vitae, which includes positions of Head of Psychiatric Unit, Western Hospital 1986-1998 and Clinical Associate, Melbourne University, Department of Psychiatry 1989-1998.

[136] Ms Meyer, the widow of one of Dr Honey's patients, gave very moving evidence. She described the "enormous role"[66] Dr Honey played in treating her husband for depression associated with a serious and progressive organic brain disorder, which became apparent in 1990 and ultimately became terminal in 2002.

[137] On that evidence we find, on balance, that there is likely to be a benefit to the public in Dr Honey continuing to practise his profession. However through our knowledge as members of this Board, we are aware that the predictive capacity of bodies such as ours in relation to repetition of sexual misconduct is poor. Therefore it is incumbent upon us to be cautious.

[138] The other relevant consideration is whether there is a need to take some action such as suspension or cancellation of registration to act as a deterrent to other medical practitioners, or to maintain public confidence in the profession by emphasising that Dr Honey's conduct was not acceptable and would be dealt with severely.

[139] That is the basis on which a six months suspension was upheld in *Craig v Medical Board of South Australia,*[67] a case which concerned an improper, but not actually sexual relationship between a doctor and his 20 year old patient. Doyle CJ said at 554:

> A disciplinary tribunal protects the public by making orders which will prevent persons who are unfit to practise from practising, or by making orders which will secure the maintenance of proper professional standards. A disciplinary tribunal will also consider the protection of the public, and of the relevant profession, by making orders which will assure the public that appropriate standards are being maintained within the relevant profession.

[140] Mr Noonan, appearing for Dr Honey, conceded that in order to protect the standing of the profession generally and, for the purposes of acting as a

[65] Transcript 149
[66] Transcript 330
[67] (2001) 79 SASR 545

deterrent to other medical practitioners, it is necessary that a period of suspension be imposed.[68]

[141] Ms Young, Counsel Assisting the Panel, acknowledged the submissions of Mr Noonan in relation to the likelihood of repetition and the limited need for the Panel to protect the public in this regard. However she referred to the remarks of Doyle CJ in *Craig v Medical Board of South Australia*[69] and reminded us of the importance of the Panel's role in maintenance of standards of the profession. She indicated that the public interest is served by the Panel making orders, which emphasise to other members of the profession and reassure the public that a certain type of conduct is not acceptable professional conduct. These orders also protect the profession by demonstrating that the profession does not allow certain conduct.[70]

[142] Ms Young indicated that the important considerations for the Panel were not about the difference between a long-term affectionate or sincere relationship, and a more casual or insincere one, because in either case the departure from professional standards remains very serious and the conduct in each case involves an abuse of the privileges of registration and exploitation of the patient.

[143] In her submission, the important factors were the doctor's conduct in entering the relationship in a conscious fashion, maintaining that relationship over a long period, and also the payment of the money, $100,000, which the Panel has found was made, in part, to influence the complainant in relation to her reporting to the Board. She indicated that the matters under consideration required interference with the doctor's registration and, whilst acknowledging Mr Noonan's submission in relation to a period of suspension, she put to the Panel that the matters were so serious that cancellation of registration was justified.

[144] Having carefully considered all the evidence, including the relevant guidelines issued by this Board and the RANZCP, and the submissions of Counsel, the Panel, by majority, believes that it must act to uphold the standards of the profession and indicate that Dr Honey's departure from these standards was so grave as to require cancellation of his registration.

[145] As an experienced and highly regarded psychiatrist, he commenced a sexual relationship with a person who had first been his patient, when she was a university student, aged 20, in the context of the recent death of her mother, having taken an overdose following a traumatic relationship break up. She attended him at that time for over two years. She gave evidence that she realised at that stage that she was infatuated with him. She was referred to him again in 1987 and saw him for a brief period. In March 1997, after a ten year gap, she was referred back a third time with gambling problems and in the midst of a marriage breakdown. In the Panel's view this constitutes more than short term psychiatric treatment.

[146] Our view is that Ms MB's various problems support the view that she was a vulnerable person.

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[68] Transcript 359
[69] (2001) 79 SASR 545
[70] Transcript 360

[147] The doctor-patient relationship was terminated in August 1997 in circumstances where Ms MB had told Dr Honey that she was infatuated with him, he had explained to her about transference and had recognised, but not disclosed, his own feelings of attraction to her. This acknowledgement by Dr Honey of the significance of the transference in their relationship ought to have left him in no doubt as the inappropriateness of going on to pursue a personal, and then sexual relationship with her.

[148] Although the professional relationship was terminated at that time, Dr Honey did not refer Ms MB to any other doctor to continue her care.

[149] Within a very short space of time, at the most two months, a personal and then sexual relationship developed, and continued until May 2004 with two breaks each of some months.

[150] In this case, the Panel believes that the personal and sexual relationship arose directly out of the doctor-patient relationship. The fact that the professional relationship had been terminated shortly before did not, in any significant way, remove or lessen the dependency created in the course of the professional relationship, which started when the patient was very young and vulnerable. Nor did it address the issues of transference and counter-transference. As Dowsett J said in *Re a Medical Practitioner*[71]: "The gravamen of this misconduct is breach of trust, misuse of power and exploitation of vulnerability." Trust is the cornerstone of the doctor-patient relationship. It is the foundation of therapeutic relationships between patients and their psychiatrists. Breach of this trust is not and cannot be tolerated by the medical profession and calls for emphatic disapproval by this body, both as a message to the profession and to reassure the public.

[151] In September 2000, Dr Honey paid Ms MB $100,000 in return, in part, for her undertaking not to lodge a complaint with the Medical Practitioners Board or any other relevant body. That any part of this arrangement was designed to deter Ms MB from making a complaint to the registration body is viewed by this Panel as an extremely serious matter.

[152] For these reasons the majority of this Panel determines that:

1. Pursuant to section 45A(2)(h) of the Act, Dr Honey's registration is cancelled.

2. Pursuant to section 45A(2)(i) of the Act, Dr Honey is disqualified from applying for registration under section 5 for a period of two years.

[153] To give Dr Honey time to make appropriate arrangements for the continuing care of his current patients, the cancellation is effective from 9 October 2006.

Minority – Ms J Dwyer

[155] The question of the appropriate determination or determinations in a matter such as this is a difficult balancing exercise. After careful consideration, I find that I cannot agree with the other Panel members that cancellation of Dr Honey's registration is necessary or appropriate.

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[71] [1995] 2 Qd R 154 at 164

[156] We have found that the conduct in issue is unprofessional conduct of a serious nature, and professional misconduct. I agree that it is important that the determination of the Board signal to Dr Honey, to other medical practitioners, and to the community, that it is not ethical and it is unacceptable for medical practitioners, and especially for psychiatrists, to enter into sexual relationships with current, or even, as in this matter, with former patients. But I find, as did Dowsett J in *Re A Medical Practitioner*[72]*,* that cancellation or *"erasure"*, which was the term used by Dowsett J, is not necessary in view of our finding as to the unlikelihood of Dr Honey re-offending. I accept, as Mr Noonan conceded, at paragraph 12(a) of his submission, that in order to protect the standing of the profession generally and, for the purposes of acting as a deterrent to other medical practitioners, it is necessary that a period of suspension be imposed.

[157] Dr Honey has an impressive curriculum vitae, which includes positions of Head of Psychiatric Unit, Western Hospital 1986-1998 and Clinical Associate, Melbourne University, Department of Psychiatry. There is strong evidence before us from Dr Millard, Dr Hucker, Dr Entwistle and Professor Ball, as to Dr Honey's reputation as a psychiatrist, as to his clinical skills, as to his participation in educational and professional activities of the RANZCP, and as to his empathy with patients.

[158] Dr Millard said that in his opinion Dr Honey is one of the most competent and caring psychiatrists he has known. He said that he has quite special skills, particularly in relating to people in areas of low socio-economic groups and deals with their problems with special understanding. He has worked in the western suburbs of Melbourne, in both public and private practice [73].

[159] Dr Hucker said that he has always found Dr Honey's clinical skills to be of a very high calibre, and has always valued his opinion. He said that he has always taken pride in having Dr Honey as a colleague and has noticed that other psychiatrists always speak of Dr Honey with high regard.[74]

[160] Dr Entwisle said that he thought it would be a major loss for the public if Dr Honey were not able to practise medicine for a time. He said it would leave a real hole in the western suburbs, where there are very few practising private psychiatrists. He said Dr Honey has a long history of working in that community and has quite a big network there. Many of his patients are chronic psychiatric patients with serious illness who have formed a very strong relationship with Dr Honey over maybe 20 years. He said that in that sense, he thought Dr Honey would be irreplaceable[75].

[161] Ms Meyer, the widow of one of Dr Honey's patients gave moving evidence. She described the "enormous role"[76] Dr Honey played in treating her husband for depression associated with a serious and progressive organic brain disorder, which became apparent in 1990 and ultimately became terminal in 2002. Ms Meyer said that from 1990 until about 2000, as long as her husband could benefit from treatment, Dr Honey saw him weekly or fortnightly, and "was amazingly responsive to Tim's needs". She said that her

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[72] [1995] 2 Qd R 154 at 166
[73] Transcript 321
[74] Transcript 334
[75] Transcript 348
[76] Transcript 330

husband relied very heavily on Dr Honey, for "just his day to day survival". Ms Meyer said that Dr Honey had also seen her on a couple of occasions in regard to the effect on her of her husband's illness and, " he was incredibly understanding and caring and very gentle and helped me. Just in a couple of visits I got a lot of help, enough to keep me going".[77]

[162] On that evidence I find that there is a benefit to the public in Dr Honey continuing to practise his profession.

[163] That must be balanced against consideration of the action required to act as a deterrent to other medical practitioners, and to maintain public confidence in the profession, by emphasising that Dr Honey's conduct is not acceptable, and will be dealt with severely. The other Panel members have concluded that cancellation of registration is required.

[164] I note that in *Craig v Medical Board of South Australia*[78], an appeal against a six months suspension was dismissed by the Full Court of the Supreme Court of South Australia. The case concerned an improper and intimate romantic, but not fully sexual, relationship between a psychiatrist and his 20 year old patient, both before and after treatment ceased. Doyle CJ said that as the tribunal had not explained why it had decided on the suspension, he had to deduce from its reasons the basis for the suspension. His Honour said, at 556:

> If the order is to be supported in point of principle, it seems to me that it must be supported on the basis of protecting the profession and maintaining public confidence by emphasising to the profession and to public that Dr Craig's conduct was not acceptable and would be dealt with severely, even though the conduct did not demonstrate that Dr Craig was unfit to practise. An order on this basis has a punitive aspect but …it may be justifiable even though the public does not require protection from Dr Craig.

The Chief Justice concluded at 557:

> I consider that Dr Craig's conduct was conduct of a kind that might well shake the public confidence in the profession of psychiatry, were it not dealt with firmly. It was conduct, which called for an emphatic indication of the Tribunal's disapproval, and of the profession's disapproval. Although Dr Craig's acknowledgement of wrongdoing was accepted as genuine, and there was no need to deter him from repeating his conduct, it was appropriate for the Tribunal to emphasise to Dr Craig the seriousness of his conduct.

[165] There are other decisions, on appeal from boards or tribunals such as this, which seem to suggest that cancellation is appropriate, where the public requires protection from a medical practitioner, but that if the public does not require protection, and the purpose of the determination is to deter other medical practitioners and to uphold high standards and maintain public confidence in the profession, then suspension rather than cancellation is appropriate.

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[77] Transcript 332

[78] (2001) 79 SASR 545

[166] I refer to the decisions of *Morris*[79], *Mullany*[80] *and Traill*[81]. *In Morris,* Harper J said that the overriding issue was whether Mr Morris should practise as a psychologist. He recognised that the character references all spoke very highly of Mr Morris both professionally and personally. His Honour also stated that he was quite certain that Mr Morris would never again become personally involved with a former client, but he dismissed the appeal against cancellation of registration pointing out that Mr Morris did not fully accept that what he did was wrong, and persisted in seeking to have the former patient share the responsibility for the fact that the relationship became sexual. Harper J concluded at 30-31:

> Although I am cognisant of the devastating effect cancellation has had on Mr Morris, I am of the opinion that the Board correctly cancelled his registration or at least made no manifest error. It seems to me that the conduct of which he was found guilty was not a mere error of judgement, but rather displayed an inability to grasp fundamental concepts and to act in a professional and objective way. I am concerned that Mr Morris continues to assert that his conduct was not wrong. The position taken by him suggests to me that the Board was correct to find as it did and to cancel his registration.

[167] In *Mullany*[82], Gillard J allowed an appeal against nine months suspension by a psychologist who was found to have abused his position towards a trainee psychologist subject to his formal supervision, by seeking an intimate relationship with her. He continued to pressure her in spite of her clear indication to him for three years that his attentions were unwanted, and even threatened not to sign the papers as to supervision required for her registration. On one occasion the complainant called the police. Gillard J, somewhat surprisingly in my view, held that the penalty was manifestly excessive in all the circumstances and that a reprimand was the most appropriate penalty.

[168] In explaining his decision, Gillard J again pointed to the failure by the Board to refer to the principles it had applied. His Honour emphasised that the Board is not concerned with punishment at all, but only with the protection of the public and of the profession. He said, at page 17 "The Board is concerned with the fitness of a person to practise the profession of psychology". Gillard J referred to the excellent references from members of the public, which he said should have satisfied the Board that there was no question of any concern about Mr Mullany's relationship with the public, or about protecting the image of the profession. Gillard J said that the Board should ask the question whether the practitioner, at the time of hearing, represents a risk to the community or poses a threat to the profession. His Honour held that the lack of any suggestion of misbehaviour by Mr Mullany to the complainant, subsequent to the conduct in issue, or to any other person during his professional life, and his high professional reputation, indicated that he did not represent any risk to the community in the conduct of his professional activities.

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[79] Unreported, Supreme Court of Victoria, 19 December 1997
[80] Unreported, Supreme Court of Victoria, 22 December 1997
[81] [2006] VCAT 1920
[82] Unreported, Supreme Court of Victoria, 22 December 1997

[169] In *Traill*,[83] Judge S Davis, Vice President and Dr M Dudycz, Member of the Victorian Civil and Administrative Tribunal dismissed an appeal against the cancellation of a doctor's registration, with a disqualification on reapplying for three years. The unprofessional conduct in issue related to the provision of unproven and ineffective treatment to three vulnerable patients. The reasons for the cancellation were expressed to be that Dr Traill did not accept that he had acted unprofessionally at all, and that he gave the majority of the Panel no confidence that he would not administer other unconventional treatments if he believed they would have an effect. The Tribunal said at paragraph 124 of its reasons:

> Having regard to Dr Traill's defence in this proceeding, his lack of insight into his conduct, his ignorance of or contempt for the process of scientific verification and clinical validation of theories which is the hallmark of modern evidence-based medicine, his disregard for the standards set by his peers for the treatment of cancer patients, and his refusal to acknowledge his duty to conform to the standards required by the profession, we consider it appropriate in the circumstances to cancel his registration, in order to protect the public, to maintain the standards of the profession, and to protect the community's confidence in the profession.

[170] I bear in mind the principles set out in those cases, the evidence as to Dr Honey's misconduct and his evidence as to his insight into his misjudgment, and his assurance that he will not repeat that conduct. I also give weight to the evidence of his good professional reputation and his clinical skills given by his colleagues and friends, and by the widow of his former patient. I am satisfied that he poses no risk to the community.

[171] I am not as concerned as the other Panel members about the payment to Ms MB for two reasons. First, the payment was made with so many motives that it may have been difficult for Dr Honey to isolate the different reasons which led him to make the payment, so as to appreciate the serious nature of the professional misconduct involved in offering a financial incentive to induce a potential complainant not to proceed with a complaint. Secondly, the agreement was drawn up by Ms MB's solicitor. There is no evidence that the solicitor alerted Dr Honey or Ms MB to the fact that it was improper, and possibly against public policy, to make a payment, in part, to induce Ms MB not to complain to the Board. If the solicitor did not appreciate the fact that, in that respect, the payment was improper, it is not surprising that Dr Honey himself did not recognise that fact.

[172] I also give weight to the fact that, as I find, there is a benefit to the public in Dr Honey continuing to practise, because of his clinical skills, and because he is one of a small number of psychiatrists in private practice in the western suburbs of Melbourne.

[173] I consider, as suggested by Gillard J in *Mullany*[84]*,* that 12 months suspension carries with it substantial loss, not only a substantial financial consequence, but also a very significant loss of self esteem and job satisfaction, and a devastating effect on one's standing in the community and amongst one's peers and a very adverse effect on the practitioner's practice, when it is able

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[83] [2006] VCAT 1920
[84] Unreported, Supreme Court of Victoria, 22 December 1997

to be resumed. Those consequences should deter other medical practitioners from following Dr Honey's example. They should also be sufficient to indicate to the community that the Board will not tolerate medical practitioners entering into sexual relationships with patients or former patients.

[174] I consider that the necessary deterrent effect for other practitioners, and the upholding of the standards of the profession, and the maintaining of public confidence in the profession would be adequately addressed by reprimanding Dr Honey under section 45A(2)(c) of the Act, and by suspending his registration for 12 months under section 45A(2)(g) of the Act. I consider that a suspension period of 12 months and a reprimand would be adequate to deter other practitioners from similar conduct, and to adequately emphasise to the profession and to the public the seriousness and unacceptable nature of his conduct.

Dr J M Flynn
Chair

6 October 2006