IN THE INDEPENDENT
LEGAL SERVICES COMMISSION

No. 013 of 2015

BETWEEN:

A SOLICITOR

Applicant

AND:

CHIEF REGISTRAR

Respondent

Coram: Dr. T.V. Hickie, Commissioner

Applicant: In Person (15th February 2017; 12th April 2017)
Counsel for the Respondent: Ms V. Prasad (15th February 2017);
Mr T. Kilakila (11th and 12th April 2017)

Dates of Hearing: 15th February, 11th and 12th April 2017

Date of Judgment: 18th April 2017

JUDGMENT

1. Introduction

[1] In a previous life as a judge of the High Court of Fiji and ex-officio Justice of the Court of Appeal, I was fortunate to deal with some unusual but interesting cases. When I was first appointed as the third Legal Services Commissioner for Fiji, I only vaguely foresaw a similar interesting caseload. I certainly did not see that I might be having to delve into such legal "wisdoms" (or should that be "mysteries") that have tested many a judge, practitioner and law student alike, on topics as diverse as duplicity (which I have previously had to confront) and now *functus officio*. I have done my best to assist the parties in the present matter. I realise at the outset that, for some, this might be a long judgment to read. I make no apologies. To do the task properly, and deal with each of the issues raised, has required lengthy consideration. If either, or both, of the parties believe that I am in error, there is, at least, now some "meat on the bone" so to speak, to form the basis of seeking the assistance of the Court of Appeal.

[2] In that regard, I recall the words of Sir Frank Kitto, a former justice of the High Court of Australia, in a paper first presented in 1973 to a Convention of Judges (then reprinted in 1992 in the *Australian Law Journal* and then published again in 2003 by the Judicial Commission of New South Wales) in what has been described as *'a standard reference work for judicial officers seeking guidance on judgment writing'*:

> *'**In a case where there is law to be decided** ... Not a few ... seem to have considered that where all parties are represented by counsel **the court is justified in relying upon counsel to draw attention to all the authorities** ... and that accordingly the Judge is not called upon to do independent research of his own. This is a view that encourages the delivery of judgments off the cuff. I hope you will join me in stoutly rejecting it, for **it implies a limited conception of the Judge's function as being to decide between competing arguments. That may be true of a judge of a debating society — there is no lack of even-handedness about it — but it is, I suggest, untrue of a Judge in a court of law.** He is the trusted representative of a society whose chosen way of life is the way of the law, in the sense that the society depends for its cohesion upon the cement of the law so that any erosion of the law tends to social disintegration and the loss of that liberty for which law is essential. **It follows that a controversy before a court is not a competition in debate, or any sort of game, but is society's method of applying its law.** The Judge's responsibility, therefore, is not to be defined as a duty to decide fairly, but as a duty to decide correctly if he can. Sometimes there is no difference ... The whole is to do justice according to law, that is to say according to the best understanding of the law that he can bring to the decision of the case. Nothing must stand in the way of that: not a desire to get on with the next case (does that sound familiar?), and certainly not a desire for some well-earned leisure. It is always possible that helpful authorities or other aids to decision have been missed in the argument through accident, laziness or inefficient research; and the experience of all of us, I imagine, confirms that in very many cases the possibility is not only theoretical. Its existence is enough to impose an imperative obligation on the Judge to do all he can to guard against it, even if that means that he must plod once more his weary way through the digests and their supplements, including the lists of cases judicially considered, and sometimes the law periodicals, English, American, Australian ... where does it end? **It is indeed a weary way — until he makes a find, and then he has his reward.**'* [My emphasis]
>
> (Sir Frank Kitto, 'Why Write Judgments', in Ruth Sheard (ed.), *A Matter of Judgment: Judicial decision-making and judgment writing*, Judicial Commission of New South Wales, Sydney, 2003, pp.69-80, at pp. 80 and 74-75; online, <https://www.judcom.nsw.gov.au/wp-content/uploads/2016/07/education-monograph-2.pdf>.)

2. The Issue

[3] This is a Ruling to clarify whether I, as the present Commissioner of the Independent Legal Services Commission, can and should make various Orders restricting publication and access to a judgment of the previous Commissioner, Justice P.K. Madigan.

[4] The reason that the Applicant legal practitioner is seeking a Ruling from me is due to the fact that the judgment (in which the legal practitioner is named) also includes a reference to a medical condition from which the legal practitioner has been suffering.

[5] The request for a Ruling has come back before the Commission after a previous attempt by me in June 2016 to refer (with the consent of the parties) eight questions of law as a case stated to the Court of Appeal arising from the initial judgment of Justice Madigan. That request was declined. The unanimous view of the Justices of the Court of Appeal was that they had no jurisdiction to receive a case stated from the Commission. Indeed, the first of the questions that I had asked of the Court of Appeal was as follows:

> ***'Question 1:*** *Can the Legal Services Commissioner reserve for consideration of the Court of Appeal, on a case stated by the Commissioner, any question of law which may arise from a judgment following a hearing of an application before the Commission?'*

[6] After reviewing the *Court of Appeal Act* Cap 12, Almeida Guneratne JA (with whom Calanchini, P and Basnayake JA agreed) concluded in a judgment of 29th November 2016 at [11]:

> *'Section 15 of the Court of Appeal Act does not confer jurisdiction on this Court to entertain a reference made by the Commissioner appointed under the Decree for determination as a case stated.'*

3. Background

(1) The original Application and judgment

[7] The original Application in this matter was filed with the Commission by the Chief Registrar on 27th October 2015. It was first called in the Commission on 3rd November 2015, before the previous Commissioner,

Justice P.K. Madigan. It was alleged that the legal practitioner (who was the Respondent to that application) *'failed to provide the Chief Registrar with a sufficient and satisfactory explanation in writing of matters contained in a complaint'* as required by a notice sent by the Chief Registrar dated 2nd September 2015. Further, the legal practitioner *'thereafter failed to respond to a subsequent reminder notice dated 29th September 2015 issued by the Chief Registrar pursuant to section 108(1) of the Legal Practitioners Decree 2009, which is a breach of section 108(2)* of the *Legal Practitioners Decree 2009 and is an act of professional misconduct'* pursuant to section 82(1)(a) of the *Legal Practitioners Decree 2009.*

[8] During the first (and only) appearance in the matter before the previous Commissioner on 3rd November 2015, the legal practitioner entered a plea of guilty. The parties were then ordered to file written submissions by 13th November 2015 and judgment was to be on notice. It was also stated in the Commissioner's notes: *'She made a response out of time – she said she unwell but no certificate attached.'*

[9] On or about 23rd November 2015, Justice Madigan advised the Secretary of the Commission that a judgment would be available from 25th November 2015 and requested for the Secretary to advise the parties accordingly. The Secretary complied with this request by sending an email to the parties on Monday, 23rd November 2015, as follows:

> *'**Subject**: Penalty Judgment ILSC Case #0013/2015*
>
> *Please note that the Penalty Judgment in the above matter will be ready for delivery as follows:*
>
> *Date:* *25th November 2015*
> *Time:* *10.30am*
> *Place:* *ILSC – Level 5 Civic Tower*
>
> *Mode of Delivery:* *Parties please advise the secretary before date of delivery your preferred mode e.g[.] faxed, emailed, or posted copy or will one of your representative[s] collect the same from our office personally on date of delivery.'*

[10] The legal practitioner replied to the Secretary on the same date to *'kindly email me the judgment once delivered'*. **Thus the parties did not appear in the Commission's hearing room before the Commissioner to take judgment and hear it pronounced or at least to have a copy of the judgment handed down to them in his presence.**

[11] When the judgment was released to the parties on 25th November 2015, paragraph [5] contained the following statement:

> *'In ... mitigation the practitioner tells me that* ***within the period in which [the practitioner] was given to respond [the practitioner] was (and still is) suffering from a very debilitating ... [medical condition]*** *and medical evidence that [the practitioner] provides attests to this.'*
>
> [My emphasis in bold as well as my anonymisation of the gender of practitioner and their medical condition]

[12] Paragraph [6] of the judgment raised a possible defence that was not pursued:

> *'[The practitioner] ... had written to the Registrar in October 2015 requesting an extension of time, a request to which there appears to have been no response.'*

[13] Paragraph [9] of the judgment then set out the matters taken into account in mitigation by the previous Commissioner and the penalties that he intended to impose as follows:

> - *'[The practitioner] ... has admitted the charge at the first available opportunity;*
> - *[The practitioner] ... had asked for an extension of time, citing ... health woes.*
> - *The Commission has seen medical evidence of [The practitioner's] ... seriously debilitating condition.*
> - *[The practitioner] ... is extremely remorseful.*
>
> *The practitioner is to be* ***publicly reprimanded*** *and is to pay a fine of $1500 to the Commission. [The practitioner's] ... right to practice will not be suspended. The fine is to be paid before December 11, 2015.'*
>
> [My emphasis in bold as well as my anonymisation as to the gender of the practitioner]

[14] At paragraph [10] of the judgment, His Lordship then stated:

> *'This is a* ***most exceptional*** *case...'* [My emphasis]

[15] Section 126(1) of the *Legal Practitioners Decree 2009* states:

> *'The Commission **shall publicise** and make public **any order** made against a legal practitioner or law firm or any employee or agent of a legal practitioner or law firm in an application for disciplinary proceeding, **in any way the Commission considers appropriate**; **provided that the Commission may withhold the publication of any order if the Commission is of the view that there are exceptional circumstances which warrant against any publication.**'*
> [My emphasis]

[16] His Lordship had previously tendered his resignation as Commissioner with effect from 30th November 2015.

[17] Although Justice Madigan had made reference in paragraph [9] of his judgment (as I have set out above) that the legal practitioner 'is to be publicly reprimanded and ... is to pay a fine of $1500 ... before December 11, 2015', **no specific Orders were separately drafted and signed by him to that effect and given to the parties, or to the Chief Registrar and the Attorney-General, or filed with the High Court Civil Registry** as required by section 122 of the *Legal Practitioners Decree 2009* which states:

> *'Orders of the Commission*
> *122. —(1) The Commission **must** give a written copy of **any orders** made by the Commission in an application for disciplinary proceeding to:*
> *(a) the legal practitioner, or the partner or partners of the law firm, against whom the application for disciplinary proceedings was made;*
> *(b) the Registrar; and*
> *(c) the Attorney-General.*
> *(2) The Commission **must, within 14 days of an order being made, file the order in the High Court.***
> *(3) **Once an order made by the Commission is filed in the High Court** under subsection (2), **the order becomes an order of the High Court**, and may be enforced accordingly in accordance with the Rules of the High Court.'*
> [My emphasis]

[18] **On 2nd December 2015, two days after Justice Madigan had officially resigned his commission as from 30th November 2015, a copy of the entire judgment was filed with the High Court Civil Registry.**

[19] It is unclear as to when the sanctions of being publicly reprimanded and fined $1500.00 were first entered in the Commission's Discipline Register.

[20] On 11th December 2015, the legal practitioner paid to the Commission a sum of $1500.00 in full satisfaction of the fine referred to in paragraph [9] of the judgment.

[21] The legal practitioner did not seek to have the matter relisted in the period between 25th and 30th November 2015 before the previous Commissioner resigned, in an attempt to make an application before him for either anonymisation and/or non-publication of his judgment. Further, once the previous Commissioner was *functus officio* (as from 30th November 2015), the legal practitioner did not file an appeal with the Court of Appeal seeking orders for anonymisation and/or non-publication of the judgment. Instead, it is agreed between the parties that the legal practitioner met with the Chief Registrar. I have not been provided with the actual date of that meeting. It would appear, however, that it may have been sometime in February 2016, following distribution of copies of the judgment to approximately 50 practitioners who were attending a continuing legal education ("CLE") workshop held in Suva on 3rd and 4th February 2016.

[22] According to an email dated 9th June 2016 sent from Counsel for the Chief Registrar to the Commission (a copy of which was also sent to the legal practitioner) the circumstances of the meeting between the Chief Registrar and the legal practitioner were as follows:

> ***'The Chief Registrar agrees that he had a meeting with the Respondent after the Judgment was issued.*** *The Respondent raised the issue of name suppression and the medical condition being mentioned in the Judgment. The Chief Registrar had advised the Respondent to write to our office regarding the above. We have not received anything from the Respondent regarding the same.*
>
> *As per the Chief Registrar's instructions we submit that our position remains the same.* ***The Respondent had ample time to make the application for name suppression before the Judgment***

was delivered. Since all the judicial functions has [sic] completed in this matter the Commission has now become functus officio.'
[My emphasis]

[23] Apart from it being unclear as to the date when this meeting occurred, it is also unclear as to what possibilities at rectification, if any, were discussed between the Chief Registrar and the legal practitioner. It is further unclear whether the Chief Registrar could have done anything concerning *'the issue of name suppression and the medical condition being mentioned in the Judgment'* other than, perhaps, agreeing to the filing of some Consent Orders between the parties as to non-publication.

(2) An attempt to obtain Consent Orders

[24] I was appointed as the new Commissioner from 22nd January 2016 and was sworn-in on 9th February 2016. One of my priorities over the past 12 months has been to ensure that copies of *'any orders made by the Commission in an application for disciplinary proceeding[s]'* since it began in 2009 have been lodged with the High Court Civil Registry (together with copies of judgments), as well as ensuring that sanctions imposed have been entered in the Commission's Discipline Register. In addition, I have also endeavoured to have copies of such judgments lodged with the High Court Library as well as soft copies of the judgments published on the internet via the website of the Pacific Islands Legal Information Institute (more commonly known by its abbreviated title of "PacLII") operated by the University of the South Pacific.

[25] It should be emphasised that PacLII is not an official publication of the Legal Services Commission. In my understanding, it is also not an official publication of the Judiciary Department of Fiji. It does, however, play an important role in disseminating information (including judgments) both within Fiji and the South Pacific, as the following excerpt from its website explains:

> ***'PacLII - Who and What are We?***
> *PacLII stands for the Pacific Islands Legal Information Institute. It is an initiative of the University of the South Pacific School of Law with assistance from AustLII. PacLII is a signatory to the Montreal Declaration on Public Access to Law and participates in the Free Access to Law movement, (FALM) a grouping of a number of world*

wide organizations committed to publishing and providing access to the law for free. PacLII is based at the Emalus Campus of the USP in Port Vila, Vanuatu.
USP School of Law is based in Port Vila and has students located across 12 countries of the Pacific who do not have easy access to the legal materials from across the region which they need to undertake their studies. PacLII was started by the School of Law as a means to overcoming the tyrannies of distance. It has grown to become a service to governments, legal professionals, NGOs, students, academics and members of the public and has been widely recognized as an example of excellence in promoting access to legal information.
...
A work in progress:
Users should be aware that PacLII databases may not be regarded as complete. The processes of collecting materials are ongoing and reliance is currently placed on individual law agencies forwarding materials to PacLII for online publication. If material you are looking for does not appear on the website you should either contact the staff at PacLII through the feedback page and they will endeavour to track the document you are looking for or contact the relevant law agency within the country in question.'
[Underlining my emphasis]

(See PacLII >> About PacLII: <http://www.PacLII.org/PacLII/index.html>)

[26] Further, PacLII is apparently undergoing some form of restructuring as the following statement on its website explains:

'Who and How:
Funding for PacLII:

In June 2016 PacLII's funding agreement with the Australian Government expired. Whilst we are hoping to be able to extend this partnership, funding is not yet determined. PacLII is also restructuring to become an Institute of the University of the South Pacific.

As part of the restructuring process staffing has been reduced ...

Please be assured that PacLII is continuing to operate and upload new legal material as it becomes available to us.

We will keep users and supporters of PacLII updated as to progress with funding initiatives we are undertaking and funding that we secure.'
[Underlining my emphasis]

(See PacLII >> About PacLII: <http://www.PacLII.org/PacLII/sponsors/>)

[27] I first became aware of the previous Commissioner's judgment of 25th November 2015 in relation to this matter, when, during the hearing of another matter, Counsel who was appearing for the Chief Registrar, cited this case, including mentioning both the practitioner's name and the practitioner's medical condition. I was, however, not provided with a copy of the judgment at that time.

[28] Thereafter, I had the Secretary of the Commission locate a copy of the judgment from the Commission's file so as to allow me to read the judgment to check not only how relevant the judgment was to the case that was then before me, but also to clarify what was in fact written in the judgment and whether a copy of the judgment had been sent to PacLII for loading onto the internet. I noted (as I have set out above) that the judgment stated at paragraph [5] that the Respondent *'was (and still is) suffering from a very debilitating [medical condition]'*. I further noted, however, as follows:

(1) The judgment had not, as yet, been published on PacLII (as, presumably, it had not been sent to them, as had been the case with many other judgments from the Commission since the Commission was established in 2009);

(2) Despite paragraph [9] of the judgment stating what were to be the penalties, such penalties were not pronounced as formal Orders at the end of the judgment;

(3) There were no copies of any Orders in the Commission's file and, according to the Secretary of the Commission, all that the Secretary received from the previous Commissioner was a typed judgment with the direction that the judgment was to be released to the parties on 25th November 2015;

(4) The High Court Registry stamp on the back sheet of the judgment on the Commission's file, confirms that the judgment in its entirety, rather than any specific Orders, were filed with the High Court Registry on 2nd December 2015.

[29] After I became aware of the above, I had the Secretary of the Commission write to the parties on 24th May 2016, initially suggesting that perhaps consideration should be given to some form of anonymising the statement in paragraph [5] of the judgment and referred the parties to section 121(5) of the *Legal Practitioners Decree 2009* which states:

> *'**The Commission may, with the consent of the Registrar and the legal practitioner** or the partner or partners of a law firm, **make any orders by consent, either before or after the hearing in the Commission.** Any order by consent shall have the same effect and force as an order of the Commission under this Decree.' [My emphasis]*

[30] The parties were advised that I intended to relist the matter during the June 2016 Sittings of the Commission so that I could hear from them and, hopefully, formal Orders could be made by consent pursuant to s.121(5).

[31] The following day, I arranged for a second letter to be sent by the Secretary of the Commission to the parties to advise that, having considered the matter further, it might be arguable that the Commission was *functus officio* in so far as the details in the specific judgment is concerned, that the slip rule would not apply and, therefore, it may well be that the judgment will just need to be published by the Commission anonymising the name of the practitioner pursuant to section 126(1) of the *Legal Practitioners Decree 2009*.

[32] When the parties appeared before me on 6th June 2016, they advised as follows:

(1) The parties were in agreement that the previous Commissioner was *functus officio* in so far as the handing down of the judgment in this matter is concerned;

(2) Counsel for the Chief Registrar submitted, perhaps, the slip rule could be invoked, however, she also noted that any attempt at anonymising or suppressing the name of the (practitioner pursuant to section 126(1) of the *Legal Practitioners Decree 2009*) would be in conflict with paragraph [9] of the judgment which includes the statement that: 'The practitioner is to be **publicly reprimanded**'; [My emphasis]

(3) The legal practitioner submitted that they had already been publicly humiliated, as soon after the release of the judgment there had been a continuing legal education seminar (that I have previously referred to above) at which a large number of legal practitioners attended and a copy of the judgment had been distributed. According to the legal practitioner, they then had to deal other legal practitioners asking of them some highly embarrassing and awkward questions in relation to the legal practitioner's health and whether their condition would affect the legal practitioner's ability to have children. The legal practitioner submitted that being a young person who had hopes of getting married and having a family within their ethnic and religious community, the publication of their name and medical condition had been particularly devastating.

(4) The parties agreed that they would attempt to arrange a meeting with the Chief Registrar to clarify his view and, accordingly, the matter was adjourned for mention before me on 10th June 2016.

[33] On 9th June 2016, however, a day before the matter was to be relisted for mention, an email (cited at paragraph [19] above) was sent from Counsel for the Applicant to the Commission outlining the Chief Registrar's position that *'the Respondent had ample time to make the application for name suppression before the Judgment was delivered'* and that *'since all the judicial functions'* had been completed *'the Commission has now become functus officio.'*

(3) Referral as case stated to the Court of Appeal

[34] When the parties appeared before me on 10th June 2016, I explained that, as there was no agreement as to what could be done, I was going to refer the matter to the Court of Appeal as a stated case. On that occasion, it was the legal practitioner who raised 'the slip rule' and suggested that might be a way of dealing with the matter. I confirmed that it was my view that the slip rule did not apply and, as there was disagreement as to whether the Commission had any power to now anonymise the judgment, I would be referring the matter as a case stated to the Court of Appeal to seek its guidance. The legal practitioner requested that I include as one of the questions to ask of the Court of Appeal for it to clarify as to what is

the meaning of the statement that '*The practitioner is to be publicly reprimanded*' as there is no such definition of the sanction in the *Legal Practitioners Decree 2009*. The legal practitioner then concluded by asking rhetorically had they not already been publicly humiliated?

[35] The parties were then invited to file written submissions. I explained that once they had been received that I would relist the matter to provide the parties with a copy of my proposed draft request to the Court of Appeal, as well as to note any objections either or both of them had as to what I had written, following which, I would then forward that document, together with the parties' respective written submissions, to the Court of Appeal for its consideration.

[36] I noted, for the legal practitioner's benefit, that as resolution of this issue was pending, I had not cited their case by name or gender in the judgment for another matter (that I had just delivered on 7th June 2016). Instead, I had simply cited the judgment as '*Case No.013.2015*' and the facts being where the practitioner suffered a medical condition.

[37] I then completed a document referring the matter to the Court of Appeal as a case stated taking into account the submissions made by the parties. I also attached the respective written submissions of the parties filed with the Commission.

[38] On 29th November 2016, as noted above, the Court of Appeal, declined my request to seek their guidance in this matter as a case stated.

(4) Relisting before the Commission

[39] In view of the judgment of the Court of Appeal, I then had the matter relisted before me on 7th December 2016, when various Orders were made for the filing of a filing application by the legal practitioner together with the filing of written submissions by the parties and the matter was set down for a hearing before on 15th February 2017. At the hearing, the parties were given the opportunity to speak to their submissions as well as to respond to questions from me so as to clarify their respective positions. The parties were then advised that judgment would be on notice.

[40] As I considered my judgment, however, I noted that the parties had not had the opportunity to address me on the fact that to be 'publicly reprimanded' is not the sanction that can be imposed by the Commission upon a legal practitioner pursuant to section 121(1) of the *Legal Practitioners Decree 2009* but simply a 'reprimand'. Therefore, I had the Acting Secretary contact each of the parties in the week prior to the April 2017 Sittings by email to advise them that the matter was to be relisted during the Sittings to allow each of them to address me on the issue. In addition, I had the Acting Secretary make each party aware that I would also like them to address me on the fact that if each party has submitted that the Commission is *functus*, then how can the current Commissioner make any Orders withholding publication and distribution of the judgment to PacLII or generally? Alternatively, due to the way original judgment was delivered in this matter, such that it was not relisted before the previous Commissioner for the parties to be present and take judgment and, if necessary, seek a Ruling from him on non-publication, can the current Commissioner make any Orders withholding publication including distribution of the judgment?

[41] When the matter was called on 11th April 2017, there was no appearance by the Applicant who relayed a message via Counsel for the Chief Registrar that they were unaware of the relisting, they had been ill and sought an adjournment. Counsel for the Respondent indicated to the Commission that he opposed that request. I agreed with the objection and made an ex tempore ruling that the matter would proceed. I have subsequently written a separate ex tempore judgment containing my reasons for that Ruling as well why a subsequent Order was made for wasted costs prior to my being prepared to relist the matter the following day to hear from the Applicant.

[42] Thus, in the absence of the Applicant legal practitioner, I allowed Counsel for the Respondent Chief Registrar to make supplementary submissions to me on 11th April 2017, to clarify their position on the issues of 'publicly reprimanded' and *functus officio*.

[43] The following day, after the Applicant legal practitioner sought to file a Notice of Motion so as to be heard in the matter, it was relisted at 2.00 pm that afternoon conditional upon the Applicant legal practitioner, undertaking to pay the reasonable wasted costs of both the Respondent Chief Registrar as well as those of the Commission. The Applicant legal practitioner then addressed me on the two issues and Counsel for the Respondent Chief Registrar responded. I have taken those further oral submissions into account when considering my judgment. This then is my judgment.

4. Clarification of issues

(1) Orders sought

[44] The Summons filed by the Applicant legal practitioner with the Commission on 10th February 2017, seeks the following Orders:

> *'(i)* ***That the publication of the Penalty Judgment*** *of Justice P. Madigan dated 25th November, 2015* ***in any form, mode and place be withheld and*** *the said Judgment* ***for the purposes of citation be anonymized*** *in the following manner:*
> *(a) Name of Applicant and the Client ... to be anonymized;*
> *(b) Gender to be pluralized (the term "they" to be substituted) and*
> *(c) The medical condition of the Applicant as stated in the said*
> *Judgment to be ... substituted with the words "serious medical condition".*
>
> *(ii)* ***That the Respondent*** *either through itself and/or through its servants and/or its agents or through whosever* ***be restrained from distributing and/or publishing the Penalty Judgment*** *of Justice P. Madigan dated the 25th November, 2015 in any from or manner whatsoever.*
>
> *(iii)* ***That the Commission*** *or any of its employer [sic] or consultant and/or Respondent either through itself and/or through its servants and/or agents or through whosoever* ***be restrained from disclosing and/or discussing*** *to whosoever either directly or indirectly the medical condition of the Applicant.*
>
> *(iv) Any other Order(s) that the Honourable Commissioner deems just and expedient in the circumstances.'*
> [My emphasis]

[45] In their written submissions also dated 10th February 2017, I note that the Applicant legal practitioner at paragraph 2.6 has collapsed the above into two questions:

[2] In that regard, I recall the words of Sir Frank Kitto, a former justice of the High Court of Australia, in a paper first presented in 1973 to a Convention of Judges (then reprinted in 1992 in the *Australian Law Journal* and then published again in 2003 by the Judicial Commission of New South Wales) in what has been described as *'a standard reference work for judicial officers seeking guidance on judgment writing'*:

> *'**In a case where there is law to be decided** ... Not a few ... seem to have considered that where all parties are represented by counsel **the court is justified in relying upon counsel to draw attention to all the authorities** ... and that accordingly the Judge is not called upon to do independent research of his own. This is a view that encourages the delivery of judgments off the cuff. I hope you will join me in stoutly rejecting it, for **it implies a limited conception of the Judge's function as being to decide between competing arguments. That may be true of a judge of a debating society — there is no lack of even-handedness about it — but it is, I suggest, untrue of a Judge in a court of law.** He is the trusted representative of a society whose chosen way of life is the way of the law, in the sense that the society depends for its cohesion upon the cement of the law so that any erosion of the law tends to social disintegration and the loss of that liberty for which law is essential. **It follows that a controversy before a court is not a competition in debate, or any sort of game, but is society's method of applying its law.** The Judge's responsibility, therefore, is not to be defined as a duty to decide fairly, but as a duty to decide correctly if he can. Sometimes there is no difference ... The whole is to do justice according to law, that is to say according to the best understanding of the law that he can bring to the decision of the case. Nothing must stand in the way of that: not a desire to get on with the next case (does that sound familiar?), and certainly not a desire for some well-earned leisure. It is always possible that helpful authorities or other aids to decision have been missed in the argument through accident, laziness or inefficient research; and the experience of all of us, I imagine, confirms that in very many cases the possibility is not only theoretical. Its existence is enough to impose an imperative obligation on the Judge to do all he can to guard against it, even if that means that he must plod once more his weary way through the digests and their supplements, including the lists of cases judicially considered, and sometimes the law periodicals, English, American, Australian ... where does it end? **It is indeed a weary way — until he makes a find, and then he has his reward.**'* [My emphasis]
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2. The Issue

[3] This is a Ruling to clarify whether I, as the present Commissioner of the Independent Legal Services Commission, can and should make various Orders restricting publication and access to a judgment of the previous Commissioner, Justice P.K. Madigan.

[4] The reason that the Applicant legal practitioner is seeking a Ruling from me is due to the fact that the judgment (in which the legal practitioner is named) also includes a reference to a medical condition from which the legal practitioner has been suffering.

[5] The request for a Ruling has come back before the Commission after a previous attempt by me in June 2016 to refer (with the consent of the parties) eight questions of law as a case stated to the Court of Appeal arising from the initial judgment of Justice Madigan. That request was declined. The unanimous view of the Justices of the Court of Appeal was that they had no jurisdiction to receive a case stated from the Commission. Indeed, the first of the questions that I had asked of the Court of Appeal was as follows:

> ***'Question 1:*** *Can the Legal Services Commissioner reserve for consideration of the Court of Appeal, on a case stated by the Commissioner, any question of law which may arise from a judgment following a hearing of an application before the Commission?'*

[6] After reviewing the *Court of Appeal Act* Cap 12, Almeida Guneratne JA (with whom Calanchini, P and Basnayake JA agreed) concluded in a judgment of 29th November 2016 at [11]:

> *'Section 15 of the Court of Appeal Act does not confer jurisdiction on this Court to entertain a reference made by the Commissioner appointed under the Decree for determination as a case stated.'*

3. Background

(1) The original Application and judgment

[7] The original Application in this matter was filed with the Commission by the Chief Registrar on 27th October 2015. It was first called in the Commission on 3rd November 2015, before the previous Commissioner,

Justice P.K. Madigan. It was alleged that the legal practitioner (who was the Respondent to that application) *'failed to provide the Chief Registrar with a sufficient and satisfactory explanation in writing of matters contained in a complaint'* as required by a notice sent by the Chief Registrar dated 2nd September 2015. Further, the legal practitioner *'thereafter failed to respond to a subsequent reminder notice dated 29th September 2015 issued by the Chief Registrar pursuant to section 108(1) of the Legal Practitioners Decree 2009, which is a breach of section 108(2)* of the *Legal Practitioners Decree 2009 and is an act of professional misconduct'* pursuant to section 82(1)(a) of the *Legal Practitioners Decree 2009.*

[8] During the first (and only) appearance in the matter before the previous Commissioner on 3rd November 2015, the legal practitioner entered a plea of guilty. The parties were then ordered to file written submissions by 13th November 2015 and judgment was to be on notice. It was also stated in the Commissioner's notes: *'She made a response out of time – she said she unwell but no certificate attached.'*

[9] On or about 23rd November 2015, Justice Madigan advised the Secretary of the Commission that a judgment would be available from 25th November 2015 and requested for the Secretary to advise the parties accordingly. The Secretary complied with this request by sending an email to the parties on Monday, 23rd November 2015, as follows:

> *'**Subject**: Penalty Judgment ILSC Case #0013/2015*
>
> *Please note that the Penalty Judgment in the above matter will be ready for delivery as follows:*
>
> *Date:* *25th November 2015*
> *Time:* *10.30am*
> *Place:* *ILSC – Level 5 Civic Tower*
>
> *Mode of Delivery:* *Parties please advise the secretary before date of delivery your preferred mode e.g[.] faxed, emailed, or posted copy or will one of your representative[s] collect the same from our office personally on date of delivery.'*

[10] The legal practitioner replied to the Secretary on the same date to *'kindly email me the judgment once delivered'*. **Thus the parties did not appear in the Commission's hearing room before the Commissioner to take judgment and hear it pronounced or at least to have a copy of the judgment handed down to them in his presence.**

[11] When the judgment was released to the parties on 25th November 2015, paragraph [5] contained the following statement:

> *'In ... mitigation the practitioner tells me that* ***within the period in which [the practitioner] was given to respond [the practitioner] was (and still is) suffering from a very debilitating ... [medical condition]*** *and medical evidence that [the practitioner] provides attests to this.'*
>
> [My emphasis in bold as well as my anonymisation of the gender of practitioner and their medical condition]

[12] Paragraph [6] of the judgment raised a possible defence that was not pursued:

> *'[The practitioner] ... had written to the Registrar in October 2015 requesting an extension of time, a request to which there appears to have been no response.'*

[13] Paragraph [9] of the judgment then set out the matters taken into account in mitigation by the previous Commissioner and the penalties that he intended to impose as follows:

> - *'[The practitioner] ... has admitted the charge at the first available opportunity;*
> - *[The practitioner] ... had asked for an extension of time, citing ... health woes.*
> - *The Commission has seen medical evidence of [The practitioner's] ... seriously debilitating condition.*
> - *[The practitioner] ... is extremely remorseful.*
>
> *The practitioner is to be* ***publicly reprimanded*** *and is to pay a fine of $1500 to the Commission. [The practitioner's] ... right to practice will not be suspended. The fine is to be paid before December 11, 2015.'*
>
> [My emphasis in bold as well as my anonymisation as to the gender of the practitioner]

[14] At paragraph [10] of the judgment, His Lordship then stated:

> *'This is a* ***most exceptional*** *case...'* [My emphasis]

[15] Section 126(1) of the *Legal Practitioners Decree 2009* states:

> *'The Commission **shall publicise** and make public **any order** made against a legal practitioner or law firm or any employee or agent of a legal practitioner or law firm in an application for disciplinary proceeding, **in any way the Commission considers appropriate**; **provided that the Commission may withhold the publication of any order if the Commission is of the view that there are exceptional circumstances which warrant against any publication.**'*
> [My emphasis]

[16] His Lordship had previously tendered his resignation as Commissioner with effect from 30th November 2015.

[17] Although Justice Madigan had made reference in paragraph [9] of his judgment (as I have set out above) that the legal practitioner 'is to be publicly reprimanded and ... is to pay a fine of $1500 ... before December 11, 2015', **no specific Orders were separately drafted and signed by him to that effect and given to the parties, or to the Chief Registrar and the Attorney-General, or filed with the High Court Civil Registry** as required by section 122 of the *Legal Practitioners Decree 2009* which states:

> *'Orders of the Commission*
> *122. —(1) The Commission **must** give a written copy of **any orders** made by the Commission in an application for disciplinary proceeding to:*
> *(a) the legal practitioner, or the partner or partners of the law firm, against whom the application for disciplinary proceedings was made;*
> *(b) the Registrar; and*
> *(c) the Attorney-General.*
> *(2) The Commission **must, within 14 days of an order being made, file the order in the High Court.***
> *(3) **Once an order made by the Commission is filed in the High Court** under subsection (2), **the order becomes an order of the High Court**, and may be enforced accordingly in accordance with the Rules of the High Court.'*
> [My emphasis]

[18] **On 2nd December 2015, two days after Justice Madigan had officially resigned his commission as from 30th November 2015, a copy of the entire judgment was filed with the High Court Civil Registry.**

[19] It is unclear as to when the sanctions of being publicly reprimanded and fined $1500.00 were first entered in the Commission's Discipline Register.

[20] On 11th December 2015, the legal practitioner paid to the Commission a sum of $1500.00 in full satisfaction of the fine referred to in paragraph [9] of the judgment.

[21] The legal practitioner did not seek to have the matter relisted in the period between 25th and 30th November 2015 before the previous Commissioner resigned, in an attempt to make an application before him for either anonymisation and/or non-publication of his judgment. Further, once the previous Commissioner was *functus officio* (as from 30th November 2015), the legal practitioner did not file an appeal with the Court of Appeal seeking orders for anonymisation and/or non-publication of the judgment. Instead, it is agreed between the parties that the legal practitioner met with the Chief Registrar. I have not been provided with the actual date of that meeting. It would appear, however, that it may have been sometime in February 2016, following distribution of copies of the judgment to approximately 50 practitioners who were attending a continuing legal education ("CLE") workshop held in Suva on 3rd and 4th February 2016.

[22] According to an email dated 9th June 2016 sent from Counsel for the Chief Registrar to the Commission (a copy of which was also sent to the legal practitioner) the circumstances of the meeting between the Chief Registrar and the legal practitioner were as follows:

> ***'The Chief Registrar agrees that he had a meeting with the Respondent after the Judgment was issued.*** *The Respondent raised the issue of name suppression and the medical condition being mentioned in the Judgment. The Chief Registrar had advised the Respondent to write to our office regarding the above. We have not received anything from the Respondent regarding the same.*
>
> *As per the Chief Registrar's instructions we submit that our position remains the same.* ***The Respondent had ample time to make the application for name suppression before the Judgment***

was delivered. Since all the judicial functions has [sic] completed in this matter the Commission has now become functus officio.'
[My emphasis]

[23] Apart from it being unclear as to the date when this meeting occurred, it is also unclear as to what possibilities at rectification, if any, were discussed between the Chief Registrar and the legal practitioner. It is further unclear whether the Chief Registrar could have done anything concerning *'the issue of name suppression and the medical condition being mentioned in the Judgment'* other than, perhaps, agreeing to the filing of some Consent Orders between the parties as to non-publication.

(2) An attempt to obtain Consent Orders

[24] I was appointed as the new Commissioner from 22nd January 2016 and was sworn-in on 9th February 2016. One of my priorities over the past 12 months has been to ensure that copies of *'any orders made by the Commission in an application for disciplinary proceeding[s]'* since it began in 2009 have been lodged with the High Court Civil Registry (together with copies of judgments), as well as ensuring that sanctions imposed have been entered in the Commission's Discipline Register. In addition, I have also endeavoured to have copies of such judgments lodged with the High Court Library as well as soft copies of the judgments published on the internet via the website of the Pacific Islands Legal Information Institute (more commonly known by its abbreviated title of "PacLII") operated by the University of the South Pacific.

[25] It should be emphasised that PacLII is not an official publication of the Legal Services Commission. In my understanding, it is also not an official publication of the Judiciary Department of Fiji. It does, however, play an important role in disseminating information (including judgments) both within Fiji and the South Pacific, as the following excerpt from its website explains:

> ***'PacLII - Who and What are We?***
> *PacLII stands for the Pacific Islands Legal Information Institute. It is an initiative of the University of the South Pacific School of Law with assistance from AustLII. PacLII is a signatory to the Montreal Declaration on Public Access to Law and participates in the Free Access to Law movement, (FALM) a grouping of a number of world*

wide organizations committed to publishing and providing access to the law for free. PacLII is based at the Emalus Campus of the USP in Port Vila, Vanuatu.
USP School of Law is based in Port Vila and has students located across 12 countries of the Pacific who do not have easy access to the legal materials from across the region which they need to undertake their studies. PacLII was started by the School of Law as a means to overcoming the tyrannies of distance. It has grown to become a service to governments, legal professionals, NGOs, students, academics and members of the public and has been widely recognized as an example of excellence in promoting access to legal information.
...
A work in progress:
Users should be aware that PacLII databases may not be regarded as complete. The processes of collecting materials are ongoing and reliance is currently placed on individual law agencies forwarding materials to PacLII for online publication. If material you are looking for does not appear on the website you should either contact the staff at PacLII through the feedback page and they will endeavour to track the document you are looking for or contact the relevant law agency within the country in question.'
[Underlining my emphasis]

(See PacLII >> About PacLII: <http://www.PacLII.org/PacLII/index.html>)

[26] Further, PacLII is apparently undergoing some form of restructuring as the following statement on its website explains:

'Who and How:
Funding for PacLII:

In June 2016 PacLII's funding agreement with the Australian Government expired. Whilst we are hoping to be able to extend this partnership, funding is not yet determined. PacLII is also restructuring to become an Institute of the University of the South Pacific.

As part of the restructuring process staffing has been reduced ...

Please be assured that PacLII is continuing to operate and upload new legal material as it becomes available to us.

We will keep users and supporters of PacLII updated as to progress with funding initiatives we are undertaking and funding that we secure.'
[Underlining my emphasis]

(See PacLII >> About PacLII: <http://www.PacLII.org/PacLII/sponsors/>)

[27] I first became aware of the previous Commissioner's judgment of 25th November 2015 in relation to this matter, when, during the hearing of another matter, Counsel who was appearing for the Chief Registrar, cited this case, including mentioning both the practitioner's name and the practitioner's medical condition. I was, however, not provided with a copy of the judgment at that time.

[28] Thereafter, I had the Secretary of the Commission locate a copy of the judgment from the Commission's file so as to allow me to read the judgment to check not only how relevant the judgment was to the case that was then before me, but also to clarify what was in fact written in the judgment and whether a copy of the judgment had been sent to PacLII for loading onto the internet. I noted (as I have set out above) that the judgment stated at paragraph [5] that the Respondent *'was (and still is) suffering from a very debilitating [medical condition]'*. I further noted, however, as follows:

(1) The judgment had not, as yet, been published on PacLII (as, presumably, it had not been sent to them, as had been the case with many other judgments from the Commission since the Commission was established in 2009);

(2) Despite paragraph [9] of the judgment stating what were to be the penalties, such penalties were not pronounced as formal Orders at the end of the judgment;

(3) There were no copies of any Orders in the Commission's file and, according to the Secretary of the Commission, all that the Secretary received from the previous Commissioner was a typed judgment with the direction that the judgment was to be released to the parties on 25th November 2015;

(4) The High Court Registry stamp on the back sheet of the judgment on the Commission's file, confirms that the judgment in its entirety, rather than any specific Orders, were filed with the High Court Registry on 2nd December 2015.

[29] After I became aware of the above, I had the Secretary of the Commission write to the parties on 24th May 2016, initially suggesting that perhaps consideration should be given to some form of anonymising the statement in paragraph [5] of the judgment and referred the parties to section 121(5) of the *Legal Practitioners Decree 2009* which states:

> *'**The Commission may, with the consent of the Registrar and the legal practitioner** or the partner or partners of a law firm, **make any orders by consent, either before or after the hearing in the Commission.** Any order by consent shall have the same effect and force as an order of the Commission under this Decree.' [My emphasis]*

[30] The parties were advised that I intended to relist the matter during the June 2016 Sittings of the Commission so that I could hear from them and, hopefully, formal Orders could be made by consent pursuant to s.121(5).

[31] The following day, I arranged for a second letter to be sent by the Secretary of the Commission to the parties to advise that, having considered the matter further, it might be arguable that the Commission was *functus officio* in so far as the details in the specific judgment is concerned, that the slip rule would not apply and, therefore, it may well be that the judgment will just need to be published by the Commission anonymising the name of the practitioner pursuant to section 126(1) of the *Legal Practitioners Decree 2009*.

[32] When the parties appeared before me on 6th June 2016, they advised as follows:

(1) The parties were in agreement that the previous Commissioner was *functus officio* in so far as the handing down of the judgment in this matter is concerned;

(2) Counsel for the Chief Registrar submitted, perhaps, the slip rule could be invoked, however, she also noted that any attempt at anonymising or suppressing the name of the (practitioner pursuant to section 126(1) of the *Legal Practitioners Decree 2009*) would be in conflict with paragraph [9] of the judgment which includes the statement that: 'The practitioner is to be **publicly reprimanded**'; [My emphasis]

(3) The legal practitioner submitted that they had already been publicly humiliated, as soon after the release of the judgment there had been a continuing legal education seminar (that I have previously referred to above) at which a large number of legal practitioners attended and a copy of the judgment had been distributed. According to the legal practitioner, they then had to deal other legal practitioners asking of them some highly embarrassing and awkward questions in relation to the legal practitioner's health and whether their condition would affect the legal practitioner's ability to have children. The legal practitioner submitted that being a young person who had hopes of getting married and having a family within their ethnic and religious community, the publication of their name and medical condition had been particularly devastating.

(4) The parties agreed that they would attempt to arrange a meeting with the Chief Registrar to clarify his view and, accordingly, the matter was adjourned for mention before me on 10th June 2016.

[33] On 9th June 2016, however, a day before the matter was to be relisted for mention, an email (cited at paragraph [19] above) was sent from Counsel for the Applicant to the Commission outlining the Chief Registrar's position that *'the Respondent had ample time to make the application for name suppression before the Judgment was delivered'* and that *'since all the judicial functions'* had been completed *'the Commission has now become functus officio.'*

(3) Referral as case stated to the Court of Appeal

[34] When the parties appeared before me on 10th June 2016, I explained that, as there was no agreement as to what could be done, I was going to refer the matter to the Court of Appeal as a stated case. On that occasion, it was the legal practitioner who raised 'the slip rule' and suggested that might be a way of dealing with the matter. I confirmed that it was my view that the slip rule did not apply and, as there was disagreement as to whether the Commission had any power to now anonymise the judgment, I would be referring the matter as a case stated to the Court of Appeal to seek its guidance. The legal practitioner requested that I include as one of the questions to ask of the Court of Appeal for it to clarify as to what is

the meaning of the statement that '*The practitioner is to be publicly reprimanded*' as there is no such definition of the sanction in the *Legal Practitioners Decree 2009*. The legal practitioner then concluded by asking rhetorically had they not already been publicly humiliated?

[35] The parties were then invited to file written submissions. I explained that once they had been received that I would relist the matter to provide the parties with a copy of my proposed draft request to the Court of Appeal, as well as to note any objections either or both of them had as to what I had written, following which, I would then forward that document, together with the parties' respective written submissions, to the Court of Appeal for its consideration.

[36] I noted, for the legal practitioner's benefit, that as resolution of this issue was pending, I had not cited their case by name or gender in the judgment for another matter (that I had just delivered on 7th June 2016). Instead, I had simply cited the judgment as '*Case No.013.2015*' and the facts being where the practitioner suffered a medical condition.

[37] I then completed a document referring the matter to the Court of Appeal as a case stated taking into account the submissions made by the parties. I also attached the respective written submissions of the parties filed with the Commission.

[38] On 29th November 2016, as noted above, the Court of Appeal, declined my request to seek their guidance in this matter as a case stated.

(4) Relisting before the Commission

[39] In view of the judgment of the Court of Appeal, I then had the matter relisted before me on 7th December 2016, when various Orders were made for the filing of a filing application by the legal practitioner together with the filing of written submissions by the parties and the matter was set down for a hearing before on 15th February 2017. At the hearing, the parties were given the opportunity to speak to their submissions as well as to respond to questions from me so as to clarify their respective positions. The parties were then advised that judgment would be on notice.

[40] As I considered my judgment, however, I noted that the parties had not had the opportunity to address me on the fact that to be 'publicly reprimanded' is not the sanction that can be imposed by the Commission upon a legal practitioner pursuant to section 121(1) of the *Legal Practitioners Decree 2009* but simply a 'reprimand'. Therefore, I had the Acting Secretary contact each of the parties in the week prior to the April 2017 Sittings by email to advise them that the matter was to be relisted during the Sittings to allow each of them to address me on the issue. In addition, I had the Acting Secretary make each party aware that I would also like them to address me on the fact that if each party has submitted that the Commission is *functus*, then how can the current Commissioner make any Orders withholding publication and distribution of the judgment to PacLII or generally? Alternatively, due to the way original judgment was delivered in this matter, such that it was not relisted before the previous Commissioner for the parties to be present and take judgment and, if necessary, seek a Ruling from him on non-publication, can the current Commissioner make any Orders withholding publication including distribution of the judgment?

[41] When the matter was called on 11th April 2017, there was no appearance by the Applicant who relayed a message via Counsel for the Chief Registrar that they were unaware of the relisting, they had been ill and sought an adjournment. Counsel for the Respondent indicated to the Commission that he opposed that request. I agreed with the objection and made an ex tempore ruling that the matter would proceed. I have subsequently written a separate ex tempore judgment containing my reasons for that Ruling as well why a subsequent Order was made for wasted costs prior to my being prepared to relist the matter the following day to hear from the Applicant.

[42] Thus, in the absence of the Applicant legal practitioner, I allowed Counsel for the Respondent Chief Registrar to make supplementary submissions to me on 11th April 2017, to clarify their position on the issues of 'publicly reprimanded' and *functus officio*.

[43] The following day, after the Applicant legal practitioner sought to file a Notice of Motion so as to be heard in the matter, it was relisted at 2.00 pm that afternoon conditional upon the Applicant legal practitioner, undertaking to pay the reasonable wasted costs of both the Respondent Chief Registrar as well as those of the Commission. The Applicant legal practitioner then addressed me on the two issues and Counsel for the Respondent Chief Registrar responded. I have taken those further oral submissions into account when considering my judgment. This then is my judgment.

4. Clarification of issues

(1) Orders sought

[44] The Summons filed by the Applicant legal practitioner with the Commission on 10th February 2017, seeks the following Orders:

> *'(i)* ***That the publication of the Penalty Judgment*** *of Justice P. Madigan dated 25th November, 2015* ***in any form, mode and place be withheld and*** *the said Judgment* ***for the purposes of citation be anonymized*** *in the following manner:*
> *(a) Name of Applicant and the Client ... to be anonymized;*
> *(b) Gender to be pluralized (the term "they" to be substituted) and*
> *(c) The medical condition of the Applicant as stated in the said*
> *Judgment to be ... substituted with the words "serious medical condition".*
>
> *(ii)* ***That the Respondent*** *either through itself and/or through its servants and/or its agents or through whosever* ***be restrained from distributing and/or publishing the Penalty Judgment*** *of Justice P. Madigan dated the 25th November, 2015 in any from or manner whatsoever.*
>
> *(iii)* ***That the Commission*** *or any of its employer [sic] or consultant and/or Respondent either through itself and/or through its servants and/or agents or through whosoever* ***be restrained from disclosing and/or discussing*** *to whosoever either directly or indirectly the medical condition of the Applicant.*
>
> *(iv) Any other Order(s) that the Honourable Commissioner deems just and expedient in the circumstances.'*
> [My emphasis]

[45] In their written submissions also dated 10th February 2017, I note that the Applicant legal practitioner at paragraph 2.6 has collapsed the above into two questions:

*'(1) **Whether the Commission has powers to withhold publication and anonymize** the Judgment for the purposes of citation in other related matters?*

*(2) **Whether the Commission has powers to restrain** itself or any of its employer [sic] or consultant and/or Respondent either through itself and/or through its servants and/or agents or through whosoever **from disclosing and/or discussing** to whosoever either directly or indirectly **the medical condition of the Applicant**?'*

[My emphasis]

[46] I also note that sections 126(1), (2) and (3) of the *Legal Practitioners Decree 2009* in relation to publication state:

'Publication of Orders

*126.—(1) **The Commission shall publicise and make public any order made against a legal practitioner** or law firm or any employee or agent of a legal practitioner or law firm in an application for disciplinary proceeding, **in any way the Commission considers appropriate; provided that the Commission may withhold the publication of any order if the Commission is of the view that there are exceptional circumstances which warrant against any publication.***

*(2) **The Commission must keep a Discipline Register of all orders made against legal practitioners** or law firms or any employee or agent of a legal practitioner or law firm. The Register must contain—*

*(a) **the full name of the legal practitioner**, or the law firm and the partner or partners of the law firm against which orders in an application for disciplinary proceedings were made;*

*(b) **the address of the legal practitioner**, or the law firm and the partner or partners of the law firm against which orders in an application for disciplinary proceedings were made;*

*(c) **the particulars of the application for disciplinary proceedings**;*

*(d) **the actual orders made against the legal practitioner**, or the law firm and the partner or partners of the law firm; and*

(e) such other particulars as prescribed by rules or regulation.

*(3) The Discipline Register may be kept in a form decided by the Commission, and **must be available for public inspection.***

...'

[My emphasis]

[47] In relation to the above, I make the following observations:

(1) The wording of section 126(1) is that the Commission '*shall publicise and make public **any order** made against a legal practitioner*'. It uses the

word 'order' and not 'order or judgment' or simply 'judgment'. There is no definition in section 2 of the *Legal Practitioners Decree 2009* as to the meaning of 'order' or 'judgment'. Further, the provision has left it to the discretion of the Commissioner '***in any way the Commission considers appropriate***' as to how the Commission 'shall publicise and make public' such order;

(2) Justice Madigan simply mentioned at paragraph 9 of his judgment that '*The practitioner is to be **publicly reprimanded** and is to pay a fine of $1500 to the Commission*'. Those sanctions have been entered in the Commission's Discipline Register. As I have noted above, it is unclear, however, when that occurred. I am unaware of any attempt to publicise the judgment other than it being distributed in a CLE on 'Ethics & Etiquette' held in Suva on 3rd-4th February 2016 (at which the parties have agreed that just under 50 legal practitioners attended);

(3) Section 126(1) states that the Commission '*may withhold the publication of any order if the Commission is of the view that there are exceptional circumstances*'. Apart from the section referring to 'order' and not 'judgment', it recognises that the discretion is within the Commission to withhold publication of any order;

(4) Section 126(2) requires that '*The Commission **must** keep a Discipline Register of **all orders** made against legal practitioners*'. Further, the section then lists what the actual details of '*The Register **must** contain*' including '*(a) **the full name of the legal practitioner***' and '*(d) **the actual orders made against the legal practitioner***'. It does NOT require specific details of the reasons for judgment to be maintained in the Register;

(5) Section 126(3) gives the Commission the discretion as to the form in how the *Discipline Register* is to be kept but also states that it '***must be available for public inspection***'.

[48] At the hearing on 15th February 2017, I had the Applicant legal practitioner clarify for me her position in relation to the following three issues:

(1) **Whether I have the power to withhold publication on Paclli of the judgment by Justice Madigan** made in this matter on 25th November 2015, **and, if so, why I should, or should not, do so**?

(2) **Whether the Applicant legal practitioner's name could still appear in the Discipline Register and thus a suppression order was not needed as such specific details as a practitioner's medical condition are not is what required to be kept in the Discipline Register** pursuant to section 126(2) of the *Legal Practitioners Decree 2009*?

(3) **Whether by the Commission making an Order restricting access without leave of the Commission to the Commission's file regarding the Applicant legal practitioner would also assist in allaying the Applicant legal practitioner's concerns (as to it being in the public domain details as to her medical condition)**?

[49] In summary, the Applicant legal practitioner responded as follows:

(1) As the present Commissioner, I did have the power pursuant to section 126(1) of the *Legal Practitioners Decree 2009* to withhold publication of a judgment on PacIli **'if the Commission is of the view that there are exceptional circumstances which warrant against any publication'.** The Applicant legal practitioner **was opposed to having the judgment in their matter submitted to PacLII for publication on its website because there was no public interest in having their medical condition so publicly broadcasted**;

(2) The Applicant legal practitioner agreed that their name should still appear in the Discipline Register and did not object to that taking place noting the particulars as to what was required to be kept in the Discipline Register pursuant to section 126(2) of the *Legal Practitioners Decree 2009;*

(3) The Applicant legal practitioner agreed with my proposal that an Order restricting access to the Commission's file without leave of the Commission would also assist.

[50] Counsel for the Chief Registrar submitted in response that:

(1) She agreed that it was a matter for me to decide whether the judgment is published on the PacLII website. She was opposed, however, to the withholding of the publication of the judgment on PacIli as it is in *'the public interest because the matter should be transparent to the public'.* Also, *'if this application is allowed there would be [a] "floodgates" of*

similar applications before this Commission' from other practitioners not wanting their names published;

(2) She agreed that the legal practitioner's name should appear in the Discipline Register;

(3) She agreed that there should be an Order restricting access to the Commission's file without leave of the Commission.

[51] Thus, there was agreement between the parties on two of the three main issues, that is, the legal practitioner's name should appear in the Discipline Register, and that there should also be an Order restricting access to the Commission's file without leave of the Commission.

(2) An anonymised judgment

[52] The position taken by Counsel for the Chief Registrar in relation to anonymising the judgment was (as I understood her oral submissions on 15th February 2017) that:

(1) I have no power to anonymise the judgment;

(2) The onus had been on the legal practitioner to ask the previous Commissioner to consider before writing his judgment as to whether he would agree to anonymising it, even though, as Counsel for the Chief Registrar conceded in her oral submissions '***I mean neither of the parties would have foreseen what the Commissioner was going to do.***'

[53] Perhaps the previous Commissioner felt that by speaking somewhat generally as to the legal practitioner's type of medical condition (without going into very specific details) that he had somewhat anonymised specific reference to the medical condition. As he resigned his position with effect from 30th November 2015, we will never know.

(3) Non-publication – the test for suppression

[54] In support of her submission against non-publication, Counsel for the Chief Registrar cited in her written submissions dated 14th February 2017 (at paragraph [26]), the judgment of Madigan J in ***State v Singh*** (Unreported, High Court of Fiji, Revisional Jurisdiction, Criminal Review Case, No.HAR005 of 2009, 27 August 2009). (See Paclli: [2009] FJHC 177, <http://www.PacLII.org/fj/cases/FJHC/2009/177.html>.

[55] In *Singh*, His Lordship had cited at paragraph [7] **the test for suppression** set out by the House of Lords in ***Attorney-General v Leveller Magazine Ltd*** [1979] AC 440. He further noted at [8] that:

> *'This decision of the House was followed in Fiji in State v Josefa Nata HAA47/94, in which Kepa J'* said:
>
> ...
>
> *The test is that the order is necessary:-*
> *(1) For the due administration of justice; or*
> *(2) In order to serve the ends of justice'*

[56] In *Nata*, Kepa J was hearing an appeal to the High Court from a suppression order previously granted by a magistrate. Although Kepa J found that the magistrate had the power to grant such an order, he refused to grant the continuation of it. The State, however, still appealed to the Court of Appeal posing the question *'whether the Magistrates' Court in Fiji has jurisdiction to make a "Suppression Order"'?* As the judgment of the Court of Appeal noted (at pages 64 G-65 A):

> *'The Respondent pleaded guilty in the Magistrates' Court at Suva of assaulting the complainant causing her actual bodily harm ... he was discharged without conviction ... subject to conditions that he pay $50.00 costs and that he not re-offend within 12 months. The learned Magistrate added: "I will in the interests of justice grant name suppression only and for public policy reasons." This was in response to counsel's request for suppression of publication of his client's name and the details of the case,* ***to which the prosecutor raised no objection.***
>
> *The State appealed to the High Court against these orders on the grounds that the sentence was manifestly lenient and that there was no provision in law for making a suppression order.* ***Kepa J*** *refused to interfere with the conditional order discharging the accused. He* ***concluded****, however,* ***that while the Magistrates' Court had an inherent jurisdiction to order name suppression, it was not warranted in this case because it was not necessary for the due administration of justice****; accordingly he quashed the order.'*
> [My emphasis]
>
> (See ***State v Nata*** **[1996] 42 FLR 64** (Tikaram P, Casey, Thompson JJA) at page 64 F; PacLII: [1996] FJLawRp 9, <http://www.PacLII.org/fj/cases/FJLawRp/1996/9.html>).

[57] On the issue in relation to the granting of a suppression order, the Court of Appeal said at page 69 C:

'This is a stringent test: ***the inherent jurisdiction is not one to be exercised to spare the feelings of individual parties*** *or witnesses, or for business* ***or other reasons personal to them.***'
[My emphasis]

[58] I have also noted that both *Singh* and *Nata*, however, were criminal matters and, arguably, different to disciplinary proceedings before the Commission which are, principally, for the protection of the public.

[59] In my written request of June 2016 when I referred the present matter as a case stated to the Court of Appeal, I drew the Court's attention to ***Prothonotary of the Supreme Court of NSW v P*** [2003] NSWCA 320 (18 September 2003) (Austlii: <http://www.austlii.edu.au/au/cases/nsw/NSWCA/2003/320.html>), as an example where, in a disciplinary matter, the Court of Appeal in the Supreme Court of New South Wales had anonymised a practitioner's name. As an excerpt from the summary of that case on Austlii notes:

> *'****A solicitor pleaded guilty to importing a trafficable quantity of cocaine and served a sentence of imprisonment.*** *The Prothonotary of the Supreme Court of NSW applied to have her removed from the Roll of Legal Practitioners on the grounds that her conviction constituted professional misconduct within the meaning of s 127(1)(b) of the Legal Profession Act and that she was not a fit and proper person to remain on the Roll of Legal Practitioners.* ***The Court found that the solicitor had been drug free for almost five years and that the factual matrix of the case was such that the solicitor was not a risk to the public.***'
> [My emphasis]

Interestingly in ***P***, the NSW Court of Appeal had no problem in anonymising its judgment with Justice Young simply stating at the beginning of his judgment (which appears to have been of his own volition and with whom Meagher JA and Tobias JA agreed) that: ***'I think we should entitle this the Prothonotary v P.'*** [My emphasis]

[60] I do note, however, that the legal profession in Fiji is far smaller than in New South Wales and referring to a practitioner by the first initial of their surname may still identify them, hence, the use by me when citing the present case to date has been to simply refer to it by its case number, that is, *Case No.013.2015.*

(4) The effect of the judgment having not been perfected by the taking out of formal orders – Is the Commission functus officio?

[61] In relation to the issue that no separate orders were set out at the end of the judgment nor later drafted, signed and sealed by Justice Madigan and filed with the High Court Registry, the Applicant legal practitioner made oral submissions on 15th February 2017 (in summary) that:

(1) *'... my judgment on penalty was never even formalised as an order. It was a judgment that was emailed to all parties. There was no pronunciation of the judgment by the Commission before the parties ... The judgment was not sealed pursuant to section 122(2)'*. My understanding was that what the legal practitioner meant by this last line (and I stand to be corrected) was that **no Orders were ever sealed pursuant to section 122(2) of the *Legal Practitioners Decree 2009***, despite that section saying that '*The Commission must, within 14 days of an order being made, file the order in the High Court'*.

(2) *'...it's very necessary for section 126 to take full effect if a judgment is made into a order. Because the publication bit [of section 126(1)] is referring to an "order", my argument is that my judgment has not been formalised as per an order pursuant to section 122(2)'*;

(3) As the Commission is *functus officio*, therefore, the current Commissioner is unable to draft formal Orders in accordance with paragraph 9 of Justice Madigan's judgment, sign them and have them filed with the High Court Civil Registry.

[62] Counsel for the Chief Registrar submitted on this issue:

(1) Even if separate orders were not made by the previous Commissioner, they are contained in paragraph 9 of his judgment of 25th November 2015;

(2) If there is a need to file separate Orders, they can be signed by the present Commissioner in accordance with the judgment that has already been delivered by the previous Commissioner.

[63] Thus, the position of Counsel for the Chief Registrar is unchanged from that of her previous position as set out in her email to the Commission of 14th June 2016, that is, '*Since all the judicial functions has [sic]*

completed in this matter the Commission has now become functus officio.'

[64] Therefore, both the Applicant legal practitioner and Counsel for the Chief Registrar are of the same view that the Commission is *functus officio* but with different outcomes (if I have understood their submissions correctly):

(1) **According to the Applicant legal practitioner the effect of the Commission now being *functus officio* is that –**

(i) no Orders can be signed by me to give effect to the judgment of Madigan J of 25th November 2015;

(ii) the judgment cannot be sent to PacLII for uploading on the internet;

(2) **Counsel for the Chief Registrar says that as *'all the judicial functions'* have been completed** the Commission is now *functus officio* such that –

(i) The judgment should be sent to PacLII for uploading on their internet website as a matter of transparency;

(ii) I can, however, still sign Orders and file them with the High Court Civil Registry to give effect to paragraph 9 of the judgment of Justice Madigan of 25th November 2015.

(5) "Preliminary observations" from the Court of Appeal

[65] Although the Court of Appeal declined to determine the reference made by the Commission as a case stated in relation to this matter, Almeida Guneratne JA made in his judgment what might be termed "some preliminary observations". I have not referred to them as obiter comments as I note that the Court unanimously declined to hear the case stated that I had referred to them. Hence, to refer to those observations as obiter comments would be, in my view, to wrongly assume that Almeida Guneratne JA was responding to my reference despite declining to hear the case stated. With that rider, I note that Almeida Guneratne JA made some preliminary observations in relation to: (1) non-publication generally; (2) withholding publication from the PacLII website in particular; and (3) the slip rule.

[66] **On the issue of withholding publication,** Almeida Guneratne JA noted at [27] that as the judgment of the previous Commissioner '*had become the subject of a legal workshop ...* ***the matter [of withholding publication] had become a fait accompli***'.

[67] Almeida Guneratne JA did note, however, at [28]-[29] in relation to PacLII:

> *'[28] Apart from all that,* ***the Respondent's argument that,*** *in terms of Section 126 (1)* ***the present Commissioner still has the power to withhold publication of the said Ruling in PacLII*** *(the official website in which case law of Fiji is published),* ***is an argument the Respondent could place before the present Commissioner and obtain a Ruling thereon.***
>
> *[29] Should such a Ruling be made by the Commissioner, either way,* ***it would be the subject of an appeal to this Court*** *and the same cannot be pre-empted by way of a case stated for determination by this Court.'*
>
> [My emphasis in bold]

[68] Apart from also stating at [37] that *'It is clear ... that the attempt on the part of the Respondent* ***to employ the "slip rule" is totally misconceived'***, Almeida Guneratne JA concluded at [38] that:

> *'...* ***I shall not say anything on the submissions made by counsel on the principle of functus officio*** *for if I were to express a view on that, I would be responding to the Commissioner's reference to this Court in regards to which this Court has no jurisdiction "to state a case".'*
>
> [My emphasis]

[69] In relation to the above, I make the following comments:

(1) **Although the issue of *general publication* of the judgment had**, in Almeida Guneratne JA's view, ***'become a fait accompli'*, this does not mean** (should I find that the Commission is not *functus*) **that I cannot now consider whether to impose a general non-publication order effective from the date of this judgment** in an attempt to "quarantine the fallout" so to speak;

(2) Clearly, **I can consider whether to '*withhold publication of the said Ruling in PacLII*'** and then either party can appeal my Ruling to the Court of Appeal;

(3) **I can also consider the issue of *functus officio* and its effect** from which either party can then also appeal my Ruling to the Court of Appeal.

(6) The law on reopening a judgment before an order is passed and entered

[70] The jurisdiction to reopen a judgment before an order is passed and entered was considered by the High Court of Australia in ***Autodesk Inc v Dyason (No 2)*** (1993) 176 CLR 300; (1993) 111 ALR 385; (Austlii: [1993] HCA 6, <http://www.austlii.edu.au/au/cases/cth/HCA/1993/6.html>), wherein Chief Justice Mason made the following remarks (CLR at; ALR at 386-387; Austlii at [2]-[3]):

> *'2. ... The exercise of the jurisdiction to reopen a judgment and to grant a rehearing* ***is not confined to circumstances in which the applicant can show that, by accident and without fault on the applicant's part, he or she has not been heard****. It is true that the jurisdiction is to be exercised with great caution ... having regard to the importance of the public interest in the finality of litigation. It is equally true, as this Court said in Wentworth v. Woollahra Municipal Council ... [(1982) 149 CLR at 684; 43 ALR at 241)], that:*
>
> > *"(g)enerally speaking, it will not be exercised* ***unless the applicant can show that by accident without fault on his part he has not been heard."***
>
> *3. But these statements* ***do not exclude*** *the exercise of jurisdiction to reopen a judgment which has apparently miscarried for other reasons,* ***at least when the orders pronounced have not been perfected by the taking out of formal orders****. So much was acknowledged by Brennan, Dawson, Toohey and Gaudron JJ. in Smith v. N.S.W. Bar Association (No.2) when their Honours said (... [1992] HCA 36; (1992) 66 ALJR 605 at 608; 108 ALR 55, at 60):*
>
> > *"if reasons for judgment have been given, the power is only exercised if there is some matter calling for review".*

[71] In ***Smith v NSW Bar Association (No.2)***, Brennan, Dawson, Toohey and Gaudron JJ said (108 ALR 55 at 60-61; Austlii at [27]-[28]):

> *'27. ...* ***It has long been the common law that a court may review, correct or alter its judgment at any time until its order has been perfected*** *... Thus, if reasons for judgment have been given, the power is only exercised if there is some matter calling for review ... And there may be more or less reluctance to exercise the power depending on whether there is an avenue of appeal ...* ***It is important that it be understood that these considerations may tend against the re-opening of a case, but they are not matters which***

***bear on the nature of the review to be undertaken once the case is re-opened**, as this case was.*
*28... **once a matter has been re-opened, the nature and extent of the review must depend on the error or omission which has led to that step being taken** ...'*

[72] The issue of reopening a judgment was considered by the Fiji Court of Appeal in ***Charan v Housing Authority*** (Unreported, Court of Appeal, Case No. ABU 15 of 1997S, 26 February 1999, Casey PJ, Lapi and Sadal JJA; PacLII: [1999] FJCA 24, <http://www.PacLII.org/fj/cases/FJCA/1999/24.html>), wherein a judgment dismissing the appeal was given on 28th August 1998 and then the appellants subsequently moved *'for orders setting aside the appeal judgment and directing that the appeal be reheard'*. As the Court of Appeal noted:

> *'This is based on the inherent jurisdiction of the Court referred to in the Australian High Court decision in Autodesk Inc. v Dyson ...*
>
> *In Charan v. Suva City Council (Civil Appeal 6/94; Judgment 12 September 1996) the Supreme Court, dealing with a similar application by the present appellants, held that a Court of **final** appeal may set aside a judgment of its own in rare and exceptional cases, citing comments by Mason C.J. at p.302 of Autodesk. In Charan v. Shah & Ors (Civil Appeal 29/94; judgment 19 May 1995) this Court accepted it had such a power before entry of any formal order on its judgment. In the present case the formal order dismissing the appeal was filed on 28 August 1998 and sealed on 31 August, the same day on which the present motion was filed. Although Mr Charan submitted that he had filed it before the order was sealed, he offered no evidence by affidavit or otherwise to confirm this, and the natural inference Mr Maharaj asked us to draw was that the order had been sealed before the motion was filed. If so, this Court had no jurisdiction to entertain it. On the Court record we conclude that on balance of probability the order dismissing the appeal had been sealed before the appellants' motion came in. Accordingly, it must be dismissed.'*
> [My emphasis underlined]

[73] A year later, in ***DJL v Central Authority*** (2000) 201 CLR 226; 170 ALR 659; Austlii: [2000] HCA 17, <http://www.austlii.edu.au/au/cases/cth/HCA/2000/17.html>, 13 April 2000), the High Court of Australia confirmed that the Full Court of the Family Court of Australia (a statutory court) **did not have the power to**

reopen its final orders after their entry, that is, after having been drawn up and signed by the Registrar of the filing registry.

[74] A helpful review of the law in this area was undertaken by Professor Margaret Allars in an article published some 16 years ago on 'Perfected Judgments and Inherently Angelical Administrative Decisions: The Powers of Courts and Administrators To Re-Open Or Reconsider Their Decisions', [2001] *AIAdminLawF* 11; (2001) 30 *Australian Institute of Administrative Law Forum* 1, pages 1-11 (Austlii: <http://www.austlii.edu.au/cgi-bin/sinodisp/au/journals/AIAdminLawF/2001/11.html?stem=0&synonyms=0&query=functus>.)

[75] According to Allars (page 2), there are certain exceptions to the general rule against reopening a judgment:

> *'The general rule is that a court has no power to set aside or vary a final judgment which has been passed and entered, because of the public interest in the finality of litigation. This has recently been re-affirmed by the High Court in DJL v Central Authority ... However* ***there are cases where exceptions have been made to the general rule****. Then there is the question of* ***a more general exception where the interests of justice or procedural fairness requires it****. When this exception is considered we need to bear in mind whether the court's judgment or order has been entered... Some of the exceptions to finality apply both where the decision is entered and where it is not entered.'*
> *[My emphasis]*

[76] In relation to the general exception, Allars explained as follows (at page 3):

> *'The leading judgment setting out the principles governing the exercise of a court's inherent jurisdiction to re-open a judgment which has not been entered, is that of Mason CJ in Autodesk Inc v Dyason (No 2). The public interest in maintaining the finality of litigation requires great caution in the court's exercise of this inherent jurisdiction.* ***Yet when the orders have not been entered judgment the jurisdiction to re-open a judgment is a wide one*** *...'*

[77] As for exceptions when a judgment or order has been entered, Allars noted (at page 5) that *'the list of exceptions is surprisingly long'* including *'****where both parties consent*** *and the rights of third parties are unaffected [then] the court may set aside a final judgment ... In obiter in DJL v*

Central Authority, the High Court affirmed this jurisdiction.' She did qualify this, however, (at page 8) explaining that ***'In practice the jurisdiction of courts to re-open decisions after entry of the order, is exercised rarely, in a much narrower class of cases than the jurisdiction prior to entry of the order.'*** [My emphasis]

[78] Allars cited in her article what she considered to be *'a thorough review of the principles'* that was undertaken by Professor Enid Campbell and published five years before Allars' article titled, 'Revocation and Variation of Administrative Decisions', [1996] *MonashULawRw* 2; (1996) 22(1) *Monash University Law Review* 30, pages 31-38 (Austlii: <http://www.austlii.edu.au/au/journals/MonashULawRw/1996/2.pdf>.)

[79] In her article Campbell explained (at page 32) the difference in attitude by the courts as to whether a judgment has or has not been 'perfected':

> '***The power of courts to set aside and vary their judgments and orders depends first on whether or not the judgment or order has been perfected.*** *The general rule is that a judgment or order can be set aside or varied at any time prior to its perfection. But, according to the High Court of Australia, this power "should be exercised with great caution". It has been said that "... [in some] cases* ***it will be a case of weighing what would otherwise be irremediable injustice against the public interest in maintaining the finality of litigation****". Circumstances which have been regarded as justifying the variation of a judgment prior to its perfection have included ...* ***a case where a party "can show that, by accident and without fault on" his or her part, "he or she has not been heard****".*
> [My emphasis]

[80] As Allars explained the conundrum in the introduction to her article (at page 1) thus:

> ***'A judgment or order is said to be perfected when it has been entered.*** *Generally a judge who recognises his or her decision is affected by a serious error may on the basis of narrowly defined principles reopen the judgment or order prior to entry, but is unlikely to have jurisdiction to do so after entry. Thus,* ***unperfected judgments which are recognised to be imperfect may be reopened, but perfected judgments which are recognised to be imperfect may not****. It is somewhat ironic that a judgment recognised to be less than perfect is persistently described in this context as perfected.'*
> *[My emphasis]*

[81] Allars also noted (at page 1) that, rather than using *'the language of unperfected and perfected judgments'* adopted by Campbell, she was *'preferring instead the less misleading language of judgments which have not been entered and those which have'* been so entered.

[82] According to the ***Concise Australian Legal Dictionary*** (5th edn, LexisNexis, Chatswood, 2015, p.544) in discussing the law in regards to ***'reopening proceedings'*** it has noted thus:

> *'... **The power of a court otherwise to reopen proceedings depends upon the statute establishing the court**: DHL v Central Authority ... Where the order of the court has been made and entered into the record of the court, there is a discretion to reopen a judgment and grant a rehearing but the power should be exercised with caution and because of the principle of finality of litigation it should be extremely rarely exercised: Wentworth v Woollahra Municipal Council (No 2) ... The court would reopen a perfected order if there has been an unintentional denial of natural justice by the court relying upon a fact or argument which one of the parties did not have the opportunity to address: Autodesk Inc v Dyason ... There can be inherent power in a court to reopen proceedings where a party was not present through no fault of his or her own: **Taylor v Taylor** (1979) 143 CLR 1; 25 ALR 418 ...' [See also Austlii: [1979 HCA 38, 22 August 1979, <http://www.austlii.edu.au/au/cases/cth/HCA/1979/38.html>.] [My emphasis]*

[83] Interestingly, in *Taylor v Taylor* ex-parte orders were obtained on behalf of the wife before a single judge of the Supreme Court of New South Wales, following which ex-parte orders were obtained on behalf of the husband before a single judge in the Family Court of Australia. The wife appealed to the Full Court of the Family Court of Australia who held that the single judge in the Family Court of Australia had no power to make the Order that he had made. According to Chief Justice Gibbs (at paragraph [13] Austlii): *'The proper course for the Full Court of the Family Court was to have set aside both the order made [in the Supreme Court] ... in relation to the matrimonial home and the further order made [in the Family Court] and to have directed a re-hearing'* which the High Court so did (in separate judgments by Stephen, Mason and Aickin JJ; Murphy J dissenting).

[84] In coming to his decision, Gibbs CJ noted the importance of a party being given the opportunity to be heard before an order is made (143 CLR at 4-5; 25 ALR at 421; and Austlii at paragraphs 4-6):

> *'4. In* ***Cameron v. Cole*** *[1944] HCA 5 at 4; (1944) 68 CLR 571 at p 589, Rich J. said:*
>
> > *"It is a fundamental principle of natural justice, applicable to all courts whether superior or inferior, that a person against whom a claim or charge is made must be given a reasonable opportunity of appearing and presenting his case."*
>
> *Similarly in* ***Commissioner of Police v. Tanos*** *[1958] HCA 6 at 4; (1958) 98 CLR 383 at p 395 , Dixon C.J. and Webb J. said that "it is a deep-rooted principle of the law that before anyone can be punished or prejudiced in his person or property by any judicial or quasi-judicial proceeding he must be afforded an adequate opportunity of being heard."*
>
> *5. Statements to a similar effect abound, but I need add only one more, that of Jenkins L.J. in* ***Grimshaw v. Dunbar*** *(1953) 1 QB 408 at p 416:*
>
> > *"Be that as it may, a party to an action is prima facie entitled to have it heard in his presence; he is entitled to dispute his opponent's case and cross-examine his opponent's witnesses, and he is entitled to call his own witnesses and give his own evidence before the court. Prima facie that is his right, and if by some mischance or accident a party is shut out from that right and an order is made in his absence, then common justice demands, so far as it can be given effect to without injustice to other parties, that that litigant who is accidentally absent should be allowed to come to the court and present his case - no doubt on suitable terms as to costs, . . ."*
>
> *6. There is no doubt that the appellant was not given an opportunity to be heard before the order, which seriously affected him in his property, was made .... This was not due to any fault on the part of the respondent, or of course on the part of the judge, but nevertheless, to repeat the words of Jenkins L.J., common justice demands that the appellant should be allowed to present his case. The question is whether the Family Court is so shackled by the statutory provisions that govern its operations that it had no power to enable justice to be done in these circumstances.'*

[85] Last year, in ***Consolidated Lawyers Ltd v Abu-Mahmoud; Abu-Mahmoud v Consolidated Lawyers Ltd*** (Unreported, New South Wales Court of Appeal, 4 February 2016); Austlii: [2016] NSWCA 4, <http://www.austlii.edu.au/au/cases/nsw/NSWCA/2016/4.html>), it was stated by Macfarlan JA (with whom Bathurst CJ and Tobias JA agreed) at [39] that **parties should consider approaching the primary judge** to vary their judgment on the ground that the judge *'had not dealt with a*

significant submission that they had made'. Further, Macfarlan JA explained at [40]:

> *'I do not suggest that parties must always approach a primary judge if it appears that the judge has overlooked a significant point in formulating the Court's judgment. It is however a course that should be adopted in the absence of particular, valid, reasons for not doing so.* ***The primary judge is almost always in a better position than an appellate court to decide an overlooked point and appellate courts are entitled to have the benefit of a primary judge's views about matters in issue on appeal.'***
> [My emphasis]

[86] Obviously, the parties in the present case cannot approach the primary judge (he having resigned), however, **even though he is personally *functus* as per his previous role as the Commissioner, the question remains as to whether or not that also makes *functus* the jurisdiction of the Commission (not in reopening the judgment) but in making further orders on which the parties have not been previously heard?**

[87] Only four years ago, the United Kingdom Supreme Court had to consider ***In the matter of L and B (Children)*** [2013] 2 All ER 294; [2013] WLR (D) 69; (Bailii: ; [2013] UKSC 8 (20 February 2013), <http://www.bailii.org/uk/cases/UKSC/2013/8.html>), **what was the effect of a judge delivering an ex tempore judgment <u>but before the decision had been perfected in a formal Order sealed by the Court's registry</u>, she changed her mind.** The case concerned care proceedings where a 'fact-finding' hearing had taken place as to the injuries a child had suffered and the judge had concluded in an ex tempore judgment *'that the father was the perpetrator'*. An Order to that effect was not sealed until some two and a half months later as Lady Hale (with whom Lord Neuberger, Lord Kerr, Lord Wilson and Lord Sumption agreed) explained (at [8]):

> ***'<u>The order</u> drawn up as a result of the judgment of 15 December** [2011] recorded that the "Court provided a summary judgment in respect of the fact finding hearing where the father was seen to have caused the injuries to [the child]". It went on to order the next steps in the case, including an experts' meeting before a further directions hearing on 23 January 2012, with the final hearing provisionally booked for 20 February 2012. Unbeknown to anyone at the time, that order* ***was <u>not formally sealed</u> by the Manchester County Court until 28 February 2012.'***

[My emphasis]

[88] As Lady Hale explained (at [9]), at the directions hearing on 23rd January 2012, a further hearing was allocated for three days as from 20th February 2012, to determine whether the child *'should be placed in the grandparents' care'* and the parties were advised that *'a perfected judgment [of 15 December 2011] would be distributed by 9 February [2012]'*. Matters then took an unexpected turn:

> *'However,* ***on 15 February, the judge delivered a bombshell in the shape of a written "perfected judgment"*** *... it reached a different conclusion from the conclusion reached in December:*
>
> *"Given the uncertain nature of the evidence after the passage of so much time I am unable to find to the requisite standard which of the parents it was who succumbed to the stress to which the family was subject. It could have been either of them who injured [Susan] and that is my finding."*
> [My emphasis]

[89] Unsurprisingly, Counsel for the mother sought clarification. The judge then delivered a further ex tempore judgment from which the mother appealed to the Court of Appeal in which she was successful. The father then appealed to the Supreme Court as Lady Hale explained (at [10]-[14]):

> *'[10] At the hearing on 20 February [2012], counsel for the mother asked the judge to explain why she had changed her mind and not given the parties an opportunity to make further submissions before doing so. She delivered a short extempore judgment apologising to the parties, although she did "not view the development of this matter as a complete change of direction and the scenario which I posited when giving my view in December remains a possibility". She went on, "the decision I reached had to be reached on the balance of probabilities and when I considered the matter carefully I could not exclude the mother because I was not sufficiently satisfied that no time had arisen when she had been alone with the child and might have caused some injury".*
>
> ...
>
> *[12] The mother ... was granted permission to appeal against the February judgment.*
>
> ...
>
> ***[13] At the outset of the appeal hearing on 14 June 2012, the court [of Appeal] suggested to the mother's counsel that she should be arguing that the judge was functus officio after***

the December judgment had been recorded in a perfected order. *Only after inquiries were made of the Manchester Civil Justice Centre did it emerge that the order had not in fact been sealed until 28 February. Nevertheless, the Court of Appeal, by a majority, not only allowed the mother's appeal but ordered that the findings of 15 December 2011 "stand as the findings of fact as to the perpetration of the injuries", the judgment of 15 February 2012 was quashed, and all reference to it excised from the orders made on 20 and 23 February.*

[14] ***The father now appeals to this court*** *[the Supreme Court] ...* ***he argues that the judge was entitled to change her mind and the February judgment should be restored*** *... '*

[90] In her judgment, Lady Hale considered the following three issues:

(1) '***The jurisdiction'*** to allow a judge to reverse a decision;

(2) '***Exercising it'***;

(3) '***Exercising the discretion in this case'***.

[91] As to ***'the jurisdiction'*** for a judge to reopen their decision, Lady Hale had no doubts, as she explained at [16]-[19]

'[16] ***It has long been the law that a judge is entitled to reverse his decision at any time before his order is drawn up and perfected*** *...*

[17] The modern story begins with the Judicature Acts 1873 (36 & 37 Vict c 66) and 1875 (38 & 39 Vict c 77), which amalgamated the various common law, chancery and doctors' commons jurisdictions into a single High Court and created a new Court of Appeal for England and Wales. In ***In re St Nazaire Company (1879) 12 Ch D 88, the Court of Appeal decided that there was no longer any general power in a judge to review his own or any other judge's orders*** *...*

[18] ***Nothing was said in In re St Nazaire about the position before the judge's order was perfected***. *In re Suffield and Watts, Ex p Brown (1888) 20 QBD 693, a High Court judge had made an order in bankruptcy proceedings which had the effect of varying a charging order which he had earlier made under the Solicitors Act 1860 (23 & 24 Vict c 127). All the members of the Court of Appeal, citing In re St Nazaire, agreed that he had no power to do this once his order had been drawn up and perfected ... As Fry LJ put it, at p 697:*

> ***"So long as the order has not been perfected the judge has a power of re-considering the matter****, but, when once the order has been completed, the jurisdiction of the judge over it has come to an end."*

Strictly speaking, the reference to what may be done before the order is perfected was obiter, but that ***this was the law was established by the Court of Appeal no later than the***

***case of Millensted v Grosvenor House (Park Lane) Ld [1937] 1 KB 717**, where the judge had revised his award of damages before his order was drawn up and the court held that he was entitled to do so.*

[19] ***Thus there is jurisdiction to change one's mind up until the order is drawn up and perfected.'***
[My emphasis]

[92] As to the question of ***'exercising it'*** (that is, the jurisdiction), Lady Hale reviewed the various applicable case law at [20]-[27] (much of which it is important that I reproduce here, particularly as this is an unanimous decision of the United Kingdom Supreme Court on the issue):

*'[20] As Wilson LJ pointed out in Paulin v Paulin [2009] EWCA Civ 221, [2010] 1 WLR 1057, para 30(c), "**Until 1972 the courts made no attempt to narrow the circumstances in which it would be proper for a judge to exercise his jurisdiction to reverse his decision prior to the sealing of the order**". He referred to In re Harrison's Share Under a Settlement [1955] Ch 260 ... The Court of Appeal rejected the submission that the order could only be corrected for manifest error or omission (as can a perfected order under the "slip rule"): **"When a judge has pronounced judgment he retains control over the case until the order giving effect to his judgment is formally completed":** pp 283-284. The court went on to say that "This control must be . . . exercised judicially and not capriciously" but that was all. **The court clearly contemplated that people might act upon an order before it was drawn up, but they did so at their own risk.***

[21] In 1972, however, the Court of Appeal decided In re Barrell Enterprises [1973] 1 WLR 19, in which it refused to allow the re-opening of an unsuccessful appeal in which judgment had been given some months previously dismissing the appeal but the order had for some reason never been drawn up. Russell LJ, giving the judgment of the court, stated, at pp 23-24, that:

> *"When oral judgments have been given, either in a court of first instance or on appeal, the successful party ought save in the most exceptional circumstances to be able to assume that the judgment is a valid and effective one. The cases to which we were referred in which **judgments in civil courts have been varied after delivery** (apart from the correction of slips) were **all cases in which some most unusual element was present**."*

There was no such justification in that case.

...

*[23] In Stewart v Engel [2000] EWCA Civ 362, [2000] 1WLR 2268, the Court of Appeal unanimously held that **the power to recall orders before perfection had survived the coming into force of the Civil Procedure Rules 1998 ...***

...

[25] ... *In Cie Noga D'Importation et d'Exportation SA v Abacha [2001] 3 All ER 513, Rix LJ, sitting in the Commercial Court, referred at para 42 to* ***the need to balance the concern for finality against the "proper concern that courts should not be held by their own decisions in a straitjacket pending the formality of drawing up the order".*** *He went on, at para 43:*

> *"Provided that the formula of 'exceptional circumstances' is not turned into a straitjacket of its own, and the interests of justice and its constituents as laid down in the overriding principle are held closely to mind, I do not think that the proper balance will be lost. Clearly, it cannot be in every case that a litigant should be entitled to ask the judge to think again. Therefore,* ***on one ground or another the case must raise considerations, in the interests of justice, which are out of the ordinary, extraordinary or exceptional****. An exceptional case does not have to be uniquely special. 'Strong reasons' is perhaps an acceptable alternative to 'exceptional circumstances'.* ***It will necessarily be in an exceptional case that strong reasons are shown for reconsideration.***"

[26] *In Robinson v Fernsby [2003] EWCA Civ 1820, [2004] WTLR 257 May LJ commented that "that expression ["exceptional circumstances"] by itself is no more than a relatively uninformative label. It is not profitable to debate what it means in isolation from the facts of a particular case" (para 94). Peter Gibson LJ commented, at para 120:*

> *"With one possible qualification it is in my judgment incontrovertible that* ***until the order of a judge has been sealed he retains the ability to recall the order he has made even if he has given reasons for that order by a judgment handed down or orally delivered****. . . . Such judicial tergiversation is in general not to be encouraged, but* ***circumstances may arise in which it is necessary for the judge to have the courage to recall his order****. If . . . the judge realises that he has made an error, how can he be true to his judicial oath other than by correcting that error so long as it lies within his power to do so?* ***No doubt that will happen only in exceptional circumstances,*** *but I have serious misgivings about elevating that correct description of the circumstances when that occurs as exceptional into some sort of criterion for what is required . . . "*

...

[27] ... ***This court is not bound*** *... to hold that there is any such limitation upon the acknowledged jurisdiction of the judge to revisit his own decision at any time up until his resulting order is perfected. I would agree with Clarke LJ in Stewart v Engel [2000] 1 WLR 2268, 2282 that* ***his overriding objective must be to deal with the case justly****. A relevant factor must be whether any party has acted upon the decision to his detriment, especially in a case where it is expected that they may do so before the order is formally drawn up. On the*

other hand, in In re Blenheim Leisure (Restaurants) Ltd, Neuberger J gave some examples of cases where it might be just to revisit the earlier decision. But these are only examples. ***A carefully considered change of mind can be sufficient.*** *Every case is going to depend upon its particular circumstances.'*

[93] On the third issue of '***exercising the discretion in this case'***, Lady Hale succinctly explained why the Court would be exercising it (at [28]-[31]):

'[28] If that be the correct approach [that there is jurisdiction to revisit before an order is formally perfected], was this judge entitled to exercise her discretion as she did? ...

[29] ***The Court of Appeal were, of course, applying an exceptionality test which in my view is not the correct approach****. They were, of course, right to consider the extent to which the December decision had been relied upon by the parties, but in my view Rimer LJ was also correct to doubt whether anyone had irretrievably changed their position as a result ...*

[30] Mr Charles Geekie QC, on behalf of the mother, argues that even if the judge was entitled to change her mind, ***she was not entitled to proceed in the way that she did, without giving the parties notice of her intention and a further opportunity of addressing submissions to her.*** *As the court pointed out in Re Harrison's Share Under a Settlement [1955] Ch 260, 284, the discretion must be exercised "judicially and not capriciously".* ***This may entail offering the parties the opportunity of addressing the judge on whether she should or should not change her decision.*** *The longer the interval between the two decisions the more likely it is that it would not be fair to do otherwise. In this particular case, however, there had been the usual mass of documentary material, the long drawn-out process of hearing the oral evidence, and very full written submissions after the evidence was completed. It is difficult to see what any further submissions could have done, other than to re-iterate what had already been said.'*

[94] Thus, *In the matter of L and B (Children)*, the Supreme Court unanimously *'ordered that the father's appeal against the decision of the Court of Appeal be allowed'* concluding at [44]: *'There is a distinction between an appeal and a variation for cause. This is the principle underlying the basic rule that* ***an order is final once sealed****.'*

[My emphasis]

(7) Constitutional arguments

[95] The Applicant legal practitioner has also submitted in her written 'Submissions in Support' dated 10th February 2017, ***'that there are express provisions in the Constitution of the Republic of Fiji*** *...* ***empowering the Commission to withhold publications*** *[sic] in exceptional circumstances* ***and anonymize judgments*** *in protecting the rights and freedoms of individuals such as the Applicant'*. In that regard, the Applicant has cited in support the following (at pages 3-5):

(1) *'... that in publishing the Judgment and failing to anonymize certain details ... would at the very outset amount to* ***a breach of the Applicant's fundamental non-derogable human rights*** *such as freedom from cruel inhumane, degrading or disproportionately severe treatment or punishment protection in* ***section 11(1)*** *... and breach of* ***section 24(1)(a)(c)*** *of the Constitution'*;

(2) *'... that* ***the Constitution is the supreme law of the State*** *pursuant to* ***section 2(1)*** *...'* and *'any law inconsistent with this Constitution is invalid to the extent of the inconsistency'*;

(3) **Section 3** - *'The Constitution* ***shall be upheld by*** *all ... including all* ***persons holding public office*** *...';*

(4) **Section 4** - The Constitution *'shall be enforced through the courts ...';*

(5) **Section 7(1)** - *'... a court, tribunal or other authority –*

(a) must promote the values that underlie a democratic society based on human dignity, equality and freedom; and

(b) may, if relevant, consider international law, applicable to the protection of the rights and freedoms in this Chapter';

(6) **Section 11(1)** - *'Every person has the right to freedom from torture of any kind, whether physical, mental or emotional, and from cruel, inhumane, degrading or disproportionately severe treatment or punishment'*;

(7) **Section 24(1)** – *'Every person has the right to personal privacy, which includes the right to -*

(a) confidentiality of their personal information;

(b) confidentiality of their communications; and

(c) respect for their private and family life.

(2) To the extent that it is necessary, a law may limit, or may authorise the limitation of, the rights set out in subsection (1)';

(7) **Section 114(1)** - *'The Independent Legal Services Commission established by the Legal Practitioners Decree 2009 continues in existence';*

Section 114(9) – *'In the performance of his or her functions or the exercise of his or her authority and powers, the Commissioner shall be independent and shall not be subject to the direction or control of any person or authority, except by a court of law or as otherwise prescribed by written law';*

Section 114(11) – *'The Commission may regulate its own procedure and may make such rules and regulations as it deems fit for regulating and facilitating the performance of its functions'.*

[96] In her written 'Submissions in Support' of 10th February 2017, the Applicant legal practitioner has summarised her argument thus (at pages 5-6):

> *'The rights and freedoms that the Applicant seeks for the Commission to protect are **rights to personal privacy and in particular rights to confidentiality of [their] ... personal medical information** pursuant to section 24(1)(b) and seeks **respect for [their] ... private life and family life** that is if the disturbing medical condition is published, the Applicant who is currently single will have difficulties getting married and despite getting fully treated (if [they do]...) will continue to be subjected to social and cultural stigmatization ... [and] would cause further emotional and mental torture and result in disproportionately severe treatment or punishment in contravention of section 11(1) which is an absolute right and does not have limitations.*
> [My emphasis]

[97] Counsel for the Chief Registrar has responded in her written 'Submission on Name Suppression' dated 14th February 2017 (at page 6) that *'the Respondent draws the attention of the Honourable Commission to section[s] 1(c) and (g) of the Constitution'* which state:

> *'1. The Republic of Fiji is a sovereign democratic State founded on the values of—*
> *(c) an independent, impartial, competent and accessible system of justice;*
> *(g) **transparency and accountability'**.*
> [My emphasis]

Further, (at page 7) Counsel for the Chief Registrar has submitted that *'Based on the above provisions and case law ...* ***there needs to be openness, transparency and accountability in Commission proceedings'***. [My emphasis]

(8) How should I proceed?

[98] In relation to the above review of the law and having considered the various submissions of both parties, I have come to the view that:

(1) Although the previous Commissioner's judgment was released to the parties on 25th November 2015, **Orders still need to be perfected and filed with the High Court Registry so as to make the Commission *functus officio*. That is, (as the High Court of Australia stated in *Autodesk), 'the orders pronounced have not been perfected by the taking out of formal orders*' or as Peter Gibson LJ commented in *Robinson v Fernsby* (cited by Lady Hale in *In the matter of L and B (Children))* '*until the order of a judge has been sealed he retains the ability to recall the order he has made even if he has given reasons for that order by a judgment handed down or orally delivered';***

(2) Obviously, **the parties cannot approach the previous Commissioner** (as suggested in *Consolidated Lawyers Ltd v Abu-Mahmoud*) to argue the issue of non-publication or even publication with anonymisation, **as the previous Commissioner is *functus officio* - NOT because all judicial functions of the Commission have been completed, but because he resigned his commission with effect from 30th November 2015**;

(3) On the other hand, if the Orders had been perfected and lodged with the High Court Registry, then arguably the only remedy would now be to file an appeal and seek relief from the Court of Appeal;

(4) Despite the Applicant having cited various sections of the Constitution (including that section 114(1) of the Constitution recognises that this Commission 'continues in existence'), the Commission is, in fact, the creation of the *Legal Practitioners Decree 2009*. **I cannot find in any of its provisions therein where I have the power to anonymise or reopen the judgment of a previous Commissioner. Hence, I decline to do so**;

(5) **That is, however, not the end of the matter so far as the jurisdiction of the Commission is concerned. In my view, because all judicial functions of the Commission have not been completed in this matter (that is, the orders from the judgment of Justice Madigan have not been perfected), the jurisdiction of the Commission is not *functus officio*. Further, whether there should be orders in relation to withholding publication and distribution of the judgment is an issue in which the parties were not previously heard before Madian J. Therefore, I do have the power to hear them and to consider whether to make appropriate orders accordingly**. As to whether I will make such orders, I will now discuss below.

5. Whether to make Orders withholding publication and distribution of the judgment

(1) Does the case hold special significance?

[99] Apart from Counsel for the Chief Registrar submitting that, in the interests of transparency, the judgment of Justice Madigan in this case should be sent to PacLII, **there was no submission by Counsel in either her written and/or oral submissions that the judgment held some special significance in relation to the offence of professional misconduct**, for failing *'to furnish to the Registrar within the time specified ... a sufficient and satisfactory explanation in writing of the matters referred to in'* a complaint.

(2) How is a practitioner to be "publicly reprimanded" and is this in conflict with a practitioner's rights under the Constitution?

[100] As the Court of Appeal was unable to assist (it having no jurisdiction to do so), I will now endeavor to provide a short answer for the parties to the above question, such that if either or both disagree with my interpretation, they can then consider filing an appeal with the Court of Appeal.

[101] In ***Napier & Anor v Pressdram Ltd*** [2009] EWCA Civ 443 (19 May 2009), Bailii: <http://www.bailii.org/ew/cases/EWCA/Civ/2009/443.html>), Lord Justice Toulson, in the English and Welsh Court of Appeal, when considering an appeal by a lawyer and their law firm from the refusal of a

High Court judge to grant an injunction preventing the investigative magazine, *Private Eye*, from publishing information as to the outcome of a complaint to the Law Society, cited the following explanation from '*Cordery [on Legal Services] from May 2004*' in relation to the meaning of an informal 'reprimand':

> *'The current practice, on an ascending scale of disapproval, is to find a breach, express regret but take no further action; to express disapproval of the solicitor's conduct; to reprimand the solicitor or to reprimand severely; the last being one step short of a decision to refer the matter to the Solicitors Disciplinary Tribunal. None of these "sanctions" have any statutory force, nor indeed any consequences of themselves.* ***A reprimand is no more and no less than an expression of the opinion of the solicitor's professional body****, acting through the appropriate committee,* ***that he was at fault in the context of the matter the subject of complaint****. Reprimands receive no publicity and are known only to the parties to the complaint, the solicitor, his senior partner if appropriate, and the complainant or complainants ... '*
> [My emphasis]

[102] The informal reprimand discussed in *Napier* was in the context of a matter being resolved under a complaints scheme operated by the then Office for the Supervision of Solicitors ("OSS") which was part of the Law Society but operated independently of it and became the forerunner to the Solicitors Regulation Authority. As the complaint was resolved informally by the OSS issuing an informal reprimand, it was not referred as an application to be filed and heard before the Solicitors Disciplinary Tribunal. It would be the equivalent in Fiji of a complaint being resolved at the initial or investigatory stage by the Legal Practitioner's Unit within the office of the Chief Registrar rather than proceeding with filing a formal application in the Commission. If, however, an application was filed with the Commission and the complaint was established, resulting in a formal order being made by the Commission *'reprimanding the legal practitioner'*, it would then be lodged with the High Court Civil Registry to become an Order of the High Court as well as formally entered in the Commission's Discipline Register. As Lord Justice Toulson noted in *Napier* (at para 30): *'Apart from any questions of publicity, a [formal] reprimand by the Solicitors Disciplinary Tribunal could lead to the imposition of conditions on the solicitor's practising certificate which an informal reprimand could not.'*

[103] **Similarly, in my view, a reprimand by the Commission is an Order, that is, that the legal practitioner was at fault in the context of the matter the subject of complaint, for which the practitioner has been formally admonished.**

[104] Interestingly, Toulson LJ in *Napier* also discussed (at paras 42-46) **that the basis for which the injunction was sought in that case** by the legal practitioner and his law firm was **to prevent allegedly confidential information being published, being the outcome of the complaint, that is, that the legal practitioner was reprimanded, rather than something private to the legal practitioner**:

> *'42. ... Freedom to report the truth is a precious thing both for the liberty of the individual (the libertarian principle) and for the sake of wider society (the democratic principle), and* ***it would be unduly eroded if the law of confidentiality were to prevent a person from reporting facts which a reasonable person in his position would not perceive to be confidential.***
>
> *43. It is important to be clear about the nature of the information with which this appeal is concerned.* ***It is possible to envisage cases where a solicitor might disclose information of an intrinsically private nature (for example, relating to his health)*** *in response to a complaint made to the Law Society by a client,* ***and to which reference might be mentioned in the adjudication****. But this is not such a case and it is not necessary to consider the issues which might arise in such a case.*
>
> *44.* ***The subject matter underlying the adjudication was nothing private to the solicitor.*** *The subject matter was the conduct of the solicitor in relation to the complainant, about which the complainant was free (subject to the law of defamation) to broadcast his grounds of complaint as widely as he wished.*
>
> *45. The solicitor has to show why any reasonable person in the position of the complainant ought to have regarded that fact as something which he was bound to treat as confidential. It cannot be because reporting the decision would involve the disclosure of underlying subject matter which was itself intrinsically confidential, for reasons already stated.* ***The case made on behalf of the solicitor is that the duty of confidentiality arose because of the nature of the process rather than because of the nature of the underlying subject matter or the nature of anything disclosed in the course of the Law Society investigation.***
>
> [My emphasis]

[105] To be clear as to the difference between the nature of the adjudication process (which was not confidential, including the fact that the legal practitioner was reprimanded), and confidentiality that arose either ***'because of the nature of the underlying subject matter'*** or the disclosure by the legal practitioner of ***'information of an intrinsically private nature (for example, relating to his health)'***, Toulson LJ concluded (at para 56):

> *'In investigating the complaint made by the complainant, the Law Society was performing a public function. I cannot see any basis on which it could have imposed on the complainant, involuntarily, a duty not to disclose the outcome of the investigation, even if it had wished to do so.* ***(I stress again, for the avoidance of doubt, that I am not here considering the position where intrinsically confidential information is supplied in the course of such an investigation****. I am concerned only with a case where the only suggested basis of confidentiality is the procedural nature of the investigation itself.)'*
> [My emphasis]

[106] **If the present application was simply in relation to the publication of an order that the legal practitioner was reprimanded as per paragraph [9] of the judgment of Justice Madigan of 25th November 2015, I question whether the legal practitioner would be able to mount much of an argument based upon their rights under the Constitution of the Republic of Fiji. The legal practitioner appeared before the previous Commissioner, entered a plea of guilty and was afforded the opportunity to file written submissions (even if there was not a subsequent hearing).**

[107] Indeed, an argument as to the effect of having been 'severely reprimanded' solely on the basis of written submissions without ever being given the opportunity of an oral hearing, was considered by the English and Welsh Court of Appeal in ***R (on the application of Thompson) v The Law Society*** [2004] WLR 2522; [2004] 2 All ER 112; Bailii: [2004] EWCA Civ 167 (20 February 2004, <http://www.bailii.org/ew/cases/EWCA/Civ/2004/167.html>.)

[108] In *Thompson*, Lord Justice Clarke (with whom Jacob and Kennedy LJJ agreed) said at [84]:

*'... **a decision to reprimand or severely to reprimand** the person concerned (here the claimant) **does not amount to a determination of his civil rights** because the right to continue to practise his profession is not at stake'.*
[My emphasis]

[109] Clarke LJ reached the above conclusion after having undertaken in his judgment a review of a number of decisions of the European Court of Human Rights ("ECHR") (see paras [77]-[83].) He did, however, also acknowledge the wider effect that a reprimand may have upon a practitioner as follows:

*'85. It follows from the above analysis that ... neither the decision severely to reprimand the claimant nor the decision to reprimand him was a determination of his civil rights. **The particular point is that it is said that the effect of the reprimand is likely to make it difficult or impossible for the claimant to obtain professional indemnity insurance and thus to continue to practise as a solicitor.** It is said, as is no doubt the case, that pursuant to his duty to disclose all material facts to prospective insurers he would have to inform them of the reprimand and indeed the other penalties imposed upon him.*

86. There are however to my mind two particular problems which this argument faces before us. The first is that it is difficult to see that this is the kind of decision which is directly decisive of his right to practise identified in the Strasbourg jurisprudence to which I have referred. There is no hint in that jurisprudence that this is the kind of consequence which the ECHR had in mind as crossing the line between a disciplinary process and a process which determines civil rights.

87. The second problem is related to the first and arises from the nature of the evidence which has been put before us. It is necessary to refer to only one piece of evidence in this regard. In a letter from Mr White of Keith H White Associates Ltd, who provide specialist insurance consultancy services dated 27 January 2004, he says that he has no doubt that the reprimand is a material fact but that he has no reason to suppose that the insurance market in which cover would potentially be placed would be restricted as a result. He assumes (so far as I am aware correctly) that previous insurers were not called on to provide an indemnity and concludes that some insurers might construe the claimant's record as clean whereas others might apply a "modest load" for between three and five years.

*88. In these circumstances **the highest that it could be put is that the effect of the reprimand might well be to increase the cost of professional indemnity insurance.** In my opinion, a penalty which has that effect cannot fairly be said to put the claimant's right to continue to practise his profession as a*

> *solicitor at stake. It follows that* ***I would hold that neither the decision severely to reprimand the claimant nor the substituted decision to reprimand him amounted to a determination of his civil rights*** *or obligations within article 6(1) of the Convention.'*
> [My emphasis]

[110] Returning to the present case, as I have noted above, the legal practitioner was given the opportunity to file written submissions. Further, to paraphrase Lord Justice Clarke in *Thompson, 'because the right to continue to practise their profession is not at stake'*, **arguably no rights have been infringed in the present case**. Indeed, it is my understanding that the complaint of the legal practitioner in relation to alleged breaches of her Constitutional rights is not of the decision of the previous Commissioner that the legal practitioner be 'reprimanded'. **Rather, the complaint concerns the interpretation of that phrase by Counsel for the Chief Registrar that the reprimand is to be done 'publicly'. That is,** according to Counsel for the Chief Registrar, **any order anonymising and/or restricting publication and distribution of the judgment, would be in conflict with paragraph 9 of the judgment, that is, that 'the practitioner is to be publicly reprimanded'.**

[111] My understanding of the Applicant legal practitioner's written submissions together with their oral submissions made before me on 15th February 2017, is such that four issues can be distilled from them as to the alleged infringement of the legal practitioner's "rights":

(1) As noted above, according to the legal practitioner, "*It was a judgment that was emailed to all parties. There was no pronunciation of the judgment by the Commission before the parties ...*". By inference, the manner in how the judgment was delivered could be said to have infringed the legal practitioner's right to be heard;

(2) That the legal practitioner's *right to personal privacy* pursuant to section 24(1) of the Constitution has been infringed by the reference in the judgment to the legal practitioner's type of medical condition;

(3) That the infringement of the legal practitioner's *right to personal privacy* has been compounded by the judgment having been distributed to just under 50 legal practitioners at a legal seminar in February 2016, such

that the legal practitioner now seeks an order from the Commission that the judgment be anonymised together with a non-publication order so as to restrict further distribution of it;

(4) What has occurred by breaching the legal practitioner's *right to personal privacy* will continue unless there are orders made by the Commission anonymising the judgment and restricting further publication and distribution of it and that to not grant such orders is a *disproportionately severe treatment or punishment* by the Commission which is outlawed by section 11(1) of the Constitution.

[112] According to the argument of Counsel for the Chief Registrar, when the parties were ordered to file written submissions at the first and only appearance on 3rd November 2015, was the time when the legal practitioner should have raised the issue of having the Commissioner consider anonymising his judgment and/or an order withholding publication of the judgment.

[113] I am still unclear, however, as to how it can be suggested that somehow the legal practitioner should have foreseen and pre-empted what occurred. That is:

(1) How would the legal practitioner have known or expected that the Commissioner would make specific reference in his judgment as to the type of medical condition from which the legal practitioner was suffering rather than a more generic statement - particularly as Counsel for the Chief Registrar has conceded in her oral submissions (as noted above): '*I mean neither of the parties would have foreseen what the Commissioner was going to do*'?

(2) I have seen no evidence that prior to receiving an email on 23rd November 2015 from the Secretary of the Commission advising that a signed judgment would be available for collection from the Offices of the Commission as from 25th November 2015, that there was an indication to the parties at the sole appearance on 3rd November 2015, that the judgment would not be distributed to them in the usual way, that is, by way of a formal appearance before the Commission. Indeed, in my view, to be advised that a 'judgment is on notice', generally means in judicial proceedings, that once a judgment has been prepared, the parties will be

notified and given a date for relisting when the judgment will be handed down by the presiding judicial officer in open court and if an issue arises it can be raised with the presiding judicial officer at that time. Further, if the Commission had been operating under different procedures at that time, how would the legal practitioner have known, particularly as this was the first occasion that they had been summoned to appear before the Commission?

(3) Conversely, if the matter had been relisted "to take judgment", (and at that time the judgment was read to the parties by the previous Commissioner), the practitioner, after hearing mention of their medical condition, could have immediately raised the issue with the Commissioner by way of an oral application seeking for the judgment to either be anonymised or that the reference to the legal practitioner's condition be rephrased to a more generic term such as 'medical condition' and a Ruling could have been given from which either could have sought a stay and/or appealed. By the usual procedure of relisting to take judgment not occurring, arguably the legal practitioner was denied an opportunity to become aware of the issue in the presence of the Commissioner and seeking a Ruling and/or a stay before him;

(4) Further, whilst acknowledging that there are occasions when a judicial officer will simply pronounce Orders and then say, "I publish my reasons", followed by providing to the parties copies of their judgment (which could consist of numerous pages and thus take some time to read), in the present case (as the judgment was only three pages, with the fourth page containing the Commissioner's signature), it is possible if it had been handed down in this way, that the legal practitioner may well have been able to have scanned the judgment very quickly, noted the glaring reference to their medical condition and sought at that time a Ruling from the Commissioner.

[114] As noted above, an email was sent to the parties on Monday, 23rd November 2015, asking them to '*please advise the secretary before date of delivery your preferred mode e.g[.] faxed, emailed, or posted copy or will one of your representative[s] collect the same from our office personally on date of delivery*', that is, 25th November 2015.

[115] Clearly, there was no option provided in the above email for the parties to elect to appear before the Commissioner to receive judgment.

[116] A judgment was then emailed to the parties on 25th November 2015. I can take judicial notice of the fact that this occurred on a Wednesday. Justice Madigan completed his commission with effect as from Monday, 30th November 2015. There has been no suggestion from Counsel for the Chief Registrar that the legal practitioner should have made some urgent approach to the Commission to have the matter relisted before Justice Madigan on either the Thursday, 26th or Friday, 27th November 2015, in attempt to see if the then Commissioner considered himself to be by then *functus officio* or was prepared to make a Ruling noting that no Orders have ever been signed by the then Commissioner and filed with the High Court Registry. I further note that the judgment was filed with the High Court Civil Registry (to which its seal was affixed) on the following Tuesday, 2nd December 2015. Quite simply, the position of Counsel for the Chief Registrar has remained, as set out in her email to the Commission dated 9th June 2016 (cited previously above), that is:

> *As per the Chief Registrar's instructions we submit that our position remains the same. The Respondent had ample time **to make the application** for name suppression **before the Judgment was delivered**. Since all the judicial functions has [sic] completed in this matter the Commission has now become functus officio.'*
> [My emphasis]

[117] I do also note, however, the recent submission made by the second Counsel for the Chief Registrar on 12th April 2017, that the legal practitioner should have appealed.

[118] Interestingly, in Fiji, **the term 'publicly reprimanded' is not a sanction listed as one of the applicable orders that the Commission can make pursuant to section 121(1) of the *Legal Practitioners Decree 2009*.** The sanction that can be imposed pursuant to section 121(1)(g) of the *Legal Practitioners Decree 2009, is 'an order **reprimanding** the legal practitioner'*. If it is an error to phrase it as to be 'publicly reprimanded' then I have also been at fault (having followed the sanction adopted by both previous Commissioners until this judgment) and not been advised

by either Counsel appearing on behalf of the Chief Registrar or practitioners, either in previous matters or the present, that there is no such sanction available in Fiji. Accordingly, I had the matter relisted on 11th April 2017 so that the parties could address me on the issue.

[119] According to the second Counsel for the Chief Registrar who appeared before me in the absence of the Applicant on 11th April 2017, and confirmed this again when he appeared before me on 12th April 2017 (when I paraphrased what I understood to be his submissions in the presence of the Applicant), he has two arguments:

(1) First, paragraph 9 of the judgment in stating that the practitioner is to be 'publicly reprimanded' is an ancillary order to give full effect to the main order, that is, that the practitioner is to be 'reprimanded'. In support, one needs to read section 121(4) of the *Legal Practitioners Decree 2009* wherein it states:

> *'The Commission* ***may make ancillary orders*** *in addition to the orders contained in subsection (1),* ***to give full effect to the orders made under subsection (1).***'
> [My emphasis]

(2) If I was against Counsel for the Chief Registrar on the above submission, then his alternative argument was that there was not a problem with Justice Madigan having stated in paragraph [9] of his judgment that the practitioner *'is to be publicly reprimanded'* as the terms 'public reprimand' and 'reprimand' have been used interchangeably in Fiji.

(3) Is to be 'publicly reprimanded' is an ancillary order to give full effect to the main order that the practitioner is to be 'reprimanded'?

[120] In support, of this argument, Counsel for the Chief Registrar, apart from citing section 121(4) of the *Legal Practitioners Decree 2009*, provided no supporting case authorities.

[121] I disagree with the submission. An ancillary order is an order separate to the main order. In family law proceedings, for example, the dissolution of a marriage (that is, the divorce) has been seen as the principal relief sought by a party and other orders in relation to, for example, property, children, maintenance and/or an injunction, have been seen as ancillary

to the principal relief. (See the *Concise Australian Legal Dictionary* (at pp.30-31.)

[122] Indeed, according to the Sentencing Council for England and Wales, ancillary orders are also relevant in sentencing as it has explained as follows:

> *'**In addition to the sentence imposed**, the judge or magistrate may also impose other orders, known as **ancillary orders**. Some ancillary orders are aimed at redressing the harm caused by an offender, such as compensation orders. Others aim to prevent future re-offending or repeat victimisation, including criminal behaviour orders and exclusion orders.*
> *In certain situations a judge or magistrate must impose an ancillary order; for example, an offender found guilty of causing death by dangerous driving must be disqualified from driving for a minimum of two years. Also, where an offence has resulted in personal injury, loss or damage a court must consider whether to make a compensation order.*
> *In other situations it is up to the judge or magistrate to decide whether an ancillary order is appropriate or necessary, taking into account the circumstances of the offence and the offender. In many cases the prosecution will invite the court to make relevant orders. There are a number of different ancillary orders available including:*
> - *criminal behaviour orders;*
> - *compensation orders;*
> - *confiscation orders (Crown Court only);*
> - *deprivation orders;*
> - *disqualification from driving;*
> - *drink banning orders;*
> - *disqualification from being a company director;*
> - *financial reporting order;*
> - *football banning orders;*
> - *forfeiture orders;*
> - *parenting orders;*
> - *restitution orders;*
> - *restraining orders;*
> - *serious crime prevention order (Crown Court only); and*
> - *sexual harm prevention orders.'*
>
> (See Sentencing Council for England and Wales, 'About Sentencing', 'Types of Sentence', 'Ancillary Orders', <https://www.sentencingcouncil.org.uk/about-sentencing/>.)

[123] I also note that in Fiji, for example, in ***Trans Pacific Aluminium Joinery Ltd v B L Naidu & Sons*** (Unreported, High Court Civil Action No. HBF 0023 of 1996L, 22 October 1997, PacLII: [1997] FJHC 244,

<http://www.PacLII.org/fj/cases/FJHC/1997/244.html>), Justice Lyons in hearing *'an application for stay pending appeal'*, noted that he had previously *'ordered the winding up of the Applicant company'* following which *'the Applicant filed a Notice of Motion seeking* ***a stay of the order pending appeal and other ancillary relief****. One such relief was a "non-publication" Order.'* [My emphasis] Clearly, the principal relief sought was an Order for a stay of the winding-up Order pending an appeal. The application for a non-publication order was ancillary relief to give effect to the main order, similarly to how section 121(4) gives the Commission the power to '*make ancillary orders in addition to the orders contained in subsection (1), to give full effect to the orders made under subsection (1)'*, in this case, a reprimand.

[124] Thus, the Orders made in paragraph 9 of the judgment were clearly not ancillary orders. They were part of the principal orders that the practitioner *'is to be* ***publicly reprimanded*** *and is to pay a fine of $1500'* by 11th December 2015. In my view, there were no ancillary orders made by Justice Madigan and thus the submission of Counsel for the Chief Registrar that to be 'publicly reprimanded' is an ancillary order to give full effect to the main order that the practitioner is to be 'reprimanded', is incorrect.

(4) Have the terms 'public reprimand' and 'reprimand' have been used interchangeably in Fiji?

[125] In his alternative submission, however, that the terms 'public reprimand' and 'reprimand' have been used interchangeably in Fiji, Counsel for the Chief Registrar has, in my view, laid a strong basis. In support of that submission, he tendered a copy of ***Amrit Sen v The Chief Registrar*** (Unreported, Court of Appeal, Case No. ABU 65 of 2013, 3 December 2015, Lecamwasam, Almeida Guneratne and Amaratunga JJA; Paclli: [2015] FJCA 160, <http://www.PacLII.org/fj/cases/FJCA/2015/160.html>) and drew my attention to paragraphs [60], [65] and [67] of the judgment of Almeida Guneratne JA (with whom Lecamwasam and Amaratunga JJA agreed) as well as Order 2 of the orders made by the Court, such that the terms

'public reprimand' and 'reprimand' have been used interchangeably as follows:

> *'[60] A **reprimand** "has the effect of identifying standards the establishment and maintenance of which protects the public"(vide: **Prothonotary of the Supreme Court of New South Wales -v- Chapman** cited by G. E. Dal Pont in his informative work on Lawyers' Professional Responsibility (4th ed., Thomas Reuters, 2010 at p.526).*
>
> ...
>
> *[65] Lawyers who approached jury members subsequent to trial **Prothonotary -v- Jackson** [1976] 2 NSW LR 457 at 462; Lawyers who had acted for both parties to a transaction involving a potential conflict **Re: a Practitioner** [1975] 12 SASR 166 at 172-173; lawyers altering the jurat of an affidavit in the absence of the deponent to formally re-swear it **Re: a Barrister and Solicitor** [1984] 73 FLR 79 had only received **reprimands**.*
>
> ...
>
> *[67] In **Legal Services Commissioner -v- Winning** [2008] LPT 13, the facts of which were somewhat similar to the instant case ... He had been **publicly reprimanded** as a consequence.*
>
> ***Orders of Court***
>
> ....
>
> 2. *Consequently, **the reprimand** served on the Appellant is affirmed.'*
>
> [My emphasis both underlined and in bold]

[126] The response of the Applicant legal practitioner was (as I understood it) that the *Legal Practitioners Decree 2009* does not define reprimand or publicly reprimanded. I then asked rhetorically, do we then look to the common law for an interpretation?

[127] I note as an aside that, obviously, as the *Legal Practitioners Decree 2009* was passed a Decree rather than an Act, there are no extrinsic materials such as a minister's second reading speech to be able to assist in understanding 'the purpose' as to what was meant by the wording of the section (and whether it was intended that a 'reprimand' and to be 'publicly reprimanded' were to be one of the same). As Saleem Marsoof

JA in the Supreme Court of Fiji recently explained in ***Suva City Council v R B Patel Group Ltd*** at [63]:

> *'... the purposive approach, which is an approach to statutory interpretation in which the courts interpret legislation in the light of the purpose for which it was enacted and which promotes the purpose of the legislation. This approach recognizes that "statutory interpretation cannot be founded on the wording of the legislation alone" (per Lacobucci J in Re Rizzio & Rizzo Shoes Ltd., [1998] 1 S.C.R. 27, at paragraph 21) and permits courts to utilize extraneous pre-enactment material such as cabinet memoranda, draft bills, Parliamentary debates, committee reports and white papers.'*
>
> (See *Suva City Council v R B Patel Group Ltd*, Unreported, Supreme Court of Fiji, Supreme Court Appeal: CBV0006 of 2012, 17 April 2014, Marsoof, Hettige and Wati JJSC); (PacLII: [2014] FJSC 7, <http://www.PacLII.org/fj/cases/FJSC/2014/7.html>.)

[128] Further, in ***Chief Registrar v Nacolawa***, (Unreported, Independent Legal Services Commission, No. 004 of 2015, 21 September 2016; PacLII: [2016] FJILSC 4, <http://www.PacLII.org/fj/cases/FJILSC/2016/4.html>), I discussed at [38]-[45] the difference between '*a purposive or literal approach*' to statutory interpretation and concluded at [46] that unless there is ambiguity, the correct approach is the application of the '*the golden rule*' *of statutory interpretation favoured by all three justices in the Supreme Court in* ***Suva City Council v R B Patel Group Ltd****, that is, 'that the words of a statute must prima facie be given their ordinary meaning'.*

[129] Returning to the present case, if there are no extrinsic materials to assist, that is why we then must look to case law for assistance, if on point. The argument of the Applicant legal practitioner was that section 121(1) of the *Legal Practitioners Decree 2009* does not define 'reprimanding'. Counsel for the Chief Registrar in response cited paragraph [60] from the judgment of Almeida Guneratne JA in *Sen*, (citing *Chapman,* which, in turn, cited Du Pont, *Lawyers' Professional Responsibility*, 2010 at p.526), that is: '*A reprimand "has the effect of identifying standards the establishment and maintenance of which protects the public"*'. Counsel for the Chief Registrar had also cited paragraph [67] and Almeida Guneratne JA's citing of the judgment in *Winning* where the practitioner *'had been publicly reprimanded'*. The response of the Applicant legal

practitioner was that is not clear that the terms 'public reprimand' and 'reprimand' have been used interchangeably in *Sen* to be able to state that point.

[130] Whilst I note that *Winning* was a judgment from Queensland, Australia, and the legislation may well be different from Fiji, it is clear to me that Almeida Guneratne JA in citing that case in his judgment in *Sen* drew no distinction between the terms 'reprimand' and 'publicly reprimanded' and that was the point made by Counsel for the Chief Registrar. Indeed, in his very helpful discussion on *'The Reprimand'*, Almeida Guneratne JA in *Sen* (apart from citing at [60] *Chapman*, [65] *Jackson, a Practitioner* and *a Barrister and Solicitor,* and at [67] *Winning,* also cited at [58] *Chamberlain* (which discussed a 'reprimand'), at [61] *a Solicitor* (which discussed 'reprimanded'). I further note that when setting out *'The Punishments or Penalties Imposed'* in *Sen,* Almeida Guneratne JA clearly stated at [57]:

> *'By way of punishment or penalty the learned Commissioner*
> *(i)* ***Reprimanded*** *the Appellant*
> *(ii) Imposed a fine of FJD$5,000.00.'*
>
> [My emphasis]

[131] By way of contrast, I note that in *Sen*, Order 1 made by the Commissioner was actually: *'The practitioner is* ***publicly*** *reprimanded'* (See ***Chief Registrar v Amrit Sen,*** Unreported, Independent Legal Services Commission, ILSC Case No.10 of 2013, 6 November 2015; Paclli: [2013] FJILSC 17, <http://www.PacLII.org/fj/cases/FJILSC/2013/17.html>.)
[My emphasis]

[132] Further, Almeida Guneratne JA in *Sen* stated at [5] that:

> *'**The learned Commissioner** having found that Count 1 was not established however found that Count 2 was proved and **reprimanded** the Appellant and in addition imposed a fine of FJD$5,000.00.'*
> [My emphasis]

[133] Clearly, Counsel for the Chief Registrar was correct in his submission that the Court of Appeal in *Sen* used the terms 'publicly reprimanded' and 'reprimand' interchangeably.

(5) What is the effect of the terms 'public reprimand' and 'reprimand' being used interchangeably in Fiji?

[134] **If the second Counsel who appeared for the Chief Registrar on 11th and 12th April 2017 is correct (as I believe that he is) in his analysis that the Court of Appeal in *Sen* used the terms 'publicly reprimanded' and 'reprimand' interchangeably, that is, they are one and the same, then, conversely, it cannot follow that the original submission made by the first Counsel who appeared for the Chief Registrar before me in June 2016 is correct.**

[135] As I understood the **oral submission made by the first Counsel for the Chief Registrar in June 2016**, any attempt at anonymising or suppressing the name of the legal practitioner pursuant to section 126(1) of the *Legal Practitioners Decree 2009* would be in conflict with paragraph [9] of the judgment which states that the practitioner *'is to be **publicly reprimanded**'* with the emphasis on **publicly**. Clearly, this is incorrect. There is no difference between section 121(g) allowing the Commission to make *'an order reprimanding the legal practitioner'* and the order made by Justice Madigan in his judgment of 25th November 2015 that the practitioner *'is to be publicly reprimanded'*.

[136] **Further, in my view, publicity is not to be equated with being 'publicly reprimanded' as an essential ingredient of a decision made pursuant to section 121(1)(g) of *'an order reprimanding the legal practitioner'*.** Rather, 'publication of orders' is a separate determination to be made pursuant to section 121(1) and left solely to the discretion of the Commission including withholding publication of any order where there are exceptional circumstances.

[137] Having considered the parties various written and oral submissions, together with my review of the authorities, **I have come to the view that,**

in the context of proceedings before the Commission, the meaning of 'reprimanded' and the procedure whereby a practitioner is to be 'reprimanded' should be construed as follows:

(1) A draft judgment containing the proposed Order should be handed down before the parties in a hearing room open to the public in accordance with section 113(1) of the *Legal Practitioners Decree 2009* (unless the Commission orders otherwise) and the parties appearing can then be asked for clarification of any errors;

(2) A draft of the Order should then be prepared and provided to the parties for clarification of any errors;

(3) **A finalised Order signed by the Commissioner, together with the Commission's seal affixed, should then be filed with the High Court Civil Registry within 14 days** pursuant to section 122(2) of the *Legal Practitioners Decree 2009*. **This is when the legal practitioner is, for all intent and purposes, formally "reprimanded" as it would also be if an order was made for fine to be paid, a suspension to be imposed or for the ultimate sanction to be ordered of being 'struck form the roll' of legal practitioners.** At the same time, a copy of the judgment signed by the Commissioner together with the Commission's seal affixed should also be filed with the High Court Civil Registry for their records;

(4) **Once the Order has been sealed by the High Court Civil Registry, the details of the formal Order should then be entered in the Commission's "Discipline Register"** in accordance with section 126(3) of the *Legal Practitioners Decree 2009*;

(5) Sealed copies of the Order should then be made available to the legal practitioner, or the partner or partners of the law firm, against whom the application for disciplinary proceedings was made, as well as to the Chief Registrar and the Attorney-General pursuant to section 122(1) of the *Legal Practitioners Decree 2009,* together with a copy of the judgment. A copy of the judgment should be provided to the Chief Justice (for his information and to arrange circulation to other members of the judiciary), as well as to the President of the Fiji Law Society (for her information and to arrange circulation to the Society's members);

(6) Pursuant to section 126(1), the Commission can then make public any order made against a legal practitioner in any way the Commission considers appropriate, such as, by providing copies of the judgment (containing such an order) to the High Court Library, as well as to PacLII for publication on that organisation's internet website, the Deans of the three law schools within Fiji and, where appropriate, distributed to various media outlets;

(7) If, and when, the Commission develops its own website, it is envisaged that a copy of the judgment will also be uploaded to it.

[138] **Thus, I disagree with the submission of the original Counsel for the Chief Registrar that to restrict 'publication' of the judgment would be in breach of paragraph 9 of the judgment that the practitioner *'is to be publicly reprimanded'*. In my view then, the sanction of a legal practitioner being 'reprimanded' in Fiji is by an Order signed by the Commissioner, having that order then filed with the High Court Civil Registry to become an Order of the High Court, followed by having a practitioner's name entered in the Commission's Discipline Register with the notation of the specific Order that the practitioner has been 'reprimanded' pursuant to section 126(2)(d) of the *Legal Practitioners Decree 2009* and that Register 'must be available for public inspection' pursuant to section 126(3). Copies of the Order are then distributed to the legal practitioner, the Chief Registrar and the Attorney-General in accordance with sections 122(1), (2) and (3) of the *Legal Practitioners Decree 2009*. It is a process that does not equate with some general notion of 'publication' of the judgment. The two are not linked as the sanction.** It is then up to the Commissioner as to how Orders are publicised *'in any way the Commission considers appropriate'* pursuant to section 126(1) of the *Legal Practitioners Decree 2009*.

[139] **Therefore, if I find that the Commission is not *functus* in relation to the present matter, as all judicial functions have not been completed, then, in my view, I can make orders withholding publication and/or any further distribution of the judgment of the previous Commissioner of 25th November 2015 and, by my doing so, I will not**

be infringing paragraph 9 of the judgment, that is, that the practitioner be 'reprimanded'.

(6) Should I withhold publication and is the Commission functus officio?

[140] As to whether I should make orders withholding publication and/or any further distribution of the judgment, **I am still at a loss to understand the argument of the first Counsel who appeared for the Chief Registrar that there is a public interest in having the Commission forward a judgment to PacLII to be uploaded on that organisation's website in the interests of transparency even though this particular judgment contains details as to the practitioner's private medical condition, details irrelevant to the fact that the practitioner has been reprimanded and fined, sanctions that have been entered in the Commission's Discipline Register which the legal practitioner does not dispute and to which the public can have access**. What the legal practitioner does dispute, however, is the need to have the full judgment published on PacLII or elsewhere when it contains details of an essentially private nature relating to the practitioner's health.

[141] According to the second Counsel for the Chief Registrar, this is where in fact, that in his view, the Commission being *functus officio* becomes particularly relevant. In support, he tendered a copy of a recent judgment of the Court of Appeal in ***Merchant Finance & Investment Co. Ltd v Lata*** (Unreported, Court of Appeal Case No.ABU0034 of 2013, 29 November 2016; PacLII: [2016] FJCA 151, <http://www.PacLII.org/fj/cases/FJCA/2016/151.html>) where Almeida Guneratne JA at [23] stated the following:

> *'Jowitt's Dictionary of English Law (2nd ed, 1977) defines Functus officio as "having discharged his duty", as an expression applied to a Judge, Magistrate or arbitrator who has given a decision or made an order or award so that his authority is exhausted. In re: V.G.M Holdings Ltd. [1941] 3A11ER 417 (Ch.D.) it had been said that, "**where a judge has made an order for a stay of execution which has been passed and entered, he is functus officio and neither he nor any other judge of equal jurisdiction has jurisdiction to vary the terms of such stay. The only means of obtaining any variation is to appeal to a higher tribunal**". (per Morton, J. vide: the Head Note)*
> [My emphasis]

[142] Counsel for the Chief Registrar also cited the Canadian case of ***Chandler v Alberta Association of Architects*** [1989] 2 SCR 848 (CanLII: 1989 CanLII 41 (SCC), <https://www.canlii.org/en/ca/scc/doc/1989/1989canlii41/1989canlii41.html?autocompleteStr=Chandler&autocompletePos=1>), wherein it was said in the joint judgment of Dickson CJ and Wilson and Sopinka JJ (La Forrest and L'Heureux-Dube JJ dissenting) at page 10 (CanLII):

> *'The general rule that a final decision of a court cannot be reopened derives from the decision of the English Court of Appeal in In re St. Nazaire Co. (1879), 12 Ch. D. 88. The basis for it was that the power to rehear was transferred by the Judicature Acts to the appellate division.* ***The rule applied only after the formal judgment had been drawn up, issued and entered, and was subject to two exceptions****:*
> *1.where there had been a slip in drawing it up, and,*
> ***2.where there was an error in expressing the manifest intention of the court****. See Paper Machinery Ltd. v. J. O. Ross Engineering Corp., 1934 CanLII 1 (SCC), [1934] S.C.R. 186.'*

[143] **The submission of Counsel for the Chief Registrar is that even though the Commission is *functus officio* (which affects why it cannot entertain an application for a non-publication order), orders can still be drawn up, signed by the present Commissioner and lodged with the High Court Civil Registry to become Orders of the High Court as this comes within the second exception *In re St. Nazaire Co.*, that is, *'where there was an error in expressing the manifest intention of the court'*.** That is, the submission is that there was an error of the previous Commissioner in expressing the intention of the Commission by not drawing up, signing and lodging orders with the High Court civil Registry, hence orders can still be perfected in accordance with his intention.

[144] I disagree. It is quite clear that *'the general rule that a final decision of a court cannot be reopened'* applied where *'the formal judgment had been drawn up, issued and entered'*. That is not the case here. Further, the second exception set out in *In re St. Nazaire Co.*, applied *'where there was an error in expressing the manifest intention of the court'* in the orders that were drawn up following the judgment. Again, that is not the case here. Rather, in my view, the judgment in *Chandler* supports the contrary view to that of the Chief Registrar. That is, that the Commission is not

functus because final orders have not '*been drawn up, issued and entered*'. Hence, as the Commission is not *functus*, a non-publication order can be considered by me.

[145] Interstingly, in some jurisdictions there is legislation to the effect that even if when proceedings have been finalised, the relevant court at first instance can still be the appropriate forum to hear an application as to a non-publication order, rather than for the first time on appeal before a Court of Appeal. For example, in the State of New South Wales, Australia, specific legislation on non-publication orders states: ***'A suppression order or non-publication order may be made at any time during proceedings or after proceedings have concluded.'*** [My emphasis] (See section 9(3), *'Procedure for making an order'*, ***Court Suppression and Non-publication Orders Act 2010*** (NSW); Austlii: <http://www.austlii.edu.au/au/legis/nsw/consol_act/csanoa2010493/s9.html>.)

[146] In Fiji, on the other hand, as there is no such legislation, the common law would apply. Indeed, I note that in *Trans Pacific Aluminium Joinery Ltd* (cited above), Lyons J in the High Court at Lautoka, after granting a winding up order, some two months later entertained *'a Notice of Motion seeking a stay of the order pending appeal and other ancillary relief'* which included *'a "non-publication" Order'*. **As the winding up order had been sealed, however, he dealt solely with the stay application as he explained:**

> *'By ruling delivered* ***on the 15th August 1997, I ordered the winding up of the Applicant company****.*
>
> *On the 20th August* ***an order was sealed****.*
>
> *On the 9th September 1997 the Applicant filed a Notice of Motion seeking a stay of the order pending appeal and other ancillary relief. One such relief was a "non-publication" Order.* ***This point has past as I believe the Order of the 15th August 1997 was in fact being published.***
>
> *I thus concern myself with the stay application only.'*
> [My emphasis]

[147] Interestingly, the case also provides support for the view that **as the Order had been sealed (and published), Lyons J could not entertain a non-publication order.** Thus, he solely concerned himself in considering the stay application. Similarly, if the winding up order of 15th August 1997 had not been sealed on 20th August 1997, then he could have entertained with the stay application he heard on 22nd October 1997, the application for other ancillary relief (including for a non-publication order).

[148] A similar reasoning was adopted by the Fiji Court of Appeal in *Charan v Housing Authority* (cited above). Judgment was delivered on 28th August 1998, the formal order dismissing the appeal was filed the same day and sealed on 31st August. Also on 31st August the Appellant filed a motion seeking to reopen the appeal. The Court dismissed the application concluding '*that on balance of probability the order dismissing the appeal had been sealed before the appellant's motion came in. Accordingly, it must be dismissed*'.

[149] In relation to applications before the Commission, my view is that the point of no return is set out in the Decree. That is, once an Order from the Commission has been drawn up, signed by the Commissioner and lodged with the High Court Registry such that it becomes an Order of the High Court pursuant to section 122(2) of the *Legal Practitioners Decree 2009*, the Commission is *functus*. Indeed, I found of great assistance on this issue the more recent decision of the Fiji Court of Appeal in ***Narayan v Bray*** (Unreported, Fiji Court of Appeal Civil Appeal No. ABU0063 of 2011, 28 September 2012, Calanchini AP and Basnayake and Balapatabendi JJA; PacLII: [2012] FJCA 58, <http://www.PacLII.org/fj/cases/FJCA/2012/58.html>) where the Court allowed an appeal from the orders of a judge of the High Court who, in turn, had set aside previous consent orders that had been entered in the High Court Registry.

[150] In *Narayan v Bray*, as Basnayake JA explained at [5]-[6], when the case came on for hearing before the High Court at Lautoka on 4th October 2011, *'it was settled and the plaintiff and the defendant and the solicitors*

placed their signatures to a typed written settlement', following which, *'A decree of court was entered by the Registrar of the Court which contained the identical terms.'* The decree included *'an order of the learned Judge [that] empowered the Court Registry to release a sum of $50,000 to the Plaintiff from the monies paid in Court by the Defendant'* and such *'sum appeared to have been released to the Plaintiff by Court in pursuance to the settlement'*. A month later, on 4th October 2011, the defendant filed a motion seeking clarification from the Court as to the understanding of the payments to be made under the Consent Orders as well as a stay of the Consent Orders. A judge in the High Court at Lautoka made various orders on 16th November 2011 including that the $50,000 deposit not be released to the plaintiff, or, if already released, be returned by the plaintiff, *'and thus'*, as Basnayake JA noted at [6], *'varied the term entered in the settlement dated 4th of October, 2011'*. After citing various cases as authorities on setting aside a compromise (which is different to the present application before the Commission), Basnayake JA also cited (at [13]) *Ainsworth v Wilding* (that has also been cited in the present case) as to the two exceptions *'in which the court can interfere after the passing and entering of the judgment'*, that is, *'where there has been an accidental slip in the judgment as drawn up'* or *'when ... the judgment as drawn up does not correctly state what the Court actually decided and intended'*. Thus, in *Narayan v Bray*, Basnayake JA concluded at [17] *'that the learned Judge has erred by amending the consent judgment and is therefore set aside'*. Calanchini AP and Balapatabendi JA agreed. Therefore, once consent orders had been entered in the High Court Registry, they could not be set aside other than by filing a new motion in the High Court arguing that the terms of the Orders were not as agreed and then evidence would have to be heard.

[151] In relation to whether and how a Commissioner decides to distribute a judgment, it is entirely up to the discretion of whoever is the Commissioner at that time. Arguably, it is an administrative rather than a judicial act unless a party formally seeks a Ruling on a non-publication order, then in making such a Ruling it becomes a judicial act. Either party can so approach the Commissioner so long as the Commission is not *functus* i.e. that all judicial functions have not been completed by the

filing of final orders with the High Court Civil Registry or, arguably, if the parties consent to jurisdiction (as the issue as to publication, including distribution, of the judgment had not been previously considered). The issue can then be argued before the Commission and a Ruling made from which the parties can then appeal. If the Commission is *functus*, however, the parties will have to file an appeal and seek relief from the Court of Appeal.

6. Concluding remarks

[152] As I was considering this judgment, I happened to come across two items. The first item was an article written by The Honourable Justice Rosalie Silberman Abella, 'Decision-Making, Public Opinion and Concepts of Rights'. It was published in 2003 by the Judicial Commission of New South Wales as part of a monograph of judicial essays titled *A Matter of Judgment: Judicial decision-making and judgment writing*. A footnote at the beginning the article notes, it had originally been presented as a paper, *'Public Opinion, the Courts and Rights'*, delivered *'as the Keynote Address at the Federal Court Judges' [of Canada] Seminar, 5 September 2002, Montebello, Quebec'*. At the time of its publication by the Judicial Commission of New South Wales, Justice Silberman Abella was serving as a justice of the Ontario Court of Appeal. She was elevated the following year to the Supreme Court of Canada, of which she is still a member. Near the conclusion of her article, Justice Silberman Abella recounts a short tale that struck a chord:

> *'When I was in first year Arts at the University of Toronto, everyone told me to take a Philosophy course with Professor Marcus Long. In the very first class, he asked: "If a tree falls in the middle of a forest and no one hears it, does it still make noise?" I turned to my best friend Sharon and said "I'm outta here".*
> ***Now that I am older and do not have the answers to everything** the way I thought I did when I was 18, **I realise what a wonderfully instructive metaphor** Marcus Long's question is. **If you do not hear about something, you do not know about it, and if you do not know about it, then it probably does not exist for you.** If we do not hear about homelessness or disadvantage or discrimination, there is no noise. And if there is no noise, there is no need to do something about it.'*
>
> (See The Honourable Justice Rosalie Silberman Abella, 'Decision-Making, Public Opinion and Concepts of Rights', in Ruth Sheard (ed.), *A Matter of Judgment: Judicial decision-making and*

judgment writing, Judicial Commission of New South Wales, Sydney, 2003, pp.59-68, page 66; online, <https://www.judcom.nsw.gov.au/wp-content/uploads/2016/07/education-monograph-2.pdf>, page 80.)

[153] The second item was in the form of a presentation that I observed (together with a summary that I received of it in paper form) when attending a continuing professional development seminar hosted by the New South Wales Bar Association on 25th March 2017. The paper was titled, *'Burnout and Vicarious Trauma – Prevention'*, by Professor Stephen J. Woods, a Clinical and Forensic Psychologist. During his presentation, Professor Woods cited the findings of a number of studies undertaken over the past ten years, both in Australia and internationally, highlighting the rates of depression in lawyers. Unfortunately, for many legal practitioners, this only becomes recognised when an individual has a complaint made against them. I mention this as I am cogniscant that the legal profession does not operate in a vacuum and that I am dealing with human beings who appear before me in the Commission – each of us with our own flaws (myself included as the Commissioner). I do not see the relevance or any public benefit in having a legal practitioner's very personal medical condition being publicly broadcasted via the publication of a judgment containing it either posted on the internet or distributed generally in the community. That is, as Toulson J noted in *Napier* cited above, '*information of an intrinsically private nature*' that might attract an injunction restricting publication. **In the present case, the practitioner has been reprimanded and fined for professional misconduct in failing to rely to the Chief Registrar within a certain time period. Those two sanctions have been so recorded in the Commission's Discipline Register to which any member of the public can have access. That is transparent and that should be the end of the matter.**

[154] I am also cogniscant that in my role as the Legal Services Commissioner as to the importance of transparency, a fact of which I was reminded a number of times during the hearing of this matter by the initial Counsel for the Chief Registrar. It was the reason why I had this case relisted before me (as well as one other that also involved a *functus* issue) prior to

making any decision as to whether to forward either or both judgments to PacLII. That is, so as to allow the parties to address me first to hear their views and then, if there could be no resolution, to seek guidance from the Court of Appeal. Even though the members of that Court have not been able to formally assist me, I appreciate the time that was undertaken by them (in a busy schedule) in considering my referral. I also appreciate the time it has taken for both parties in first appearing before me, preparing various sets of submissions for me as well as the Court of Appeal, appearing before that Court and then returning before me necessitating the filing of further submissions and appearances. I also acknowledge the assistance of the second Counsel for the Chief Registrar who took over the matter only recently. I realise that for everyone who has been involved in this matter, it has taken a good deal of precious time. To quote, however, Mr Justice Felix Frankfurter, of the Supreme Court of the United States of America, from his dissenting judgment in ***First Iowa Coop. v. Power Comm'n***, 328 U.S. 152 (1946) (see <https://www.courtlistener.com/opinion/104291/first-iowa-coop-v-power-commn/>) (at 188-189):

> *'If it be said that the procedure for which the Federal Power Commission contends may take time, there is no assurance that a contested case like this will not take just as much time hereafter. The Commission must pass independently on an unconstrued State statute; its construction may then come before the Court of Appeals for the District and eventually before this Court. Even then the possibility remains that this Court's decision will be followed by one in the State court ruling, as has not been unknown, that this Court's interpretation was in error.* ***In any event, mere speed is not a test of justice. Deliberate speed is. Deliberate speed takes time. But it is time well spent.*** *'*
> [My emphasis]

[155] As I have explained near the beginning of this judgment, the present case originally came to my attention when it was cited to me in a somewhat indirect way during oral submissions in a plea in mitigation hearing for another case. The implication for the legal practitioner in having their medical condition so publicly cited as some form of precedent in the context of the hearing of another matter concerned me. Soon afterwards, once I had the opportunity to read what was actually in the judgment, I took the view that I could not simply just forward it to PacLII for

uploading on its website for the world to see (without at least first hearing from the parties as to how each of them believed that I should proceed). Thus, I undertook the following course of action. First, I attempted to see if this could be ameliorated by way of consent orders agreed between the parties. Second, when consent orders were not possible, I forwarded the matter as a case stated to the Court of Appeal to seek their guidance. Third, when the Justices of the Court of Appeal advised that they were unable to assist, I relisted the matter to give each of the parties the opportunity to address me as a result of which I have now written this judgment. If either or both parties are not satisfied with the outcome, they can now at least proceed to the Court of Appeal. On that note, perhaps it is apt to conclude, as did Justice Silberman Abella in her abovementioned article (at page 68; page 80 online):

> *'In the end, we are each limited by what we do not know and we are each limited by what others do not know. With knowledge comes understanding, with understanding comes wisdom, and with wisdom comes the capacity to judge fairly. A worthy goal for judges and public alike ...'*

[156] In closing, I must put on the record that this judgment is not meant to be in any way a criticism of the previous Commissioner. No doubt, he probably thought that he was assisting the legal practitioner by making reference in the judgment as to the practitioner's medical condition and then concluding at paragraph 10 that *'this is a most exceptional case'*. Due to the circumstances as to how the judgment was delivered, followed soon afterwards by the previous Commissioner's departure from Fiji, the parties were never given the opportunity to appear before the previous Commissioner and either hear the judgment delivered by him or to have his published reasons handed to each of them in his presence, such that an application for anonymising the judgment or a non-publication order could then have been raised and a Ruling made by him at that time before he had resigned his Commission and was *functus officio* with effect from 30th November 2015.

[157] **Therefore, in my view, this case qualifies as exceptional circumstances which warrant against any publication of the judgment of 25th November 2015, notwithstanding that a primary**

objective of the Commission is to safeguard the public combined with there being a public interest in open justice. I am fortified in my decision by the following:

(1) The previous Commissioner found this to be 'a most exceptional case' (even if it was in terms of not imposing a suspension);

(2) By withholding further publication of the judgment, I am not withholding publication of the Orders of the previous Commissioner contained within paragraph 9 of his judgment of 25th November 2015;

(3) Indeed, the Orders of the previous Commissioner contained within paragraph 9 of his judgment of 25th November 2015 have been complied with as the legal practitioner paid, as ordered, by 11th December 2015, the fine of $1500.00 imposed, together with being publicly reprimanded by having their name entered on the Discipline Register maintained by the Commission in accordance with section 126(2) of the *Legal Practitioners Decree 2009* which includes:

(a) the full name of the legal practitioner;
(b) the address of the legal practitioner;
(c) the particulars of the application for disciplinary proceedings;
(d) the actual orders made against the legal practitioner;

(3) Further, in accordance with section 126(2) of the *Legal Practitioners Decree 2009*, the Discipline Register '*must be available for public inspection*'.

ORDERS

[158] The formal Orders of the Commission are:

1. It is hereby ordered as from today's date, being 18th April 2017, that the judgment of Justice P.K. Madigan made on 25th November 2015, in relation to the Independent Legal Services Commission's Case No. 013 of 2015, is not to be published on the website of the Pacific Islands Legal Information Institute.
2. It is further ordered from today's date, being 18th April 2017, that should the Pacific Islands Legal Information Institute be restructured to become an Institute of the University of the South Pacific or any other new entity, the judgment of Justice P.K. Madigan made on 25th November 2015, in relation to the

Independent Legal Services Commission's Case No. 013 of 2015, is not to be published on the website of that new entity.

3. It is further ordered that from today's date, being 18th April 2017, that the publication, disclosure and/or public dissemination of the judgment of Justice P.K. Madigan made on 25th November 2015 in relation to the relation to the Independent Legal Services Commission's Case No. 013 of 2015, and/or any information that will reveal or is likely to reveal the identity and/or the medical condition of the legal practitioner mentioned in such judgment, is hereby prohibited.
4. The above Order No.2 does not apply to the listing of the legal practitioner's name on the "Discipline Register" maintained by the Independent Legal Services Commission in accordance with section 126(2)(a) of the *Legal Practitioners Decree 2009*.
5. If any person wishes to have access to the Commission's file in Case No. 013 of 2015, they must first obtain an Order of the Commission specifically granting them such access to the relation to the Independent Legal Services Commission's file in Case No. 013 of 2015.

Apart from the wasted costs Order that I made on 12th April 2017, I do not believe that, in the circumstances, the Applicant legal practitioner should be ordered to pay any costs associated with bringing their application. Before deciding, however, I will first hear from the parties on the issue of costs in relation to the application generally.

Dated this 18th Day of April 2017

INDEPENDENT LEGAL SERVICES COMMISSION SEAL

Dr. Thomas V. Hickie
COMMISSIONER