

BUILDING PRACTITIONERS INQUIRY BOARD

Reasons for Decision

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| Building Practitioner: | Penelope Whinney-Houghton |
| Referred by: | Director of Building Control |
| Proceedings: | Referral of Inquiry to the Building Practitioners Board (the Board) in accordance with section 34G of the <i>Building Act</i> . |
| Inquiry Board: | Duncan McConnel (Presiding Member) Clive Clements Grant O'Callaghan |
| Date of Decision: | 21 June 2018 |

Decision on Action to be Taken

1. On 20 April 2018 the Inquiry Board published our reasons for decision in this matter ("Reasons"). In summary we found the following:
 - (a) the Practitioner failed to comply with a reasonable request from an Auditor in circumstances where the audit was frustrated from proceeding (Complaint 1);
 - (b) the Practitioner failed to comply with a reasonable request of the Director in the course of an investigation following a complaint (Complaint 2);
 - (c) the Practitioner failed to lodge either a building permit or an occupancy permit for building works at 5 Bul Bul Court Ludmilla within 7 days, in fact lodging them almost 8 years and almost 2 years late respectively (Complaint 3);
 - (d) the Practitioner's work in relation to the building permit and the occupancy permit was incompetent (Complaint 3); and
 - (e) the Practitioner produced a document being the building permit documentation for 5 Bul Bul Court Ludmilla that was false and misleading by marking up plans as if they had been approved in February 2009 and submitting them to Building Advisory Services as the original building permit documents (Complaint 4).
2. We found that the misconduct was serious.
3. We invited submissions from the parties on what action the Inquiry Board ought to take in light of the findings of professional misconduct.

4. Brief submissions were received from the Practitioner on 27 April 2018. Detailed submissions were received from the Director on 18 May 2018. The Practitioner was given an opportunity to file submissions in reply. She sought and was granted two extensions of time in respect of those submissions. The Practitioner's final written submissions were filed on Friday 8 June 2018.
5. Before stating the action that we have decided upon it is necessary to address some aspects of the submissions.

Directors Submissions

6. The Director seeks the cancellation of the Practitioner's registration and has relied on certain findings or conclusions in our Reasons in support of cancellation.
7. It is necessary for us to record our disagreement with some of the statements made in the Directors' submissions including their attribution to our Reasons.

A. The Practitioner's role as Chairperson

8. The Inquiry Board must exercise care when considering the relevance of the Practitioner's role as Chairperson of the Building Practitioners Board and her personal involvement in the implementation of various legislative or policy reforms aimed at the professional standards of building certifiers. The Practitioner's personal involvement in those matters demonstrates that she had, at all material times, an actual awareness of the content of her professional obligations. However, the question of whether the Practitioner subjectively did or did not know of her obligations is not in issue in this Inquiry. We are well and truly satisfied that the Practitioner had actual knowledge of her professional obligations when she acted as she did.
9. The Inquiry Board cannot treat the Practitioner's role as Chairperson or her involvement in those matters as an aggravating circumstance which warrants treating her professional misconduct more seriously. It would be an error to do so. In the circumstances, we cannot accept the submission of the Director that the matters referred to in paragraphs [6] and [7] are the background on which the seriousness of her misconduct must be assessed.
10. The Practitioner's position as Chairperson is a relevant factor to the extent that the findings of professional misconduct and any action that the Inquiry Board takes may have a greater impact on her. The Practitioner, having enjoyed the good professional standing that comes from being in such a position, and noting that the

position is remunerated, suffers a greater loss as a result of these findings. It is appropriate to factor that greater loss into our deliberations when considering what action is reasonably necessary for the protection of the public.

11. Ironically, the fact that findings have been made against a person in such a senior position in the profession is a palpable demonstration that no one is above the law and that the systems in place to preserve the integrity of the building certification system will be enforced without fear or favour. In and of itself, this action goes some way to restoring confidence in the system that might have been undermined by the Practitioner's conduct.

B. Dishonesty and Intention

12. The Director has made a number of submissions that certain actions of the Practitioner were dishonest¹, that she sought to mislead the investigator², that she acted to avoid detection of prior misconduct³ and that the Inquiry Board made findings of incompetent work practices⁴.

13. The Director has also submitted that the Inquiry Board should take into account the Practitioner's past interactions with the department and with clients and others as set out in [20] - [22].

14. We consider that some of those submissions cannot be supported by the evidence. In particular:

(a) the only findings of incompetence made by the Inquiry Board were at Reasons [135] and [138] – [142]. The other references to the Reasons in footnote 8 of the Director's submissions are not findings of incompetence;

(b) In our Reasons, we found that the Practitioner's motivation in not complying with requests relevant to complaint 2 was to avoid detection of non-compliance with the Act, not prior misconduct⁵. This is an important difference;

(c) In our Reasons, we found that the Practitioner's motivation in not producing all of the documents to the investigator was to avoid the contents of the file from being seen, not to avoid detection of prior misconduct. This is an important difference. We also did not find that the Practitioner 'refused' to provide the documents. We

¹ see footnote 12

² see [11](2) and footnote 14

³ see [11](2),(3); footnotes 13 and 16.

⁴ see [10], footnote 8.

⁵ see Reasons [95]

found that she failed to do so. We characterised the failure as motivated by avoidance rather than an intention to defeat the Act;

(d) We do not rely on the matters referred to in paragraphs [20] to [22] of the Director's submissions. Those matters were not the subject of a complaint and accordingly the Practitioner was not required to answer them. It would be inappropriate to weigh the seriousness of the proven misconduct on the basis of matters which have not been proven or admitted as previous instances of misconduct. We do accept that the evidence of those matters stands as undisputed evidence of non-compliance with the Act by the Practitioner, but cannot regard it as misconduct.

Practitioners Submissions

15. The Practitioner submits that any penalty should be one that supports the object of protecting the public interest not one of punitive remedies. Whilst accepting the general proposition that protection of the public is the paramount consideration, that does not mean that some element of punishment of the Practitioner will not be the result of the action to be taken. Protection of the public is achieved in various ways, including ensuring that building practitioners know that personal consequences will follow from a failure to uphold the standards required of the profession.
16. We agree that supervision of the Practitioner would be a necessary requirement for any continuation of practice by the Practitioner. Accordingly, we intend to frame our orders in a way that ensures that supervision occurs in the future.
17. We also accept that the underlying defects in certification do not extend to certifying defective building work with the result that unsafe building works have been permitted to occur. This reminds us that this is not the worst possible instance of incompetence.
18. We are unable to give much weight to the character references provided by the Practitioner on 8 June 2018. The character references pre-date this Inquiry and are not addressed to the Inquiry Board. The purpose for which those character references were provided is not clear but it cannot have been for these proceedings. In order for a character reference to carry any weight, it is necessary that the person supplying the reference be aware of the purpose for which the reference is to be used and be fully aware of the circumstances relevant to the provision of the reference. In this case, any person who the Practitioner sought to provide her with a character reference should have been provided with a copy of our Reasons.

19. Finally, we note that the Practitioner has expressed concerns about the impartiality of the Inquiry Panel (sic) due to the publication of the Reasons on the Building Practitioners Board website. The publication of the Reasons occurred at a secretariat level without the knowledge of the Inquiry Board. Once the fact of publication had been brought to our attention by the Practitioner we directed that the decision be removed from the website as we had not directed it to be published. In the circumstances, while we acknowledge that the Practitioner was embarrassed by the premature publication of the Reasons it does not indicate partiality or bias by the Inquiry Board.

Disposition

20. In the circumstances of this matter, we have determined that the Practitioner's registration should be suspended for a period of two years.
21. We have given serious consideration to whether the Practitioner's registration should be cancelled. There are some aspects of the findings we have made about the Practitioner's conduct that mean that cancellation of her registration is a real possibility. However it is important that the Inquiry Board arrive at an outcome that involves the minimum penalty to the Practitioner that is necessary for the protection of the public.
22. We agree with the Directors' submission that the nature of the dishonesty as we have found, including that the Practitioner lied in her affidavit and in oral evidence to the Inquiry, leads to the conclusion that she is not at this time a fit and proper person to practice as a building certifier.
23. However, we also consider that the Practitioner has reasonable prospects of demonstrating that she is a fit and proper person to practice as a building certifier within a reasonable period of time.
24. The professional misconduct which occurred in the present case was in some respects characterised by a failure by the Practitioner to appreciate her predicament and respond appropriately. Sadly, sometimes human nature is such that rather than confront a problem people ignore it, hoping it will go away, or respond in the wrong way. This can lead to a situation where "the cover up is worse than the crime"⁶.
25. This case contains features that lead us to think that is what happened here. The Practitioner had some issues in her practice. She failed to follow them up in the way

⁶ *In the matter of an Application by Micah Kickett* [2018] NTSC 26 at [27]

she should have and in the way the audit process was designed to achieve. As a consequence, she faced an inevitable finding of professional misconduct by the time the next audit took place. Figuratively speaking, she put her head in the sand.

26. The Practitioner also failed to respond adequately to the numerous and repeated attempts to produce the paperwork for her client Mr Kammler. However we observe that there was no evidence before us that such failures were systemic or widespread in relation to the Practitioner's practice and that other clients experienced similar difficulties.
27. This is not the worst kind of misconduct. It is not a case of a certifier fraudulently covering up sub-standard building work, taking a bribe, or stealing a client's money. We consider that cancellation of a practitioner's registration should be reserved for cases of the worst kind, where the circumstances of the conduct involved leave no doubt that the Practitioner is unsuited to practice in the profession.
28. Regrettably, the Practitioner's response in this case did go beyond mere avoidance and strayed into dishonesty. She set about a course of misrepresentation of the true state of affairs in relation to the certification of the Kammler permit. In addition, she fobbed off the department from its investigation of her practice to avoid detection of non-compliance. This requires us to reflect upon the Practitioner's conduct and whether the protection of the public can be maintained while allowing the Practitioner to continue to practice.
29. We do not consider that we can do so. In particular, the Practitioner has demonstrated a longstanding non-compliance with her obligations in respect of audits and filing of relevant certification documentation with Building Advisory Services. Coupled with this, the Practitioner has not shown any insight into her failings nor taken any steps to address the continuing non-compliance, even in the face of this Inquiry into her conduct.
30. We consider that if it had not been for the dishonesty of the Practitioner in relation to the building permit documents lodged with Building Advisory Services and the Practitioner's dishonesty in the Inquiry, we would nevertheless have suspended the Practitioner's registration but would have done so for a shorter period of time.
31. Putting the findings of dishonesty to one side, we consider that the Practitioner's failure to comply with the request of the auditor, which had the effect of frustrating the audit and has still not been remedied, is sufficient to warrant suspension of her

registration. In the absence of any other findings, this would have warranted suspension of at least 6 months.

32. Further, the Practitioner's failure in respect of the investigation of the complaint also had the effect of frustrating the investigation. Moreover, the excuse raised by the Practitioner could not be sustained in the face of the clear reminder given to her by the investigator. This misconduct would have warranted a suspension of at least several months also.
33. The persisting failure in respect of the Building Permit and the Occupancy Permit also warranted suspension. Although there was no evidence of a widespread problem, the fact remains that in this particular case the Practitioner's failure to lodge was a gross failure and, in the case of the Building Permit, persisted for many years despite repeatedly being the subject of follow up through the audit process. In the case of the Occupancy Permit, the Practitioner's failure persisted even in the face of personal intervention by the Director and a formal complaint. When it was finally submitted, it was missing numerous documents and so was not complete.
34. The Practitioner's dishonesty requires a more serious penalty in order to protect the public and to ensure that the public and the building profession understand that honesty and candour by building practitioners in their dealings with clients and Building Advisory Services is a critically important matter.
35. However, we also take into account that the Practitioner has not been found guilty of professional misconduct previously. Moreover, she has practiced as a building certifier for many years and has reached a stage of her career where the impact of being unable to work in her chosen profession for any period of time could have a substantial detrimental effect on her participation in the work force.
36. We reiterate our earlier comments that in light of the Practitioner's position as Chairperson of the Building Practitioner's Board, the imposition of a suspension on her registration has an additional impact on her both as regards her reputation and financially. Moreover, the fact of a finding against a practitioner who held the status of chairperson sends a strong message to the public that professional misconduct is viewed seriously by the profession itself.
37. In the circumstances, we consider that cancellation of the Practitioner's registration would impose too harsh a punishment on the Practitioner and would deprive her of any opportunity to re-establish her reputation and demonstrate her fitness to practice in the future.

38. In addition to the fixed period of suspension we have imposed, we consider that as a consequence of finding that the Practitioner is not at this time a fit and proper person to hold registration as a building certifier, the Practitioner is and remains a person who has ceased to comply with the requirements for registration under the Act. As a result, pursuant to s.34VA of the Act, the Board must suspend the Practitioner's registration until such time as it is satisfied that the Practitioner is a fit and proper person to be registered.
39. In the course of the Inquiry, it became evident that there were a number of outstanding matters which the audit in 2016 was intended to review. Because the audit did not take place, the status of those matters is unknown. In addition, in light of the findings we have made in this Inquiry we consider that there is a reasonable likelihood that further instances of non-compliance with the Act have occurred and that the Practitioner's current practice falls short of the standards required. In the circumstances, pursuant to s.34U of the Act we direct the Director to conduct an audit of the Practitioner in the same terms as the audit proposed in 2016 and in addition, including a sample of matters undertaken since 2016 to be selected according to the usual audit procedures.
40. After the further audit is conducted, it may be that there are additional matters which the auditor and/or the Director considers should be the subject of a further inquiry under s.34F(2)(b) of the Act.
41. We have considered whether to impose a further condition on the Practitioner's right to practice once her registration is reinstated, in the form of an undertaking to work under supervision. However, we consider that the question of what, if any, supervision is required of the Practitioner in the future is best determined after the audit (and any subsequent inquiry) is completed because this will provide the clearest demonstration of the current state of the Practitioner's practice and the extent, if any, of any non-compliance with the Act beyond the historical incidents the subject of this Inquiry.
42. Once the results of the audit are known, we consider that the Director is best placed to provide for such supervision through his powers to develop a remedial program with the Practitioner under s.34F(2)(c) of the Act.
43. Any proposal for a remedial program is a matter which the Board can consider, together with the findings of the audit and any subsequent Inquiry, when it determines if the Practitioner is at that time a fit and proper person to be registered as a building certifier.

44. Without attempting to bind any future Board's deliberations, we consider that two significant matters for consideration by the Board at that time will be:

- (a) whether the Practitioner has shown a substantial commitment to reform of her practice and to achieving consistently high standards of record keeping; and
- (b) whether the Practitioner has demonstrated insight into the impropriety of her conduct in relation to the Kammler file, the investigation following Mr Kammler's complaint, the 2016 audit and this Inquiry.

45. We note that in our Reasons we identified that the Occupancy Permit for the Kammler file was incomplete. We will make an order directing the Practitioner to provide the remaining documents to Building Advisory Services to ensure that the Occupancy Permit is complete.

46. Finally, we observe that the Director has not sought an order for costs against the Practitioner. In light of the length of suspension that we have ordered, together with the requirement for further audit, we consider that an order for costs would have an unreasonably punitive impact on the Practitioner and we decline to make any orders in respect of costs.

47. The Inquiry Board therefore makes the following orders:

1. The Practitioner is determined not to be a fit and proper person to be registered as a building certifier at this time.
2. The Practitioner's registration be suspended for a period two (2) years from the date of this decision.
3. The Director conduct an audit of the Practitioner's work in the terms of the 2016 audit and further, in relation to her work since she was notified of the 2016 audit.
4. The Practitioner provide to Building Advisory Services the following documents in relation to the Kammler file within 60 days of this decision:
 - (a) a signed s.40 certificate from Wallbridge & Gilbert for inspections undertaken by Bede Rodeghiero;
 - (b) the two inspection certificates provided by the Practitioner to the Inquiry Board dated 26 May 2009 and 14 March 2011;
 - (c) 'as built' drawings for the building works;

5. The Reasons and these further reasons be published on the Building Practitioners Board Website once they have been provided to the Practitioner.



Duncan McConnell
Presiding Member
Building Practitioners Inquiry Board

21 June 2018