



# The Bar Tribunals & Adjudication Service

The Council of the Inns of Court

## Report of Finding and Sanction

**Case reference: PC2020/1230/D3**

Mr Duncan Maxwell-Stewart

The Director-General of the Bar Standards Board

The Chair of the Bar Standards Board

The Treasurer of the Honourable Society of Gray's Inn

### Disciplinary Tribunal

#### Mr Duncan Maxwell-Stewart

1. In accordance with an appointment made by the President of the Council of the Inns of Court contained in a Convening Order dated 10<sup>th</sup> August 2021, I sat as Chairman of a Disciplinary Tribunal on 2<sup>nd</sup> September 2021 to hear and determine four charges of professional misconduct contrary to the Code of Conduct of the Bar of England and Wales against Mr Duncan Maxwell-Stewart, barrister of the Honourable Society of Gray's Inn. The Panel's decision was handed down on 6<sup>th</sup> September 2021.

#### Panel Members

2. The other members of the Tribunal were:

Tracy Stephenson (Lay Member)

Siobhan Heron (Barrister Member)

#### Charges

3. All four charges were admitted by the Respondent when they were put to him by the Clerk at the commencement of the hearing. He had previously accepted them in writing from the

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outset of the internal investigation by his own chambers, and when sent the formal charges by the BSB.

### Charge 1

#### Statement of Offence

Professional misconduct contrary to Core Duty 5 of the Bar Standards Board's Handbook.

#### Statement of Offence

Duncan Maxwell-Stewart, behaved in a way which was likely to diminish the trust and confidence which the public places in a barrister or in the profession in that on or around the 15 February 2020, whilst on a night out at a bar with Person A, over whom he was in a position of professional seniority and/or authority, he: a] lifted up the hem of Person A's skirt, all the way up to her hips, revealing her underwear which was covered by her tights, b] was in too close a proximity to Person A whilst in an upstairs area of a bar and c] untucked Person A's jumper from her skirt, put his hand up the back of her jumper and messed around with her bra strap. The actions were intentional, the actions were sexually motivated. Person A did not consent to the actions, and Mr Maxwell-Stewart did not reasonably believe that Person A consented to the actions.

### Charge 2

#### Statement of Offence

Professional misconduct contrary to Rule rC8 of the Bar Standards Board's Handbook.

#### Statement of Offence

Duncan Maxwell-Stewart, behaved in a way which could reasonably be seen by the public to undermine his integrity in that on or around the 15 February 2020, whilst on a night out at a bar with Person A, over whom he was in a position of professional seniority and/or authority, he: a] lifted up the hem of Person A's skirt, all the way up to her hips, revealing her underwear which was covered by her tights, b] was in too close a proximity to Person A whilst in an upstairs area of a bar and c] untucked Person A's jumper from her skirt, put

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his hand up the back of her jumper and messed around with her bra strap. The actions were intentional, the actions were sexually motivated. Person A did not consent to the actions, and Mr Maxwell-Stewart did not reasonably believe that Person A consented to the actions.

### Charge 3

#### Statement of Offence

Professional misconduct contrary to Core Duty 5 of the Bar Standards Board's Handbook.

#### Statement of Offence

Duncan Maxwell-Stewart, behaved in a way which was likely to diminish the trust and confidence which the public places in a barrister or in the profession in that on or around the 15 February 2020, whilst on a night out at a bar with Person B, he positioned himself close to her and groped her bottom. The action was intentional, the action was sexually motivated. Person B did not consent to the action, and Mr Maxwell-Stewart did not reasonably believe that Person B consented to the action.

### Charge 4

#### Statement of Offence

Professional misconduct contrary to Rule rC8 of the Bar Standards Board's Handbook.

#### Statement of Offence

Duncan Maxwell-Stewart, behaved in a way which could reasonably be seen by the public to undermine his integrity in that on or around the 15 February 2020, whilst on a night out at a bar with Person B, he positioned himself close to her and groped her bottom. The action was intentional, the action was sexually motivated. Person B did not consent to the action, and Mr Maxwell-Stewart did not reasonably believe that Person B consented to the action.

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## Parties Present and Representation

4. The Respondent was present and was represented by Mr Marcus Pilgerstorfer QC. The Bar Standards Board (“BSB”) was represented by Ms Naomi Parsons.

## Preliminary Matters

5. At the outset of the hearing Mr Pilgerstorfer QC referred the Panel to the content of Dr Falkowski’s report – he applied for the matter dealt with in two specific sentences to be dealt with only in private parts of the hearing. The BSB did not oppose the application and accepted that matter should be kept private. The Chair reassured the observers that this matter did not concern the complainants and was referred to a profoundly personal matter concerning the Respondent.

## Evidence

6. The evidence before the Panel was not contested. It consisted mainly of the evidence gathered by the internal chambers’ investigation into Mr Maxwell-Stewart’s conduct towards Person A and Person B.
7. The charges accepted by Mr Maxwell-Stewart related to his conduct towards two female individuals – one employed by his chambers, and another a trainee solicitor from the firm from which he received most of his work. Mr Maxwell-Stewart and a friend went out for the evening and arranged by text to meet up with Persons A and B, who were out together for the evening.
8. Having met up in a bar, Mr Maxwell-Stewart accepted that he had lifted up Person A’s skirt to her hips, revealing her underwear (she was wearing tights at the time); stood too close to her, and untucked her jumper from her skirt, put his hand up the back of her jumper and messed around with her bra strap. He did this for sexual gratification and did not reasonably believe that Person A was consenting.
9. On the same evening and in the same bar he stood too close to Person B and groped her bottom. He did this for sexual gratification and did not reasonably believe that Person B was consenting.

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10. The Chair asked Ms Parsons why the BSB did not say that Mr Maxwell-Stewart was in a position of professional authority in relation to Person B. Ms Parsons observed that the link was much clearer cut in relation to Person A, who was an employee in his chambers. However, Person B was a trainee solicitor whom he had not previously met, and who had not instructed him, though was working on some files of cases in which he was instructed. The Chair indicated that the Panel would be entitled to conclude that there was a strong nexus of professional authority between the Respondent and Person B.
11. Mr Pilgerstorfer QC mitigated on behalf of Mr Maxwell-Stewart. He relied chiefly on the following matters:
- a. Clear disciplinary record and 14 years at the Bar
  - b. Instances entirely out of character – reliance was placed on character references
  - c. Psychiatric report on Mr Maxwell-Stewart, which made clear a number of accumulating problems affecting his mental health.
  - d. The events occurred outside of a work context, and all previous behaviour towards Person A had been entirely appropriate. Mr Maxwell-Stewart did not persist when she sought to distract him.
  - e. Made immediate admissions, showed remorse and made apologies. Self-referred to the BSB promptly and accepted the allegations at every stage.
  - f. The Panel could see that Mr Maxwell-Stewart had sought help with the matters that were troubling him at the time of the incident.
  - g. That the incidents had led to Mr Maxwell-Stewart being expelled from both chambers with which he was associated, leaving him as a sole practitioner during Covid. He had ruined the bright career prospects he was said to have had through this behaviour.
12. The Panel retired and came to a decision on sanction. There had been a request on behalf of the Respondent that the written reasons and sanctions' decision be made public at the same time, to avoid speculation about the case.

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13. The Panel accepted this submission but decided that there ought to be no announcement as to the sanction even to the parties before the full written reasons were ready.
14. The matter was therefore adjourned to 16:00 on Friday 10<sup>th</sup> September 2021 for hand down of decision with full written reasons. On this date the clerk advised the parties that she had provided legal advice on two matters – the period of suspension available to a 3-person Panel (rE210), and the imposition of conditions before a suspended barrister could return to practice (rE222 and rE224).

### Findings

15. Unless otherwise stated, these facts are taken from the unchallenged statements of Persons A and B.
16. Person A is a Practice Manager within the Chambers. [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]
17. Person B is a trainee solicitor at the Firm. Though she had not personally directly instructed Mr Maxwell-Stewart, she had worked on files in which Mr Maxwell-Stewart was instructed. Person B therefore knew who he was and had met Mr Maxwell-Stewart on three occasions prior to the incident: 19 December 2019, 31 January 2020 and 10 December 2020. It is of note that Mr Maxwell-Stewart was clearly a barrister of some standing for the Firm. It was Mr Maxwell-Stewart's primary Instructing Solicitors from whom he derived about one third of his income in the three years preceding this incident.
18. Persons A and B had become known to each other through their professional roles and had become friends, having contact with each other through work, through professional social networking events and also meeting each other socially out of the work setting.
19. On 10 February 2020 the Firm hosted a networking event. Person B attended and during the course of the event spoke to Mr Maxwell-Stewart. She told him that she and Person A would be going out on the following Friday evening. No formal plans to meet were made, but the possibility of meeting up was mentioned.
20. On Friday 14 February 2020, Persons A and B went out into town from work as planned. The evening began with dinner followed by visiting several locations for drinks. During the course of the evening, they agreed to message Mr Maxwell-Stewart to meet up. All three

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together with an unnamed friend of Mr Maxwell-Stewart met in a bar at about midnight. Mr Maxwell-Stewart had been consuming alcohol before meeting up. Person A did not think that Mr Maxwell-Stewart displayed any obvious signs of being intoxicated when they first met, though she accepts from his behaviour fairly soon after that he was drunk. Neither Person A or B accepts being drunk themselves. Though they had consumed alcohol, they had also eaten during the evening and as Person B makes clear the incident itself was such that it rapidly cleared her mind. She is adamant and we accept that she had a clear recollection of events.

21. After Mr Maxwell-Stewart bought a round of cocktails, he and Person A danced together. Whilst they did so, Mr Maxwell-Stewart lifted the hem of Person A's skirt up to her hip thereby revealing her underwear: Charge 1 and 2, particular (a). In a later clarification of this incident,<sup>1</sup> Person A stated that her skirt was not a floaty skirt, and it had a lining making it difficult to accidentally pull up as it was quite stiff. Mr Maxwell-Stewart's left hand was on the bottom of the skirt and his right hand half way up. Person A recalls that the underwear would have been on show as her skirt came fully up. Afterwards she had to adjust the skirt by pulling it down from the inside.' Person A was immediately uncomfortable and made excuses to leave the dancefloor to return to the Bar. Upon returning to the bar, Mr Maxwell-Stewart began to dance on the tables. It was this that made Person A realise how drunk Mr Maxwell-Stewart was.
  
22. Person A suggested that they got a drink. It may have been unfortunate to invite Mr Maxwell-Stewart to consume more alcohol but as a device to stop him from dancing on the tables, we can understand doing so. Mr Maxwell-Stewart suggested that they go upstairs to get the drink. In fact, there was no Bar upstairs and by going up it had the effect of isolating Person A from her friend. Whilst there, Mr Maxwell-Stewart stood in very close proximity to Person A, in her words "he was in my personal space': charge 1 and 2, particular (b). Mr Maxwell-Stewart says that he believed that there was a bar upstairs and because of deafness in one ear (supported by medical evidence) he thought it would be easier to talk with less noise. Whilst of itself, this may not constitute misconduct, taken in context with his behaviour as a whole and his admitted sexual motivation, we are sure that whatever other partial motivations Mr Maxwell-Stewart had in so acting, he was in at least some degree motivated by sexual attraction to be stood in such close proximity to Person A. In any event, his conduct had the effect of making Person A feel uncomfortable. It is also significant in assessing Mr Maxwell-Stewart's culpability that it was at this stage that he told Person A 'not to tell [the Senior Family Practice Director] about us being out together'. In whatever state of inebriation he was then in, Mr Maxwell-Stewart had sufficient clarity of thought to understand that it would be regarded by fellow members of chambers and the other clerks to be inappropriate for him to be out socialising in this manner with Person A

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<sup>1</sup> Bundle p83

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and that comment further fuelled Person A's sense of unease. To her it was becoming a 'red flag'.

23. Either upon returning to the bar from the dancefloor or returning there from speaking to Person A upstairs, it is not clear which, Mr Maxwell-Stewart walked past Person B and positioned himself close to her. Upon doing so, he then groped Person B's bottom: charge 3 and 4. She was immediately shocked. She did not know what to say or do. She knew that she wanted to leave but she also felt uncomfortable about the possibility of confrontation.
24. Person A and Person B both went outside to have a cigarette and decide what to do. They each told the other what had happened and decided to leave. Person A had to return to the bar to collect her bag and coat. To do so, she had to pass close by Mr Maxwell-Stewart. As she passed, Mr Maxwell-Stewart took hold of her jumper, untucked it and put his hand up inside her clothing to start 'fiddling with [her] bra strap': charge 1 and 2, particular (c). She said that this happened for 5-10 seconds.
25. Upon both complainants being outside again, Person A was crying. Person B was angry. Person A notes that 'if Duncan had not been a barrister at Chambers, I would have been more frank with him when we were upstairs and asked him to leave me alone. In the past when a stranger has made me feel uncomfortable I would confront them immediately. However, I was conscious of the fact that Duncan was somebody who I worked with and I tried to diffuse the situation by suggesting that we went downstairs for a drink. I didn't want the awkwardness of meeting him in Chambers on Monday morning.'
26. Both Person A and B reported matters to their line managers as soon as reasonably practicable. Person A's first complaint was to her office manager on the same day, Saturday 15 February 2020. Person B reported to her line manager on the following Monday morning.
27. Person B reported these events to the Firm. Having done so, the Firm immediately suspended any contact between itself and Mr Maxwell-Stewart and has awaited the outcome of the Chambers Grievance process and this Tribunal.
28. The Chambers immediately began an Internal Grievance process which led to a report<sup>2</sup> and addendum report.<sup>3</sup> Mr Maxwell-Stewart's position throughout that process and remaining his position up to and including the hearing before us is that he was so drunk that he has no effective recollection of the evening and certainly none of the impugned conduct but that

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<sup>2</sup> Bundle pp22-70

<sup>3</sup> Bundle pp71-78

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he accepts that neither Person A or B has any reason to be other than truthful. He therefore accepted their accounts as to his conduct as true and accurate.

29. Having reached their conclusions as to the actions to be taken by Chambers, there was some debate as to whether these circumstances required Mr Maxwell-Stewart to self-report to BSB. Mr Maxwell-Stewart was initially of the view that it was not required. The author of the Chambers report was initially uncertain but in the event decided that self-reporting was required and Mr Maxwell-Stewart complied with that decision. He self-reported on 3 March 2020 and included within that self-report copies of the Chambers Grievance report and addendum.
30. Mitigation was put forward on behalf of Mr Maxwell-Stewart. Insofar as we make findings of fact arising from that mitigation that shall be made clear in the relevant section of this judgment.
31. It is confirmed that each member of the Panel had read the bundle, including the additional pages, prior to the hearing. We were also assisted by the skeleton arguments of Ms Parsons for the BSB dated 26 August 2021 and of Mr Pilgerstorfer QC for Mr Maxwell-Stewart dated 26 August 2021, supplemented by oral submissions at the hearing.
32. Based upon those submissions and not contested by Mr Maxwell-Stewart we find:
  - a. That the Code is engaged by Mr Maxwell-Stewart's admitted conduct and that Core Duty 5 and rC8 are engaged 'at all times'.
  - b. That the admitted conduct is serious as defined in Walker v BSB (PC 2011/0219) in that it is conduct of a sexual nature.
  - c. Insofar as Person A is concerned, the BSB assert and Mr Maxwell-Stewart accepts it was conduct involving abuse of a professional position.
  - d. Insofar as Person B is concerned, Mr Maxwell-Stewart did not make that concession and it was advanced on his behalf that there was no professional but only a purely social context. We reject that submission. Person B was and Mr Maxwell-Stewart was fully aware that Person B was a trainee solicitor in the Firm from which Mr Maxwell-Stewart derived the primary source of his work and income, that Person B was at that time within her Family seat at the Firm, and though had not personally instructed Mr Maxwell-Stewart she had worked on files in which he was instructed. Though Mr Maxwell-Stewart may not have specifically known that Person B was working on files he was instructed in, given the nature of his relationship with the

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Family Department of the Firm it was reasonably foreseeable to him that Person B would work on files he was instructed in. Further he had met Person B on 3 previous occasions all in a work related context and the relationship between Person A and B arose directly out of their respective employment in the Chambers and the Firm. It is simply too artificial to extract this incident from its professional context. Bearing in mind the junior (and vulnerable) position of a trainee solicitor in these circumstances, we are satisfied so that we are sure that this ought properly to be judged a professional context for Person B also.

33. The Skeleton argument of Mr Pilgerstorfer QC paragraphs 6 to 18 sets out the mitigation in detail.

34. In oral submissions, the points were set out as follows:

- a. Previous good character in the sense of no previous disciplinary finding in 14 years of practice.
- b. Previous good character in the sense of positive good character as attested to by the submitted character references.
- c. Mr Pilgerstorfer submitted the following elements ought to be derived from the character issue:
  - i. Mr Maxwell-Stewart has fully owned up to his conduct
  - ii. The conduct was out of character
  - iii. Mr Maxwell-Stewart shows genuine remorse
  - iv. That but for this matter Mr Maxwell-Stewart had a promising future at the Bar which is now lost to him.
- d. We accept as a fact that Mr Maxwell-Stewart is of previous good character. However, his admitted conduct amounts to admission of criminal behaviour amounting to sexual assault upon two separate complainants. We are therefore of the view that previous good character is not of significant weight in the circumstances of this case.
- e. Psychiatric report/ personal circumstances:

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- i. Mr Maxwell-Stewart at the material time was suffering from personal ill health which he feared would result in his total loss of hearing and consequentially the loss of his career at the bar.<sup>4</sup>
  - ii. Mr Maxwell-Stewart's uncle, who he was close to, had died in the days before this incident causing Mr Maxwell-Stewart significant distress.<sup>5</sup>
  - iii. Mr Maxwell-Stewart's marriage had broken down in the period shortly before this incident causing Maxwell-Stewart significant distress, aggravated by the fact that many of their friends in common had not felt able to stay in contact with Mr Maxwell-Stewart thereby reducing his available support network.<sup>6</sup>
  - iv. At the time of the incident Mr Maxwell-Stewart was effectively homeless having vacated the marital home, having access to only (very) temporary accommodation and a house purchase having just fallen through, leaving Mr Maxwell-Stewart very unsettled.
  - v. The result of these combination of factors triggering in Mr Maxwell-Stewart distress, anxiety, a sense of being over whelmed and resulting in a depressive illness.<sup>7</sup>
- f. Since the impugned behaviour occurred, Mr Maxwell-Stewart has suffered further tragedy (see paragraph 4 of the Psychiatric report which the Panel took note of but agreed not to have aired in public)<sup>8</sup> and he has suffered with suicidal ideation. Fortunately Mr Maxwell-Stewart is no longer suffering from low mood or suicidal ideation.
- g. It was submitted that the incident was unplanned, not instigated by Mr Maxwell-Stewart and was of overall short duration. We accept that it was unplanned. We accept that the meeting was not instigated by Mr Maxwell-Stewart. However, undoubtedly the unwanted touching was wholly instigated by Mr Maxwell-Stewart. There is no evidence whatsoever that either complainant said or did anything to encourage or to lead to an impression that any touching was wanted or would be tolerated. We do not accept that the duration of the unwanted touching is of any

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<sup>4</sup> Psychiatric report para 14, bundle p158

<sup>5</sup> Psychiatric report para 15, bundle p158

<sup>6</sup> Psychiatric report para 16, bundle p158

<sup>7</sup> Psychiatric report para 42, bundle p164

<sup>8</sup> Bundle p156

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material mitigation. As is clear from the impact upon the complainants, in particular Person A (see para 26 below), the fact that it was of short duration has not diminished the harm caused. Nor can Mr Maxwell-Stewart claim any credit for the incident being short due to coming to his senses. In each case the unwanted behaviour ended because the complainants removed themselves from Mr Maxwell-Stewart.

- h. Alcohol consumption - Mr Maxwell-Stewart was very drunk. We do not accept that this is of any mitigation at all.
- i. Remorse/ apology – we accept that from the outset Mr Maxwell-Stewart has admitted his conduct, is genuinely embarrassed about it, is wholly and genuinely remorseful and that he has offered a full apology to both complainants.
- j. Conduct since incident – Mr Maxwell-Stewart has voluntarily attended counselling for his personal and mental health issues, counselling relating to alcohol consumption, remaining fully abstinent since the incident, and has attended on Equality and Diversity training and Harassment, bullying and inappropriate behaviour training.
- k. It was further submitted that as a direct result of this matter, Mr Maxwell-Stewart has lost his tenancy in both his Leeds and London Chambers , that he is no longer instructed by the Firm, and that he has lost his professional and personal reputation and any realistic prospects for career advancement to Leading Counsel.

### **IMPACT ON COMPLAINANTS**

35. In this case, the clear dangers and consequential damage caused by significant power imbalances between a member of the bar and those in a position junior to him, either by virtue of juniority of professional status or differences in employment status are readily seen and apply to both complainants.

36. Person A [REDACTED] was distressed and crying in the immediate aftermath. Her mood at work changed from bubbly to withdrawn. She felt her work began to suffer. By the following Wednesday she was crying more than once per day in Chambers. Over the next couple of weeks, Person A felt obliged to take holiday from work to separate herself from the environment. This did not help and led ultimately to taking two weeks sick leave. She suffered with stress and flashbacks and required counselling.<sup>9</sup> She states ‘at present and for some foreseeable

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<sup>9</sup> Person A, statement paragraphs 13-15, bundle p118-119

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future I do not wish to have any contact with Duncan be that via email, letter or otherwise. ... The impact that the assault has had upon me has deeply saddened and distressed me and continues to be something that I process every day. ... My role in chambers is very important to me ... I feel an overwhelming amount off guilt that certain instructions have or may have been removed from his diary, along with any inconvenience caused to instructing solicitors and their clients. During the last couple of weeks I have felt hugely uncomfortable in chambers and have felt that I have been disloyal to chambers in reporting the assault with the inconvenience caused to all involved.<sup>10</sup> We commend the Chambers for their supportive approach to Person A.

37. Person B is a trainee solicitor in a Firm which held Mr Maxwell-Stewart in high regard. Her immediate reaction was one of anger. However, we are satisfied that given her junior status the act of reporting Mr Maxwell-Stewart was one which inevitably would cause her anxiety as regards her position within the Firm and her future prospects. In the event, we commend the Firm in ensuring that Person B has been properly supported.

### Sanction and Reasons

38. The Panel must consider sanction, taking into account the current Sanctions guidance.<sup>11</sup> However, it is trite to observe that guidance is precisely that, guidelines not tram lines.
39. The limit of sanction powers for a three person panel is up to twelve months suspension.
40. We note the following paragraphs of the Sanctions Guidance:

Part I

Section 3 – Purpose and principles of sanctions

3.1 The purposes of applying sanctions for professional misconduct are:

- a. To protect the public and consumers of legal services;
- b. To maintain high standards of behaviour and performance at the Bar;
- c. To promote public and professional confidence in the complaints and disciplinary process.

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<sup>10</sup> Person A, Further Information bundle p85

<sup>11</sup> rE204, Sanctions Guidance Version 5

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3.2 The three purposes of applying sanctions (outlined above) have equal weighting; in fulfilling the purposes it is important to avoid the recurrence of behaviour by the individual or the authorised body as well as provide an example in order to maintain public confidence in the profession. Decision makers must take all of these factors into account when determining the appropriate sanction to be imposed in an individual case. Decision makers should also bear in mind that sanctions are preventative and not intended to be punitive in nature but nevertheless may have that effect.

#### Deterrence and upholding standards

3.3 In some cases, the sanction imposed may be necessary to act as a deterrent to other members of the profession. Therefore, when considering a sanction, it may be necessary not only to deter the individual barrister or authorised body from repeating the behaviour, but also to send a signal to the profession and the public that the particular behaviour will not be tolerated. A deterrent sanction would be most applicable where there is evidence that the behaviour in question seems to be prevalent in relation to numbers of barristers within the profession.

#### Proportionality

3.4 In deciding what sanctions (if any) to impose, the decision maker should ensure that the sanctions are proportionate, weighing the interests of the public with those of the practitioner or authorised body. Proportionality is not a static concept and will vary according to the nature of the breach and the background of the individual barrister or authorised body. For example, a first time breach of the practising requirements would rarely, if ever, warrant a suspension or disbarment but a similar breach, having been committed many times without remorse or any attempt to remedy the situation, might warrant consideration of suspension or disbarment. Repeated breaches of relatively minor provisions of the Handbook may indicate a significant lack of organisation, integrity, or insight on the part of the barrister or authorised body which could represent a risk to the public and undermine confidence in the profession. Sanctions should be reflective of the seriousness and circumstances of the conduct e.g. where the incentive for breaching the Handbook was for financial gain the sanction should reflect that. The sanction imposed

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should be no more onerous than the circumstances require, the lowest proportionate punishment should be imposed in any particular case. The decision maker should consider the totality of the breaches when considering proportionality.

## Part II

4. The guidance *is not intended to represent a tariff* [emphasis added] for the breaches and decision makers must decide each case on its own facts. The suggested sanctions do not necessarily represent the most likely sanction to be given and the guidance merely indicates where a decision maker might start before considering all the relevant factors.

5. It is important that consistency and proportionality in sanctions are maintained and therefore where a decision maker imposes a lesser or higher sanction than suggested by this

guidance, it is important that full reasons are given as to why the sanction is considered appropriate. This will not only give the barrister or authorised body and the complainant a clear indication of the reasons for a lenient or harsh sanction but will provide justification for

the decision should the case go to appeal.

41. We have been referred to and take note of the Sanctions Guidance for Misconduct of a Sexual Nature.<sup>12</sup> It goes without saying that matters of sexual misconduct can cover a vastly differing range of conducts. Mr Pilgerstorfer invites us to conclude that this matter falls within the least serious form of such conduct, amounting to little more than inappropriate behaviour and falling within the bracket 'Inappropriate conduct within a professional context' with a starting point of reprimand and medium level fine to short suspension. He in fact goes further, inviting our attention to paragraph 6.20 of the Sanctions Guidance and submits that there is no ongoing risk to the public, Mr Maxwell-Stewart has admitted the conduct, the effects of the disciplinary process have already had a significant impact on Mr Maxwell-Stewart's reputation and practice and no further purpose would be served by further sanction. Accordingly, he invites us to take no further action.

42. We unhesitatingly reject that proposition. Firstly, the words 'no further purpose would be served by further sanction' are highly relevant. In our judgment, having regard to the

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<sup>12</sup> Sanctions Guidance v5, section B.7, p45

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purposes of sanctioning to maintain the highest standards of the Bar and to preserve professional and public confidence in the discipline system, deterrence is a highly relevant further purpose to be served by further sanction in cases of sexual offending in a professional context. Secondly, Mr Maxwell-Stewart's admitted conduct amounts to an admission by a barrister of committing the criminal offence of sexual assault upon two separate victims over whom he has the benefit of a very substantial power imbalance. We are of the view that the words in the Sanctions Guidance 'a conviction for a criminal offence' can be properly construed as to include an admission of a criminal offence. For a single victim/ single offence, even on the current guidelines the starting point would be a medium level suspension. A medium level suspension within the terms of the current guidance is defined 3 to 6 months. In the present case there are two complainants, and three distinct sexual assaults [with the standing within close proximity forming part of the overall conduct], increasing the level of culpability and seriousness. They occurred within the context of a professional relationship albeit on a social occasion. The power imbalance was self-evident and indeed is cited by Person A as being a matter forefront in her mind. The impact upon the complainants has been significant, and the confidence the public has in the profession has been heavily undermined by the specific conduct on the part of Mr Maxwell-Stewart.

43. Furthermore, we note that the current guidelines date from 2014. There has been a sea change in the opinion of both the profession and the public as to appropriate levels of sanction to be imposed on members of the Bar in matters of sexual misconduct. Bearing in mind our duty to promote public and professional confidence in the complaints and disciplinary process, whilst having due regard to the current guidelines, we would be failing in our duty not to recognise that the current suggested starting points are now perceived to be far below the levels necessary to meet the stated purposes of the disciplinary system and purposes of sanction.<sup>13</sup>
44. Taking all matters into account, in particular the criminality of the admitted conduct, the fact that there are two victims and not one and the issue of deterrence, we have had to consider whether we ought properly to refer this case onwards to a five person panel for determination of sanction. We have concluded that the appropriate starting point for sanction before any reduction for the admissions and the mitigation on each charge would be 18 months suspension. We have further concluded that the proper discount for the admissions and the substantial mitigation put forward on behalf of Mr Maxwell-Stewart including his acceptance of responsibility from the outset; his admitting the charges; his

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<sup>13</sup> It is noted that BSB/ BTAS research and consultation on the levels of sanction, including for sexual misconduct is currently the subject of a complete reworking of the Sanctions Guidance to come into force in 2022. We have expressly NOT taken that research to provide us with a notional starting point in this case which has been judged on its own facts.

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difficult circumstances and his clear and evident remorse justify a reduction from that starting point of 6 months.

45. We therefore conclude that the appropriate sanction in this case is 12 months suspension in relation to each charge, to run concurrently. As that sentence is within the powers of a three person panel, we are satisfied that we can pass that sentence without referral of the matter to a five person panel.
46. In addition, as Mr Maxwell-Stewart has relied heavily on his psychiatric and emotional state in his mitigation before us, we direct that upon completion of his suspension, Mr Maxwell-Stewart may not be readmitted to a practising certificate until he has filed with the BSB a psychiatric report confirming that Mr Maxwell-Stewart is fit for practice.

#### Costs

47. The Panel then heard an application by the BSB for costs. The schedule has been provided to the Respondent. The BSB seeks costs in the sum of £2,100 and the Panel received submissions from Mr Pilgerstorfer QC on both the sum of costs and on the possibility of postponing the period of suspension. Both counsel for the BSB in her submission in reply, and the Clerk in her role of providing legal advice, observed that the power to postpone applied only to suspensions for period of 3 months or less (rE221).
48. The Panel retired to consider those issues. When they returned, they expressed the view that they had no power to postpone a suspension of 12 months. Mr Pilgerstorfer noted that rE222 noted that a suspension could run for a fixed period. The clerk provided advice that this was a 'fixed period' in juxtaposition to the second subsection that dealt with suspension 'until conditions had been complied with'.
49. The Panel took view that they did not have the power to postpone the suspension, and even if they had had they would not have been minded to exercise that power.
50. The Panel awarded costs in the sum of £600 to paid within 28 days.
51. The Respondent has 21 days to appeal the decision.

**Approved: 10 September 2021**

**HHJ Jonathan Carroll**

**Chairman of the Tribunal**

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