JULY 2022, ISSUE 10

WELLINGTON BRANCH NEWSLETTER

IN THIS ISSUE

New Zealand Law Society
Wellington Branch

PRESIDENT'S COLUMN – ĒTAHI WHAKAARO NŌ TE TUMUAKI

Nau mai, haere mai ki tēnei whakaputanga mō tā tātou niupepa. I te marama nei, ka kōrero au mō te raruraru o te whakahāwea ā-iwi i ō tātou kōti me ō tātou tari ture. I waenganui i te 17 o Haratua me te 30 o Pipiri 2022, i whakahaerehia e te Pacific Lawyers Association me Te Hunga Rōia Māori o Aotearoa tētahi rangahau e aro ana ki ngā wheako o ngā rōia he Maori, he iwi Moana-nui-a-Kiwa rānei. I pātaihia ki a rātou mehemea i kī mai ngā kaimahi o ngā kōti i te whakapono o ngā kaimahi he kaikaro ngā rōia, kaua he rōia, nā te mea he tae kiri. Kotahi rau rima tekau mā whitu ngā rōia i whakautu ki ēnei pātai. Kotahi rau o āua rōia he Māori, he iwi Moana-nui-a-Kiwa rānei.

I kitea e te rangahau e rima tekau paiheneti o ngā kaiwhakautu kua pā ki tēnei momo whakahāwea ā-iwi a ngā kaimahi o ngā kōti i ngā tau e whitu kua hipa. Rima tekau mā rua paiheneti o ngā kaiwhakautu i pā ki tēnei momo whakahāwea ā-iwi i ētahi tari ture i ngā tau e whitu kua hipa.

E mōhio ana koutou katoa ehara tenei i te mea hou mō ngā rōia he Māori, he iwi Moana-nui-a-Kiwa rānei. Heoi, kaua tātou e tuku kia haere tonu tēnei. Ko tāku tumanako ka kaha te mahi a Te Tāhū o te Ture ki te whakangungu i āna kaimahi kia rite ki tā te ripoata e kī ana, "ko ngā tangata katoa e haere ana ki te kōti me ngā tangata katoa e mahi ana i te ture kia rite te whakaute".

This is a pivotal moment for the legal profession in New Zealand. If you have not yet read the discussion document here, issued by the independent review panel commissioned to examine the regulation and representation of legal services in our country, I urge you to do so. Your voice needs to be heard.

Whatever your level of engagement with the Law Society, this review asks fundamental questions, the answers to which will shape our profession for generations to come.

As I mentioned when I spoke to our AGM in June, the Law Society has been around since 1869. It has served us well, both as a regulator and our voice in the halls of power. But we cannot just assume it will be here forever. The review asks whether the current model is fit for purpose in the modern age. Should New Zealand adopt something akin to the Solicitors Regulation Authority (and the Bar Standards Board) in England and Wales – do we want a fully independent or autonomous regulator for the legal profession? Many other questions flow from this, including:

- In view of the consumer-protection purpose of our governing legislation, should such a regulator govern all persons who provide legal services, such as employment advocates and McKenzie friends? Should the reserved areas of work be broadened to include all legal services?

- Given the fact that our current regulatory model relies on thousands of hours of voluntary work by lawyers across the country, how would a new regulatory model be staffed (and paid for)?

- If the Law Society ceased to be a regulator as well, would its representative role be sustainable? If so, how? If the Law Society imploded (which is not inconceivable), what implications could that have for our profession? Is it likely to lead to a reduction in the valuable links across practice areas and regions of this country? Would it weaken our collective voice? What implications could that have for our democracy and the rule of law? Do we care?

We have until **31 August 2022** to send a submission to secretariat@legalframeworkreview.org.nz or complete the survey at the review's website. I think we should all care about this, whether or not we are particularly engaged with the Society. Because it will affect all of us. And as the famous whakataukī observes:

Nā tāu raurau, nā tāku raurau, ka ora ai te iwi.

Christopher Griggs

High Court appeal - James Gardner-Hopkins

On 17 January 2022, James Gardner-Hopkins was suspended for two years. The suspension started on 7 February. The Tribunal set out steps he should take to satisfy the Law Society that his practising certificate should be renewed at the end of the suspension.

The National Standards Committee No 1 lodged an appeal against the Tribunal's penalty decision imposing a two-year suspension on James Gardner-Hopkins for findings of misconduct.

The High Court decision came out on 20 July 2022, increasing James Gardner-Hopkins's penalty to the maximum 3 years. We reached out to the legal community again for their perspectives. The views expressed here do not necessarily reflect the views of the Law Society.

Steph Dyhrberg, Partner at Dyhrberg Drayton Employment

In increasing the penalty from 2 years to the maximum 3 years suspension, the High Court has provided a strong condemnation of Mr Gardner-Hopkins' sexually inappropriate behaviour towards the 5 young women who were summer clerks at Russell McVeagh Wellington over the summer of 2015 – 16. The Court considered the seriousness of the offending required a high level of condemnation. However, the Court also considered Mr Gardner-Hopkins had made some progress in taking appropriate steps to address his conduct and ensure there would be no repetition of it, and so did not consider it warranted strike off.

The judgment emphasised the seriousness of the conduct and its adverse impacts on all of the women. The power imbalance between Mr Gardner-Hopkins and the summer clerks was significant. His exploitative sexual behaviour towards vulnerable young women was a serious breach of trust and the duty of care Mr Gardner-Hopkins held for the young employees' safety in the workplace.

The Court accepted Mr Gardner-Hopkins had started to make some progress in terms of developing insight into his conduct and the causes of his behaviour. Reliance was placed on the 6 years that had elapsed since the offending, without any further complainants coming forward. The Court observed that at the time of the offending, Mr Gardner-Hopkins was not a fit and proper person to practise law. Had the penalty hearing occurred closer to the time of the offending, strike off may have been appropriate.

I consider Mr Gardner-Hopkins was very fortunate not to be struck-off. His behaviour was disgraceful and exploitative of vulnerable teenagers for whom he had a duty of care. He brought the profession into unprecedented disrepute. The harm he caused to the young women, their friends and families and other colleagues was considerable. His acknowledgement of fault was at the 11th hour, forcing the women to give evidence. The efforts he made to rehabilitate himself were belated and rather meagre. The fact Mr Gardner-Hopkins benefitted from the delay in bringing these proceedings to a conclusion is particularly galling: this was not of the women's making.

The profession still needs to learn a number of lessons from this case. Unprofessional conduct flourishes in environments where there are power imbalances and a refusal to hold people accountable. Much more education is needed at all levels of the profession about the expected standard of behaviour and how to make legal workplaces safe and respectful. Internal and Law Society complaints processes need to be far more supportive. Senior lawyers and firms are in many cases still resistant to accepting the need to do things differently and hold perpetrators accountable. I am still getting regular calls through the National Friends' panel about all manner of unfair, unprofessional behaviour: sexual harassment, bullying, threatening people who make complaints (including with reporting them to the Law Society), over-work and exploitative employment terms that I do not see in any other profession.

But there are also positive signs: more and more people are seeking support and refusing to tolerate being treated badly at work. More enlightened firms are putting good policies and processes in place and upskilling their partners and staff. They are encouraging complainants to seek independent representation and sometimes funding it. To anyone being subjected to sexual harm in the workplace: it is not acceptable. Seek support and do not suffer in silence.

Tess Upperton, Co-President of Aotearoa Legal Workers' Union

The Aotearoa Legal Workers' Union (ALWU) is disappointed in the result of the High Court decision issued relating to James Gardner-Hopkins. His cross-appeal was dismissed, while the Standards Committee's appeal led to an increase from a 2-year suspension to 3 years. However, the Standards Committee's argument that Mr Gardner-Hopkins should be struck off was not successful.

ALWU sees this case as a missed opportunity. The court described Mr Gardner-Hopkin's conduct as "serious, exploitative, sexual misconduct". ALWU agrees with that assessment. But legal workers are left asking why someone assessed by a court as posing that level of danger has not been struck off. This is a missed opportunity to right a long series of wrongs that have left a stain on the profession.

Mr Gardner-Hopkins is now free to apply for a practising certificate in 2025. Suspension is not enough. And it's not like no one is getting struck off - just this month, a lawyer was struck off for behaviour like misleading clients and failing to provide information or cooperate with an investigation. Obviously, lawyers are a publicly regulated profession and all breaches of the rules need to be taken seriously. But where is the consistency? Where is the understanding of harm?

Perhaps most concerningly, the Court decision noted that had the Disciplinary Tribunal or the Court been considering the case "much closer to that time", "the misconduct would have justified striking off". The egregious delays on the part of the Law Society, Russell McVeagh, and Mr Gardner-Hopkins himself have contributed to this outcome - but delays do not fix harm and should not result in the denial of justice we saw with this decision.

These proceedings provide important points of discussion that will help inform the highly anticipated Independent Review of the statutory framework for legal services in Aotearoa.

ALWU continues to engage with the review panel to discuss how to improve the complaints system and the wider culture of the legal profession.

James Gardner-Hopkins Penalty Decision Appeal: The Profession Still Remains a Relatively Safe Space for Sexual Predators

Ana Lenard, Dispute Resolution Lawyer

The Standards Committee appealed the Tribunal's penalty decision and the judgment was released on 20 July 2022. Although increasing Gardner-Hopkins' suspension period to three years, the High Court unfortunately did not agree with the Standards Committee that strike off was merited. The Court missed an opportunity to send a strong message about sexual misconduct in the legal workplace.

What the High Court got right

One of the criticisms of the Tribunal's penalty decision was the failure to understand that even short episodes of sexual misconduct can have profound consequences. The High Court accepted that the brevity of sexual misconduct does *"little to mitigate its seriousness".* The Court also strongly rejected the practitioner's argument that the consensual nature of one of the incidents was relevant. The High Court correctly concluded that Gardner-Hopkins *"breached the duty of care and trust owed to [the woman] as a young employee of his firm"*. He acted in an "entirely inappropriate" way and *"should have appreciated the considerable power imbalance".*

Another critique of the penalty decision was that it exhibited too much sympathy for Gardner-Hopkins vis-à-vis the women and that it incorrectly categorised career and financial consequences as mitigating factors. The Court agreed with the Standards Committee that the Tribunal erred when it categorised financial and professional consequences suffered by Gardner-Hopkins as mitigating factors. As the High Court rightly concluded, *"[t]he fact that Mr Gardner-Hopkins was required to resign from the Russell McVeagh partnership, and lost connection with the profession, was an inevitable consequence of his actions".* Such negative consequences are not factors that will be considered in mitigation in disciplinary proceedings, the primary purpose of which is protection.

Referring to the practitioner's living costs of $144,000 a year after tax, the High Court left intact the Tribunal's decision declining to view Mr Gardner-Hopkins' financial position as a mitigating factor: *"[a] budget at that level does not suggest dire circumstances"*. Importantly, the Court held that financial position is not a mitigating factor in lawyers' disciplinary proceedings.

The High Court agreed with the Tribunal that a recent Standards Committee case addressing similar conduct was wrongly decided. But the Court rightly went a step further than the Tribunal and disregarded it. The Court also disregarded the Daniels and Horsley cases which were determinative comparators in the Tribunal's penalty decision: *"there has been a profound societal change in attitude towards sexual harassment over the last decade and that shift in perception is important when considering penalty in light of the need to maintain the confidence of the public in the legal profession"*.

Concluding that Gardner-Hopkins' misconduct was serious and "is wholly unacceptable in the legal profession", the Court — in agreement with the Tribunal — adopted strike-off as the starting point. The Court also agreed with the Standards Committee's submission that strike-off should not be reserved for the worst possible case: *"[t]here may be variations or different examples of serious misconduct, all of which could require a very serious sanction, be it strike-off or the maximum period of suspension".*

What the High Court got wrong

Unfortunately the High Court downgraded the importance of evidence about the toxic and misogynistic culture of the team led by Gardner-Hopkins at Russell McVeagh. Accepting that such a workplace culture is no longer acceptable, the High Court concluded that it ultimately did not "significantly inform the seriousness of the conduct giving rise to the charges". But it was rightly accepted by the Tribunal that this evidence indicated Gardner-Hopkins' conduct was not totally out of character and was therefore properly treated as an aggravating feature. It is normal and desirable to factor past conduct into an analysis of aggravating factors.

Like the Tribunal, the High Court accepted Mr Gardner-Hopkins' submission that he had taken and was continuing to take appropriate steps to address future risk, including his alcohol dependency. But, the self-reported evidence at the penalty hearing was that he was still drinking alcohol at the level of Ministry of Health guidelines (being up to 15 standard drinks a week).

The High Court also relied on the fact that the incidents were closely connected in time, during a time when Mr Gardner-Hopkins had difficulties in his personal life. The Court noted that no further complainants had come forward: "[g]iven the high-profile nature of the proceeding it is likely they would have done if such incidents had occurred". This statement contains dangerous assumptions about the choices victims make. There are examples of more victims coming forward with the publicity of certain cases — but this does not necessarily translate into more formal complaints. Victims would have to be willing to be in the public eye for years in a case like this. Those two factors alone would be chilling for people trying to move on with their lives.

The Court also cited references from a "number of women" who confirmed that the practitioner had "acted appropriately towards them". Gardner-Hopkins necessarily would have behaved

appropriately towards some, even most, women in the workplace over the years: superiors, clients, equals — any women with whom it would be beneficial to be on good terms. We do not know who these references are from and how the practitioner was connected to these women. These references do not speak to the specific risk Gardner-Hopkins poses to women in the workplace where there is a power imbalance.

The Court admitted and relied on fresh evidence from a psychologist who considered Gardner-Hopkins' motivation to change was now intrinsic, no longer resulting from the pressure of the proceedings. The Court also unfortunately discounted the relevance of Gardner-Hopkins' past conduct (creating a sexualised work environment) to the issue of future risk. Accepting that Gardner-Hopkins took too long to accept responsibility for the incidents, the Court ultimately concluded, referring to the apology given at the penalty hearing, that *"there is now some insight on Mr Gardner-Hopkins' part of the impact of his actions on the young women"*. As I have previously argued, characterisations such as these are too generous: *"Gardner-Hopkins acted with a lack of remorse throughout the proceedings and well past the eleventh hour"*. The practitioner's points on cross-appeal reflecting an ongoing lack of understanding of the nature and gravity of the misconduct.

In its analysis of penalty, and echoing the Tribunal, the Court concluded that *"[a]part from the misconduct towards the young women there is no suggestion that Mr Gardner-Hopkins is anything other than a competent practitioner"*. Is it right that the two can neatly be cabined in this way? A "competent" practitioner who has trouble complying with legal obligations is somewhat of an oxymoron. Relying, amongst other things, on *"absence of any further complaints and his past clear disciplinary record"*, the Court's view was that *"the risk [of] similar conduct in future has considerably diminished*". This was the significant factor that led to a penalty short of strike off being imposed by the Court. As I have previously argued, it is wrong to take into account the lack of further complaints. Complaining is traumatic and unlikely to be worth it absent real consequences: *"[n]o complaints simply means none have been lodged, not that there has been no conduct to complain of."*

Conclusion

Deftly side-stepping some of the Tribunal's unfortunate analysis, the High Court introduced some unhappy ideas of its own. It is difficult to understand the Court's decision. Having accepted that *"Gardner-Hopkins seriously beached the trust that was imposed on him and his actions undoubtedly affected [the women's] futures in the law"*, and that the incidents have "had a significant effect on each of the victims", why should the practitioner's future be preserved and protected in the absence of specific and sufficient evidence that he no longer poses a risk to certain women in the legal workplace? Gardner-Hopkins should have been struck off. He is not currently fit and proper.

The New Zealand Law Society | Te Kāhui Ture o Aotearoa

The New Zealand Law Society acknowledges the High Court judgment, following an appeal by the Standards Committee, which increases James Gardner-Hopkins' suspension as a practising lawyer from two years to the maximum period of three years.

The High Court regarded Mr Gardner-Hopkins' misconduct as serious, and said *"it is conduct that is wholly unacceptable in the legal profession."*

The Law Society says the judgment recognises the importance of the public and the profession being able to have confidence that those entering the profession will be safe and treated with respect, and ensuring that misconduct is appropriately dealt with in a way which both the profession and the public expect.

The High Court's decision means Mr Gardner-Hopkins cannot practise as a lawyer in New Zealand for three years. The penalty imposed also means Mr Gardner-Hopkins will not automatically be able to work as a lawyer after his suspension ends in February 2025. Following suspension, he will need to apply to the Law Society for a new practising certificate and he will have to prove he is fit and proper to be a lawyer again.

The Law Society acknowledges the time this matter has taken to progress and the effect this has had on the women involved. As an organisation, the Law Society says it has already made changes to its process to make it more suitable for sensitive complaints like this one. Other changes to ensure the complaints system can be faster, more victim-focused and transparent require amendments to our legislation.

As well as this, the Independent Review of legal services in Aotearoa New Zealand is currently consulting with the legal profession and the wider public to identify what changes are needed for modern and well-functioning regulation and representation of the legal profession in Aotearoa New Zealand.

The Law Society has already adopted recommendations from the inquiry undertaken by Dame Silvia Cartwright including mandatory reporting obligations for sexual harassment, bullying, discrimination and other inappropriate workplace behaviour within the legal profession, clearer behavioural standards, and 'whistle-blower' protection.

The High Court concludes that *"Mr Gardner-Hopkins' actions were serious. All the young women were particularly vulnerable. Quite apart from his physical presence and the age difference between them, as a partner of the firm, Mr Gardner-Hopkins was responsible for their safety and wellbeing."*

The Law Society will continue its focus on making positive changes for the legal profession and wider public.

UPDATES AND EVENTS

Kāpiti - Social mix and mingle

The Kāpiti Twig had our first get together on 14 July 2022, being a social mix and mingle held in Paraparaumu. This was a great success, with approximately 45 attendees, which included several lawyers from the wider Wellington region who had come along and used the opportunity to meet new colleagues. There was much chatter and introductions, the enjoyment of delicious food and agreement that we need to engage on a regular basis. Several attendees commented this was the first time in years they had connected and were surprised at the new faces on the Coast, especially with many sole practitioners attending who said they can feel quite isolated and unsure of who to refer clients to if they do not work in a particular area.

We can never underestimate the power of networking and collegiality and so to progress this, we are forming a Kāpiti organising committee to make a plan of events. This will enable the sharing of ideas and ensure the workload is not too onerous. Some of the ideas already suggested include guest speaker events, a Christmas bar dinner, quiz night and coffee morning catch ups. Please email me if you want to be a part of our exciting plans and can assist on our committee at **sue@lawconnect.co.nz**.

Solicitors' Fidelity Guarantee Fund being wound up 30 March 2023, Lawyers' Fidelity Fund continues

A fund providing for claims of theft by solicitors prior to 2008 is being wound up by the New Zealand Law Society | Te Kāhui Ture o Aotearoa. The Law Society is giving notice that it has started the procedures to wind up the Solicitors' Fidelity Guarantee Fund, under s.367 of the Lawyers and Conveyancers Act 2006. For anyone that has experienced theft by a solicitor on or before 31 July 2008, the last day to make a claim for compensation is 3 March 2023.

The Solicitors' Fidelity Guarantee Fund has continued to exist following the repeal of the Law Practitioner's Act 1982. The purpose of this fund was to receive claims for compensation for theft by a solicitor occurring on or before 31 July 2008. Since 2008, the Solicitors' Fidelity Guarantee Fund has been superseded by the Lawyers' Fidelity Fund.

This is a different fund and is unaffected by the proposal to wind up the old fund. The Lawyers' Fidelity Fund continues to be available to receive claims. Inquiries and potential claims can be sent via email to **sfgf@lawsociety.org.nz**.

Lawyers' Fidelity Fund

The Lawyers' Fidelity Fund was introduced by the Lawyers and Conveyancers Act 2006, and is maintained by the Law Society in order to protect lawyers' clients against pecuniary loss arising from theft by lawyers. The maximum amount payable by the Fidelity Fund by way of compensation to an individual claimant is limited to $100,000. Except in certain circumstances specified in the Lawyers and Conveyancers Act 2006, the Fidelity Fund does not cover a client for any loss relating to money that a lawyer is instructed to invest on behalf of the client. More information can be found online here.

Lower Hutt Bar Dinner - July 2022

As many of you know, it was quite some time ago since we last gathered for a Bar Dinner in the Hutt Valley. The last occasion being 6 years ago when we farewelled Her **Honour Judge Mos**s and welcomed His **Honour Judge Black**.

Occasions like these serve to both facilitate collegiality and to add some much-needed lightness to the profession. These events also provide a prime opportunity for thrilling tales to be told, such as Judge Black's spectacular recount of the magical disappearing chihuahua and terror-inducing bell. His Honour definitely lived up to his reputation of being witty!

Needless to say, without your support events like these could not possibly succeed on the scale that they do. As such, we sincerely thank you for your attendance. Let us hope that the next dinner is not too far off.

Finally, we would also like to once again, extend a special thanks to Antonio, Luisa, Miriam, and their team at La Bella Italia in Petone.