NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2020] NZLCDT 27

LCDT 030/19

IN THE MATTER	of the Lawyers and Conveyancers Act 2006
BETWEEN	**NATIONAL STANDARDS COMMITTEE 2** Applicant
AND	**RICHARD THOMAS HARKER** Respondent

DEPUTY CHAIR

Judge J G Adams

MEMBERS OF TRIBUNAL

Hon P Heath QC

Mr G McKenzie

Prof D Scott

Ms P Walker

DATE OF HEARING 6 August 2020

HELD AT Specialist Courts and Tribunals Centre, Auckland

DATE OF DECISION 31 August 2020

COUNSEL

Ms K Davenport QC and Mr J Kleinbaum for the Applicant

Mr W Pyke for the Respondent

DECISION OF THE TRIBUNAL RE PENALTY

Introduction

[1] On 7 December 2017, in the District Court at Hamilton, Mr Richard Harker entered pleas of guilty to two charges of doing an indecent act, one on a child and one on a young person.[1] Convictions were entered on the same day. Mr Harker was sentenced on 30 April 2018. Judge Denise Clark imposed a mix of sentences, all rehabilitative in nature: intensive supervision for a period of 18 months, subject to judicial monitoring; 160 hours' community work and payment of emotional harm reparation of $1,000 in respect of the two victims.[2]

[2] National Standards Committee 2 (the Committee) commenced an "own motion" investigation in consequence of the convictions, pursuant to s 130(c) of the Lawyers and Conveyancers Act 2006 (the Act). The Committee determined to charge Mr Harker with a disciplinary offence, against s 241(d) of the Act.[3]

[3] Mr Harker accepts that he was providing regulated legal services at the time of his criminal offending and at the date of his convictions. Mr Harker is charged that the convictions have brought "the [legal] profession into disrepute and/or reflect upon [his] fitness to practise". Section 241(d) states:

> **241 Charges that may be brought before Disciplinary Tribunal**
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> If the Disciplinary Tribunal, after hearing any charge against a person who is a practitioner or former practitioner or an employee or former employee of a practitioner or incorporated firm, is satisfied that it has been proved on the balance of probabilities that the person—
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> …
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> (d) has been convicted of an offence punishable by imprisonment and the conviction reflects on his or her fitness to practise, or tends to bring his or her profession into disrepute,—
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> it may, if it thinks fit, make any 1 or more of the orders authorised by section 242.

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1 The offences are described at paras [11] and [12] below.
2 *R v Harker* [2018] NZDC 8366 at para [26].
3 See paras [24] and [25] below.

[4] Section 241 includes more serious charges based on misconduct,[4] unsatisfactory conduct,[5] and negligence or incompetence of such a degree as to reflect on the practitioner's fitness to practise or bringing the profession into disrepute.[6] The offence charged under s 241(d) is at the lower end of the spectrum of conduct that may give rise to disciplinary charges. For convenience, we refer to the two elements respectively as the "disrepute limb" and the "fitness to practise limb". The fact that any type of conviction may provide a foundation for a s 241(d) charge highlights the need to demonstrate a nexus between the conviction and either (or both of) the maintenance of professional standards (the fitness to practise limb) and the reputation of the profession (the disrepute limb).

[5] Mr Harker accepts that his convictions do tend to bring the legal profession into disrepute. However, he denies that they reflect on his fitness to practise law. Because of the way in which this aspect of the charge was argued, and its potential impact on penalty, we must determine whether the Committee has established that second (albeit disjunctive) element of the charge.

Suppression orders

[6] On 24 March 2020, the Tribunal made an interim order for suppression of Mr Harker's name, and the psychological reports provided by him.[7] Mr Harker does not seek to have the order for name suppression made permanent, but asks us to continue the order prohibiting access to or publication of the psychological reports. We agree that there is no public interest in the reports themselves being put into the public domain. We shall make a suppression order to that extent.[8]

[7] In our view, it is appropriate that Mr Harker's name be published, not least because no suppression order was made in the District Court. The existing order for interim name suppression is discharged.

[8] Although the District Court did not prohibit publication of Mr Harker's name, it did suppress the name of his employer and any information likely to lead to

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4 Lawyers and Conveyancers Act 2006, ss 7 and 241(a).
5 Ibid, ss 12 and 241(b).
6 Ibid, s 241(c).
7 *National Standards Committee 2 v Mr BC* [2020] NZLCDT 11 (Judge Kendall, Mr G McKenzie and Prof D Scott).
8 Lawyers and Conveyancers Act 2006, s 240(1)(b).

identification. To maintain consistency, we shall make a similar order. There is no public interest in publication of this detail.[9]

[9] For those reasons, we make permanent orders:

[a] Prohibiting access to the psychological reports filed in the Tribunal and prohibiting publication of any information derived from them.

[b] Prohibiting publication of the name and any identifying particulars of Mr Harker's employer.

[10] For the avoidance of doubt, we have written this decision in a form that can be published in its entirety. To facilitate publication, we do no more than to provide enough detail of the offending and the rehabilitative steps taken by Mr Harker to provide context to the decisions we are required to make. Necessarily, our description of those aspects are pitched at a high level of abstraction.

Context

[11] The first of the offences took place in June 2015 when a boy, aged 12 years at the time, was at a local mall with friends. The group was seated at a table. The victim was leaning against it, as there were not enough seats. As Mr Harker walked past the victim, he intentionally touched the victim's buttocks with his hand, in a motion that was described as more forceful than a "passing brush". Mr Harker did not move away immediately. When the victim turned to see what had touched him, Mr Harker was about 5 metres away. He is described as "stopping, looking back and staring at" the victim.[10]

[12] The second incident occurred in April 2017 and involved a boy aged 10 years at the time. He, together with his parents, was at a local shopping mall. They walked into a store. Mr Harker followed them. Shortly after, the victim and his parents left. Mr Harker continued to follow them. After all of them had travelled to the second

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9 Lawyers and Conveyancers Act 2006, s 240(1)(c).

10 *R v Harker* [2018] NZDC 8366, at para [2].

floor of the mall on an escalator, Mr Harker walked towards the victim, and lightly patted his right buttock with the palm of his hand.[11]

[13] Plainly, the touching of each victim was deliberate. The District Court Judge's sentencing notes reveal that both victims were emotionally affected by what happened. Each regarded the behaviour as unusual. Both were concerned that they (or other children) might be at risk of similar acts being committed in the future.[12]

[14] Mr Harker referred himself for psychological assessment and treatment soon after his first appearance in the District Court. His first appointment with a registered psychologist, Mr Nathan Gaunt, was on 2 November 2017. Mr Harker attended 13 further treatment sessions with Mr Gaunt between that first appointment and a report that Mr Gaunt prepared for the District Court, dated 23 April 2018.

[15] In his report, Mr Gaunt described the "therapeutic aims" of Mr Harker's psychological treatment as development of comprehension and an empathetic understanding of the impact of his offending on others, including the victims; an understanding of the impacts and consequences of sexual offending and sexually harmful behaviours generally; development of effective self-regulation of mood and thought; and preparation of a plan to manage the risk of reoffending. Mr Gaunt stated that Mr Harker had been "engaged and motivated to understand and address the decisions and behaviours" that led to his offending. He expressed the opinion that Mr Harker had "made sound and useful gains in his therapy" to that time. In particular, Mr Gaunt recorded that:

> … Mr Harker appears to show and demonstrate appropriate regret and remorse for his offending behaviours, and in treatment sessions he has exhibited a sound and empathetic understanding of how his actions have impacted upon victims, his friends and family, the community, and himself.

[16] Mr Gaunt recommended that Mr Harker continue "therapeutic engagement" for a period of between one and three years.

[17] Mr Gaunt's report of 23 April 2018 was available to the sentencing Judge. She was aware that Mr Harker had undertaken psychological assessments and counselling. Judge Clark accepted that Mr Harker had attempted to curb his

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11 *R v Harker* [2018] NZDC 8366, at para [3].
12 Ibid, at paras [7]–[10].

inappropriate behaviour and to avoid situations in which he might risk sexual arousal around young children.[13] The imposition of a sentence of intensive supervision highlights the fact that the experienced Judge regarded rehabilitation as the primary sentencing goal. It is plain that, at the time of sentencing, Mr Harker was contrite and recognised the need for continuing rehabilitative assistance.

[18] On 28 September 2018, Mr Harker was interviewed by two members of the New Zealand Law Society's Practice Approval Committee. Their mandate was to ascertain whether Mr Harker remained a fit and proper person to hold a practising certificate. One of the factors to be taken into account in making such a determination is whether the practitioner has been convicted of an offence in New Zealand or elsewhere. When considering the conviction, three aspects are relevant: the nature of the offence, the time that has elapsed since the offence was committed, and the person's age when the offence was committed.[14]

[19] As part of the interview process, the Practice Approval Committee referred Mr Harker for a further psychological assessment. The report that they considered was prepared by Mr Jim van Rensburg and is dated 26 November 2018. Mr van Rensburg was asked to comment specifically on the risks of reoffending and Mr Harker's fitness to practise without risk to consumers of legal services, or the reputation of the profession.

[20] Many of Mr Gaunt's observations are replicated in Mr van Rensburg's independent report. The latter, having noted Mr Harker's frank acceptance of problematic sexual desires, made it clear that "Mr Harker has steered clear of activities and interests involving children". Based on his interview of Mr Harker, supporting character references, and the results of two psychometric tests, Mr van Rensburg assessed that there was a low to moderate prospect of reoffending. In doing so, Mr van Rensburg regarded Mr Harker's acknowledgement of inappropriate sexual desires as "significantly positive in terms of his ability to remain offence free in future".

[21] Mr van Rensburg reported that Mr Harker had prepared a "comprehensive safety plan, depicting strategies and actions he should take to avoid risk situations, to

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13 *R v Harker* [2018] NZDC 8366, at paras [11]–[15] (inclusive).

14 Lawyers and Conveyancers Act 2006, s 55(1)(c), in the context of admission to the Bar.

identify any warning signs and to take preventive action when he recognises a trigger toward risky behaviour on his part". He concluded:

> I am of the opinion that the safety plan is robust and should provide adequate security for Mr Harker and the community given his commitment to ongoing psychotherapy for the foreseeable future.

[22] In addressing the question of fitness to practise, Mr van Rensburg noted that the offending was unrelated to Mr Harker's role as a lawyer and was "at the lower end" of the "seriousness spectrum, as reflected in the community-based sentence". He offered a view that the adverse consequences to Mr Harker of refusing to issue a practising certificate "might outweigh the reputational risk for the [profession] by a considerable margin, especially if Mr Harker undertakes to only accept employment in areas of the law that would not bring him into direct contact with children, such as Family Court litigation". Nevertheless, Mr van Rensburg recommended that any decision to grant a practising certificate should "be made conditional on [Mr Harker's] continuation with psychotherapy or at least monthly follow-up sessions for a period of 12 months with regular reporting by his therapist" and an undertaking by Mr Harker not to engage in legal work that would bring him into direct contact with children.

[23] On the basis of Mr van Rensburg's report, the Practice Approval Committee recommended issue of a practising certificate. One was issued on 19 December 2018, Mr Harker having given the undertakings required by the Practice Approval Committee to continue psychotherapy until December 2019 with regular reporting by his therapist and not to work in areas of law that would bring him into direct contact with children. Nevertheless, on 18 February 2019 the Lawyers' Complaints' Service referred a "potential own motion investigation" to the Committee.

[24] The Committee decided to embark on an own motion investigation. In doing so, it received comprehensive submissions from counsel instructed to act for Mr Harker. Those submissions contained frank admissions about the nature of the conduct and its tendency to bring the profession into disrepute. However, the suggestion that Mr Harker was not a fit and proper person to practise law was firmly challenged.

[25] On 28 June 2019, having considered further submissions on the investigation itself, the Committee determined that "the matter and any and all issues involved in the complaint should be considered" by the Tribunal.

Legal principles

[26] The Act draws a sharp distinction between (on the one hand) conduct that occurs in the provision of regulated services and (on the other) conduct which is unconnected with the provision of such services. Using convenient shorthand expressions, these are often called professional and personal misconduct respectively. The Act treats professional and personal misconduct differently.

[27] The underlying policy is best explained in s 7(1) of the Act, which defines the term "misconduct". Conduct of a lawyer unconnected to the provision of regulated services amounts to misconduct only if it would justify a finding that the lawyer is not "a fit and proper person or is otherwise unsuited to engage in practice as a lawyer".[15] The distinction between professional and personal misconduct was explained (in a context that covers both admission and strike-off cases) by a Full Court of the High Court in *Orlov v New Zealand Lawyers and Conveyancers Disciplinary Tribunal*.[16] Delivering the judgment of the Court, Simon France J said:[17]

> [106] We consider the Act's definitions continue to maintain the distinction between professional and personal misconduct. The latter involves moral obloquy. It is conduct unconnected to being a lawyer which nevertheless by its nature, despite being unrelated to the practitioner's job, is so inconsistent with the standards required of membership of the profession that it requires a conclusion that the practitioner is no longer a fit and proper person to practice law.

[28] The need to differentiate between professional and personal misconduct arises most acutely when charges of misconduct are brought and it is contended that the underlying conduct is such that the practitioner is no longer a fit and proper person to practise law. The same issue arises on an application for admission, in

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15 Lawyers and Conveyancers Act 2006, s 7(1)(b)(ii).

16 *Orlov v New Zealand Lawyers and Conveyancers Disciplinary Tribunal* [2015] 2 NZLR 606 (HC).

17 Ibid, at para [106].

circumstances in which the New Zealand Law Society has declined to give a certificate that the candidate is a fit and proper person to be admitted.[18]

[29] Also, there is need to distinguish an inquiry under s 241(d) from one in which it is suggested that someone is not a fit and proper person to practise law. The focus is on the conviction itself and whether it reflects on the practitioner's fitness to practise. In determining whether the fitness to practise limb has been proved, the Tribunal must determine whether a reasonable member of the public would regard entry of convictions on the two charges as reflecting on Mr Harker's fitness to practise law.

[30] Caution must be exercised in giving too much weight to the authorities that consider the separate question whether conduct underlying a conviction requires a finding that the person concerned is not a fit and proper person to be a barrister and solicitor of the High Court. Not only are those authorities fact-specific but they also address a question that is different to the one that arises under the fitness to practise limb of s 241(d).[19]

[31] Counsel referred us to *Hart v Auckland Standards Committee 1 of the New Zealand Law Society*[20] and *Hong v Auckland Standards Committee No 5*.[21] Those authorities are directed to the question whether the practitioner was or was not a fit and proper person to practise as a lawyer. Delivering the judgment of a Full Court in *Hart*, Winkelmann J said "determination of that issue will always be a matter of assessment having regard to several factors," including the "nature and gravity of [the] charges that have been found proved".[22] The Chief High Court Judge went on to say that the nature and gravity of the offending was important as it was "likely to inform the decision" whether a person was fit to be admitted or to remain in practice. She added:[23]

> … in some cases these factors are determinative, because they will demonstrate conclusively that the practitioner is unfit to continue to practise as

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18 For example, *New Zealand Law Society v Stanley* [2020] NZSC 83.

19 For example, see *A Solicitor v The Council of the Law Society of New South Wales* [2004] HCA 1 and *New Zealand Law Society v Stanley* [2020] NZSC 83.

20 *Hart v Auckland Standards Committee 1 of the New Zealand Law Society* [2013] 3 NZLR 103 (Winkelmann and Lang JJ) at paras [185]-[190].

21 *Hong v Auckland Standards Committee No 5* [2020] NZHC 744 (Gault J) at para [66].

22 *Hart v Auckland Standards Committee 1 of the New Zealand Law Society* [2013] 3 NZLR 103, at para [185] and [186].

23 Ibid, at para [186].

> a lawyer. Charges involving proven or admitted dishonesty will generally fall within this category.

[32] As to penalty, the Committee does not seek an order striking Mr Harker's name from the roll. It seeks suspension as the primary response. So far as suspension is concerned, while having a punitive effect, its purpose is primarily to advance the public interest. In *Daniels v Complaints Committee 2 of the Wellington District Law Society*,[24] the High Court said:

> … [The] primary purpose [of suspension] is to advance the public interest. That includes that of the community and the profession, by recognising that proper professional standards must be upheld, and ensuring there is deterrence, both specific for the practitioner, and in general for all practitioners. It is to ensure that only those who are fit, in the wider sense, to practise are given that privilege. Members of the public who entrust their personal affairs to legal practitioners are entitled to know that a professional disciplinary body will not treat lightly serious breaches of expected standards by a member of the profession.

Competing contentions

[33] Ms Davenport QC, for the Committee, submits that the two convictions both tend to bring the profession into disrepute and reflect on Mr Harker's fitness to practise law. She emphasises the sexual nature of the offending and vulnerability of both young victims.

[34] Ms Davenport contended that we should view the disciplinary issues through two lenses: the need to maintain professional standards and the protection of members of the public who may seek legal services from Mr Harker. While recognising that the offending did not relate to Mr Harker's role in providing regulated services under the Act, Ms Davenport contended that this was a case in which the personal misconduct demanded the imposition of professional sanctions. In her submission, the seriousness of the offending was such that it is inappropriate to separate Mr Harker's personal life from his profession.

[35] The Committee seeks an order suspending Mr Harker from practising for a period of six months, together with the imposition of conditions that would protect possible future victims.

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[24] *Daniels v Complaints Committee 2 of the Wellington District Law Society* [2011] 3 NZLR 850 (HC), at para [24] (Gendall, MacKenzie and Miller JJ).

[36] Mr Pyke, for Mr Harker, acknowledges that the charge has been proved, but only to the extent that Mr Harker's behaviour tended to bring the profession into disrepute. He challenges any suggestion that the convictions reflect on Mr Harker's fitness to practise law. Mr Pyke submits that the "modern approach" to disciplinary charges based on convictions for offences involving moral turpitude is best captured in a judgment of the High Court of Australia, *A Solicitor v The Council of the Law Society of New South Wales.*[25]

[37] In *A Solicitor*, the practitioner had been found guilty of four offences of indecent assault on two girls. The offending was much more serious than that committed by Mr Harker. Nevertheless, the lawyer had co-operated with the Law Society and had sought rehabilitative assistance. There was expert evidence that the practitioner had developed a full awareness of the situations which led to his inappropriate behaviour. Notwithstanding the seriousness of the offending, the High Court of Australia unanimously held that the characterisation of the practitioner's behaviour as "professional misconduct" was erroneous and that it should be seen as relating solely to personal misconduct.[26]

[38] As to penalty, Mr Pyke relies on the low level nature of the offending and Mr Harker's full co-operation with both the Police and the Committee. Further, Mr Pyke points out that Mr Harker is highly regarded as a lawyer; there are a number of character references; Mr Harker has shown an "exemplary commitment" to his personal rehabilitation; he has complied with all orders of the Court and has no previous criminal convictions or disciplinary offences.

[39] In those circumstances, Mr Pyke submits that suspension is unnecessary and that the need for disciplinary sanction will be met adequately by an appropriately worded censure and undertakings that will protect young persons from the risk of reoffending.

[40] Mr Harker offers an undertaking that, for a period of five years from the date of the penalty decision (or any term of suspension), he will not commence practice as an employed lawyer or on his own account without the written approval of the New Zealand Law Society, and that he will not be in the presence of any person aged 16

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25 *A Solicitor v The Council of the Law Society of New South Wales* [2004] HCA 1.

26 Ibid, at para [17].

years or under unless accompanied by another lawyer. Mr Harker is also prepared to continue therapy in accordance with the recommendations of his psychologist for a period of not less than two years, from the date of the penalty decision.

Analysis

(a) The "disrepute limb"

[41] Mr Harker accepts that his conduct was such that it tended to bring the legal profession into disrepute. In our view, he rightly conceded that convictions entered for serious sexual offending of the type of which he was convicted necessarily establish such a link.

[42] One of the fundamental obligations of a lawyer is "to uphold the rule of law".[27] Committing offences involving indecent acts on young persons is an obvious breach of that obligation. We find that aspect of the charge proved.

(b) The "fitness to practise limb"

[43] Mr Harker has been convicted of two offences involving indecent acts against young victims. Do those convictions *reflect* on his fitness to practise law?

[44] We start with two important points:

[a] The inquiry relates to the convictions, not to the nature of the underlying conduct or the reasons for it.

[b] The question is not whether the convictions themselves actually render Mr Harker unfit to practise law but whether they reflect on his fitness to do so.

[45] In terms of s 241(d),[28] we consider that a reasonable member of the public would regard entry of two criminal convictions for sexual offences against a child or young person as reflecting on Mr Harker's character and, therefore, his fitness to practise. Without more information about the nature of the offending, a reasonable

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27 Lawyers and Conveyancers Act 2006, s 4(a).

28 Section 241(d) of the Lawyers and Conveyancers Act 2006 is set out at para [3] above.

member of the public would regard such conduct as falling squarely within the descriptive term used by Simon France J in *Orlov*, namely "moral obloquy".[29] Applying the test in *Complaints Committee of the Canterbury District Law Society v W,*[30] we consider the public would think less of a profession which viewed such conduct by their members as acceptable.

[46] We find that the convictions do reflect on Mr Harker's fitness to practise. As a result, the fitness to practise limb is proved.

(c) Penalty

[47] In determining what penalty to impose, we are entitled to take into account evidence establishing the nature of the indecent acts, the circumstances in which they occurred, the reasons for the offending, and rehabilitative steps taken by Mr Harker. The Committee does not assert that Mr Harker is not a fit and proper person to practise law. On the basis that he is entitled to a practising certificate, our task is to impose an appropriate sanction to respond to the proven elements of the charge. That requires a penalty that will promote the maintenance of standards within the profession and uphold the reputation of its members.

[48] It is important to remember that disciplinary sanctions are not imposed for the purpose of punishing a practitioner for past conduct. This point has particular relevance where a practitioner is subjected to both criminal and disciplinary sanctions, arising out of the same conduct. The Supreme Court affirmed this principle in *Z v Dental Complaints Assessment Committee,*[31] in terms applicable to all forms of professional disciplinary proceedings.

[49] While sanctions for behaviour that contravenes the Act may have the effect of punishing the practitioner, that is an indirect consequence of the imposition of a penalty that is justifiable, in order to maintain professional standards or to protect the public. The criminal justice system is different in character from the professional

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29 *Orlov v New Zealand Lawyers and Conveyancers Disciplinary Tribunal* [2015] 2 NZLR 606 (HC) at paras [106], set out at para [27] above.

30 *Complaints Committee of the Canterbury District Law Society v W* [2009] 1 NZLR 514 (HC).

31 *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1 (SC) at para [97] (Blanchard, Tipping and McGrath JJ); see also Elias CJ at para [70] and Anderson J at para [151], each referring to Lord Diplock's speech in *Ziderman v General Dental Council* [1976] 1 WLR 330 (PC) at 333.

disciplinary regime. The former is concerned with marking offending and responding with an appropriate sentence to recognise the harm done to the community. The latter is more focussed on a predictive assessment of the practitioner's trustworthiness and reliability in the future.[32]

[50] By the time that Mr Harker was sentenced, it was acknowledged by the Crown that he had taken steps "to address triggers" for his behaviour in an endeavour to prevent similar offending from occurring again. Judge Clark also drew attention to other mitigating factors. In addition to attempts at rehabilitation, she noted contributions that Mr Harker had made in the community and his former workplace. It is apparent that once Mr Harker, on understanding the magnitude of the effect that his behaviour had on his victims, confronted his demons. The District Court Judge considered that continued rehabilitation through intensive supervision was beneficial not only to Mr Harker but also to the community.

[51] The assessment made by the sentencing Judge is reflected in the terms of intensive supervision that she imposed. She said:[33]

> [19] Having considered your circumstances, in particular the progress that has been made through regular psychological treatment since these matters came to light, my view of matters is this intensive supervision can be imposed with these conditions:
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> (a) That you attend and complete psychological counselling to address sexual offending as directed by your probation officer.
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> (b) That you attend any programme, counselling or treatment as directed by your probation officer.
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> (c) That you not associate with or contact your victims without the prior written approval of a probation officer.
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> (d) You must not associate or otherwise have contact with any person under 16 years of age except in the presence and under the supervision of an approved informed adult. An approved informed adult means a person who has been given prior approval in writing by a probation officer as being suitable for the purpose of this condition.

[52] Mr Harker provided affidavit evidence relevant both to the fitness to practise limb of s 241(d) and penalty. No issue was taken with his deposition. However, the Tribunal decided to examine Mr Harker to clarify certain aspects of his evidence.

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32 *Re M (Note)* [2005] 2 NZLR 544 (HC) at para [21].

33 Ibid, at para [19].

Ms Davenport and Mr Pyke were given the opportunity to ask questions arising from Mr Harker's answers.

[53] Mr Harker gave full and frank answers to questions put by members of the Tribunal. He acknowledges responsibility for his conduct. In his evidence, Mr Harker stated that he remains "deeply ashamed about [his] behaviour, and [affirmed his earlier] apologies to the victims". Mr Harker added that he was "determined not to repeat such or similar behaviour". Mr Harker deposed that:

[a] He had co-operated fully in the Committee's investigation.

[b] He had not sought to diminish or justify his wrongdoing.

[c] He was open with his employer from the commencement of the criminal investigation and resigned in order to avoid embarrassment to that person.

[d] He recognised the need "for vigilance" on his part, to manage the risk that he may reoffend.

[54] We accept what Mr Harker describes as his "moral commitment to [the Tribunal] and [his] profession never to engage in such conduct again". We accept Mr Harker's evidence that he deeply regrets the significant harm done to his victims. We acknowledge the good faith undertakings that Mr Harker has given (and offers to continue) to ensure that he can practise with minimal (if any) risk to young persons.

[55] We are satisfied that Mr Harker understands the reasons for his offending and regrets the significant harm caused to both victims by his behaviour. He recognises the need for continued psychological assistance. Importantly, Mr Harker acknowledges that he must manage the risk that he may reoffend.

[56] We are satisfied that Mr Harker has strong support networks and is acutely conscious of the need to remind himself regularly of the steps he must take to avoid putting himself in a position where he may reoffend.

[57] In many ways, this is a sad and tragic case. If there were a silver lining, it is that the offending provided an opportunity for Mr Harker, as someone whom we assess as being able to make a significant contribution to both society generally and

his profession in particular, to seek therapy and to redeem himself. We accept that Mr Harker has done as much as could possibly have been done to rehabilitate and consider that he is well along the path to redemption. In those circumstances, what penalty is required to mark what a reasonable member of the public would regard as behaviour that fell well below that expected from a legal practitioner?

[58] We do not consider that a penalty involving suspension is necessary. To impose that penalty would serve more as an additional punishment for Mr Harker's past conduct than as a disciplinary response. Given the steps taken by Mr Harker to address the underlying reasons for the offending and his continued endeavours to mitigate any risk of reoffending, there is no public interest in preventing him from practising law.

[59] We accept Mr Harker's evidence that, on every occasion when he has sought employment as a lawyer, he has made full disclosure of the offending. Sadly, that disclosure has been counterproductive, in the sense that no prospective employer was prepared to employ him. Now, Mr Harker has the ability to provide a copy of this decision to any prospective employer to whom he makes disclosure of his prior offending so that the employer can understand more readily the circumstances in which it occurred, the steps Mr Harker has taken to rehabilitate, and our positive view about his prospects for the future.

[60] We are satisfied that an appropriately worded censure coupled with undertakings of the type offered by Mr Harker to protect members of the public, in particular young persons, adequately respond to the disciplinary charge. There is a need for proportionality in the Tribunal's response.

[61] Mr Harker has now been undergoing counselling and therapeutic interventions since November 2017. His period of intensive supervision has ended, without incident. He offers an undertaking for a period of five years. That is longer than the period suggested by Mr van Rensburg in the report he prepared for the Practice Approval Committee.[34]

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[34] See para [22] above.

Conclusion

[62] For those reasons, we make the following orders:

[a] Mr Harker is censured in the terms attached to this decision as Appendix 1.

[b] Mr Harker shall give undertakings to the Tribunal to the following effect:

[i] He will not, for a period of five years from the date of this decision, commence practice as an employed lawyer or on his own account unless he has the prior written approval of the New Zealand Law Society, which must record that the Society is satisfied that he will adhere to a condition that he will not, as a lawyer, be in the presence of any person aged 16 years or under except in the physical presence of another lawyer.

[ii] He will continue to undertake therapy in accordance with the recommendations of the psychologist from whom he is currently seeking treatment (who shall be named in the undertaking) for a period of not less than two years from the date of this decision.

The undertakings shall be filed and served on or before 18 September 2020. We expect counsel to agree the wording of the undertakings but we will rule on any aspects on which they disagree.

[c] We discharge the existing order suppressing Mr Harker's name but make permanent an order prohibiting publication of the name and any identifying particulars of Mr Harker's employer at the time of the offending.[35] We also make an order prohibiting access to or publication of all or any of the psychological reports filed on behalf of Mr Harker.[36]

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35 See paras [7] and [9] above.
36 See para [6] above.

[63] We were asked to reserve costs. We do so on the basis that counsel for the Committee shall file and serve submissions on or before 18 September 2020, with Mr Harker's response being filed and served on or before 9 October 2020.

[64] We thank counsel for their assistance.

DATED at AUCKLAND this 31st day of August 2020

Judge J G Adams
Deputy Chair

APPENDIX 1

Censure

Mr Harker, the Tribunal has found that your convictions for offences involving indecent acts on two young boys tend to bring the legal profession into disrepute and reflect on your fitness to practise law.

Members of the legal profession have a fundamental obligation to uphold the rule of law and by committing offences of that type you breached your obligation to do so.

This formal censure to mark your conduct will remain on your disciplinary record.