NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2021] NZLCDT 5
LCDT 022/20

IN THE MATTER	of the Lawyers and Conveyancers Act 2006
BETWEEN	**NATIONAL STANDARDS COMMITTEE No. 1** Applicant
AND	**NAME SUPPRESSED** Practitioner

CHAIR
Judge D F Clarkson

MEMBERS OF TRIBUNAL
Hon P Heath QC
Ms M Noble
Ms G Phipps
Prof D Scott

DATE OF HEARING 11 February 2021

HELD AT Specialist Courts and Tribunals Centre, Auckland

DATE OF DECISION 4 March 2021

DATE OF REISSUED DECISION 22 March 2021

COUNSEL
Mr D La Hood for the Standards Committee
Mr J Long and Mr J K Grimmer for the Practitioner

DECISION ON ADMISSIBILITY OF HEARSAY EVIDENCE

Introduction

[1] The National Standards Committee (No 1) (the Committee) has charged the Practitioner[1] with eight charges of misconduct or (alternatively) unsatisfactory conduct. The factual allegations underlying the charges involve the conduct of the Practitioner at two Christmas functions some years ago, when he was with Russell McVeagh in Wellington. Various forms of sexual misconduct are alleged.

[2] The first five charges arise out of an office Christmas function that occurred in Wellington. The remaining three charges involve events that occurred at a "team" Christmas party held at the Practitioner's home.

[3] The charges will be heard in Wellington during the week of 17 May 2021. In advance of that hearing, the Committee seeks a ruling on whether hearsay evidence that it proposes to call in support of Charge 7 is admissible against the Practitioner. Charges 6 and 7 refer to various alleged incidents that occurred at the Practitioner's home; as does Charge 8 which is based on the whole of the conduct alleged in Charges 1 to 7. Charge 7 alleges [sexual misconduct – details suppressed]. The Practitioner denies that allegation. This ruling is restricted to the hearsay issue that arises in relation to Charge 7 only.

The hearsay evidence

[4] The alleged victim has never made any written statement to the New Zealand Law Society (the Society), whether to the Legal Standards Officer having carriage of the investigation or Ms Toohey, a barrister whom the Committee appointed as an investigator.[2] Nor has the alleged victim shown any inclination to involve herself in this

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1 The Practitioner's name and identifying particulars are currently suppressed: *National Standards Committee (No 1) v Name Suppressed* [2021] NZLCDT 2 and [2021] NZLCDT 3.

2 Lawyers and Conveyancers Act 2006 and reg 33 of the Lawyers and Conveyancers (Lawyers: Complaints Service and Standards Committee) Regulations 2008.

disciplinary process. Indeed, she has, through her barrister, Maria Dew QC expressed an overt desire not to participate.[3]

[5] Although the alleged victim has not made any written statements to the Society, she is said to have spoken about the incident to four other females and one male (the five confidants) in close proximity to the alleged event. The Committee seeks to introduce evidence of the statements made to the five confidants to support the allegation of [sexual misconduct – details suppressed] contained in Charge 7.

[6] The accounts given by the five confidants demonstrate nuanced differences in the description of relevant events. While accepting that we are omitting some of the surrounding contextual statements, we summarise the essence of what the five confidants' evidence is expected to be:

1. Ms A says that the alleged victim told her she had become intoxicated and [sexual misconduct – details suppressed].

2. Ms B relays a discussion in which she was told by the alleged victim that [sexual misconduct – details suppressed].

3. Ms C says that the alleged victim "was not clear about the details" for the night in question, but that from what the alleged victim said, Ms C was able "to establish that [sexual misconduct – details suppressed]".

4. Ms D was not prepared to go into detail about what the alleged victim had said to her. However, she said that, [sexual misconduct – details suppressed].

5. Mr E says that the alleged victim told him that: [sexual misconduct – details suppressed].

[7] [redacted].

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3 See para [8] below.

[8] During the course of the hearing, we were referred to correspondence between the Society and Ms Maria Dew QC, who was acting for the alleged victim. The Society had provided certain documents to the alleged victim's counsel and asked for comment on the accuracy of what she had been recorded as saying. Counsel for the Committee and the Practitioner conferred after the hearing and have now provided a joint memorandum to clarify the relevance of this correspondence. It is now accepted that the documents forwarded for comment did not contain anything relevant to the subject matter of Charge 7. As a result, a subsequent letter from Ms Dew to the Society of 14 May 2018 cannot be read as an adoption of any prior statement by the alleged victim of what occurred at the Practitioner's home. Later, counsel for the Committee wrote to Ms Dew asking for further information about the incident underlying Charge 7. Ms Dew responded, on 10 July 2020, by saying:

> [The alleged victim] does not wish to provide any statement or explain any matters.

[9] We have had the benefit of some information about the alleged victim's situation but no detailed evidence about the reasons she has declined to engage in the disciplinary process. While it is unnecessary for us to explain the nature of that information, the circumstances disclosed certainly show the alleged victim has made a considered decision on legal advice not to engage in the disciplinary process. No criticism can be (or is) made by us in relation to her decision not to provide a statement to the Society, or to give evidence before the Tribunal. However, we must approach the hearsay question on the basis that she will not give evidence, and assess the consequences as to admissibility which flow from that.

Legal principles

[10] Section 239 of the Lawyers and Conveyancers Act 2006 (the Act) states:

> **239 Evidence**
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> (1) Subject to section 236, *the Disciplinary Tribunal may receive as evidence any statement, document, information, or matter that may, in its opinion, assist it to deal effectively with the matters before it, whether or not that statement, document, information, or matter would be admissible in a court of law.*
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> (2) The Disciplinary Tribunal may take evidence on oath, and, for that purpose, any member of the Disciplinary Tribunal may administer an oath.

(3) The Disciplinary Tribunal may permit a person appearing as a witness before it to give evidence by tendering a written statement and verifying that statement by oath.

(4) *Subject to subsections (1) to (3), the Evidence Act 2006 applies to the Disciplinary Tribunal in the same manner as if the Disciplinary Tribunal were a court within the meaning of that Act.*

(5) A hearing before the Disciplinary Tribunal is a judicial proceeding within the meaning of section 108 of the Crimes Act 1961 (which relates to perjury).

(Emphasis added)

[11] Section 236 of the Act, to which s 239(1) refers, states:

236 Rules of natural justice

The Disciplinary Tribunal must, in performing and exercising its functions and powers, observe the rules of natural justice.

[12] In *W v Health Practitioners Disciplinary Tribunal*,[4] the High Court admitted evidence of the type that the Committee seeks to adduce in this case but in the context of an existing statement by the complainant. The issue in *W* was whether, if the complainant did not give evidence before the Tribunal, his hearsay statements could be admitted under either the Evidence Act 2006 or a general admissibility provision akin to s 239 of the Act.

[13] In *W,* analysing the comparable evidential provision of clause 6 of Schedule 1 to the Health Practitioners Competence Assurance Act 2003, the High Court held that a two-stage approach was required in determining whether the hearsay evidence should be admitted. In explaining what approach should be taken and why, Collins J said:[5]

> [104] In my assessment, treating the Evidence Act as the primary mechanism for regulating the admissibility of evidence before the Tribunal is the most likely interpretation intended by Parliament. This approach provides a starting point that is familiar to all trained in the traditions of the common law, such as the Chairperson of the Tribunal. Many of the long-standing rules of evidence, such as the hearsay rules, are linked to the principles of natural justice. Others are based on important policy concerns that are equally applicable to proceedings before the Tribunal. In both instances there is an

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4 *W v Health Practitioners Disciplinary Tribunal* [2019] 3 NZLR 779 (HC) upheld on appeal in *A Professional Conduct Committee of the Nursing Council of New Zealand v Health Practitioners Disciplinary Tribunal* [2020] NZCA 435.

5 *W v Health Practitioners Disciplinary Tribunal* [2019] 3 NZLR 779 (HC) at paras [104]–[108]. We have replaced references to clause 6 of Schedule 1 to the Health Practitioners Competence Assurance Act 2003 with the comparable provisions of the Lawyers and Conveyancers Act 2006.

established body of law developed by the courts that the Tribunal can refer to. It is logical that a discretion to admit evidence, such as that provided for in [section 239(1) of the Act], should at least be grounded in such established principles. This provides a useful basis from which the Tribunal can decide to depart if the circumstances of a particular case so require.

[105] This approach to the interpretation of [section 239(1) of the Act] leads to me conclude that it should be applied by following a two-step process:

(1) First, the Tribunal should assess whether the evidence would be admissible under the Evidence Act.

(2) Second, the Tribunal may, nonetheless, in its discretion, admit the evidence if that evidence may assist the Tribunal to deal effectively with the matters before it.

This approach is consistent with the purposes of the Act that I have explained at [68].

[106] The discretion at the second step must be exercised judicially. The Tribunal has a wide ambit to determine what evidence will assist it, as demonstrated by the use of the phrase "that may in its opinion assist it" (emphasis added). However, just because the scope of [section 239(1) of the Act] is wide, does not mean that the Tribunal should exercise its discretion to admit evidence in all cases. The Tribunal must exercise its discretion by taking into account:

(1) the principles and purpose underlying the Act;

(2) the particular circumstances presented by the proceeding and the evidence sought to be admitted; and

(3) the importance of the principles underlying the applicable rule in the Evidence Act.

[107] The rules of natural justice provide a hard limit on the discretion of the Tribunal because of [section 239(1) of the Act], which makes the discretion in [section 239(1) of the Act] subject to the requirement to "observe the rules of natural justice at each hearing" referred to in [section 236 of the Act]. But even in the absence of that provision, the Tribunal would be required to observe the principles of natural justice. It will inevitably be unnecessary to engage in a natural justice analysis at this stage because, for the reasons I have already addressed, it is appropriate to deal with natural justice considerations first in cases where they arise.

[108] … The Tribunal must provide reasons for its decision to exercise its discretion to admit otherwise inadmissible evidence.

(Emphasis added)

[14] We follow the approach articulated by Collins J in *W*, which was substantially endorsed by the Court of Appeal,[6] on appeal from his decision.

Admissibility under Evidence Act 2006

[15] Section 18 of the Evidence Act 2006 controls, in general terms, the admissibility of hearsay evidence in court proceedings. Section 18(1) states:

> **18 General admissibility of hearsay**
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> (1) A *hearsay statement is admissible in any proceeding* if—
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> (a) the circumstances relating to the statement provide reasonable assurance that the statement is reliable; and
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> *(b) either—*
>
> *(i) the maker of the statement is unavailable as a witness; or*
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> (ii) the Judge considers that undue expense or delay would be caused if the maker of the statement were required to be a witness.
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> …..

[16] Section 16(2) of the Evidence Act defines the term "unavailable as a witness". Section 16(2) provides:

> **16. Interpretation**
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> …
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> (2) For the purposes of this subpart, a person is unavailable as a witness in a proceeding if the person—
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> (a) is dead; or
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> (b) is outside New Zealand and it is not reasonably practicable for him or her to be a witness; or
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> (c) is unfit to be a witness because of age or physical or mental condition; or
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> (d) cannot with reasonable diligence be identified or found; or
>
> (e) is not compellable to give evidence.
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> …

[17] In addition, the Evidence Act contains a general prohibition against the admission of evidence, the probative value of which is outweighed by the risk that the

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6 *A Professional Conduct Committee of the Nursing Council of New Zealand v Health Practitioners Disciplinary Tribunal* [2020] NZCA 435 at para [47].

evidence will "have an unfairly prejudicial effect on the proceeding".[7] For the purpose of criminal trials, a Judge, in balancing probative value and unfairly prejudicial effect, must take into account "the right of the defendant to offer an effective defence".[8] Although the Practitioner is not charged with a criminal offence, we consider, as a matter of discretion relevant to the natural justice requirements of s 236 of the Act, that the same consideration should be weighed in determining admissibility of the proposed evidence.[9]

[18] In our view, the hearsay evidence is inadmissible under the Evidence Act. That is because the alleged victim is not "unavailable" to give evidence as a witness. She does not fall into any of the categories set out in s 16(1)(a), (b) or (d).[10] The alleged victim is both competent to give evidence, and compellable.[11] There is no medical evidence to demonstrate that the alleged victim is unable, by virtue of her present mental state, to give evidence.[12] Indeed, Mr La Hood conceded that there were no grounds on which the Committee could demonstrate that the alleged victim was "unavailable".

[19] While the Committee has decided not to issue a subpoena to compel her attendance before the Tribunal, she remains "available" to give evidence. If she were called to give evidence, it is possible to ameliorate the trauma of giving evidence by adopting the use of screens or CCTV to shield her from the Practitioner.[13] We understand that those options have been explored with the alleged victim, but she continues to decline to participate in the evidential process. For those reasons, the hearsay statements are inadmissible under s 18(1) of the Evidence Act.

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7 Evidence Act 2006, s 8(1)(a).
8 Ibid, s 8(2).
9 This point was made by the Court of Appeal in *A Professional Conduct Committee of the Nursing Council of New Zealand v Health Practitioners Disciplinary Tribunal* [2020] NZCA 435 at para [46], in relation to the *prima facie* natural justice right to challenge one's accusers.
10 Evidence Act 2006, s 16(1)(a), (b) and (d), are set out at para [16] above.
11 Ibid, s 16(1)(e).
12 Ibid, s 16(1)(c).
13 Ibid, s 105(1).

Admissibility under s 239(1) of the Act

[20] The next question is whether the general discretion under s 239(1) should be exercised in favour of admissibility.[14] Applying s 239(1) of the Act, is the evidence of the five confidants as to what they say they were told by the alleged victim such as to "assist [the Tribunal] to deal effectively with the matters before it"?

[21] In *W,* Collins J made three points about the exercise of the s 239(1) discretion that are relevant to our determination of admissibility:

(a) The discretion must be exercised judicially;[15]

(b) Just because the scope of s 239(1) is wide, that does not mean the Tribunal should exercise its discretion to admit otherwise inadmissible evidence in all cases.[16] The statutory scheme and purpose, together with all relevant circumstances presented by the proceeding and the evidence sought to be admitted should be evaluated with care;[17]

(c) The rules of natural justice provide a "hard limit" on the discretion of the Tribunal because of the unqualified obligation to observe those rules set out in s 236 of the Act to which s 239(1) is subject.[18]

[22] In *W,* Collins J quashed the decision of the Tribunal to admit the hearsay evidence but remitted the question to the Tribunal so that it could reconsider its decision and undertake a proper evaluation of whether there were "compelling reasons why [the complainant] should not be required to give evidence".[19] In upholding Collins J's decision, Clifford J, for the Court of Appeal, reinforced this point by saying, in relation to the need to take into account the seriousness of an allegation, "there may be little

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14 Section 239 is set out at para [10] above.

15 *W v Health Practitioners Disciplinary Tribunal* [2019] 3 NZLR 779 (HC) at paras [106], set out at para [13] above.

16 Ibid.

17 Ibid, at para [106](1) and (2), set out at para [13] above.

18 Ibid, at para [107], set out at para [13] above. Sections 239(1) and 236 of the Act are set out at paras [10] and [11] respectively.

19 Ibid at para [115].

room to admit [the hearsay statements] under the [section 239] residual discretion" because of the "close link" between the natural justice right to challenge one's accusers and the need to exclude unfairly prejudicial evidence.[20]

[23] In this case, while we have considerable sympathy for the alleged victim's position, there is no "compelling reason" why she should be "exempted from giving evidence," to use the words of Collins J in *W.* Sadly, there are many cases of sexual abuse that are heard throughout the country every day and, despite the obvious trauma caused to victims, they are expected to give evidence to support the allegations of fact made against an accused person. The availability of alternative means of giving evidence and the ability to have a support person present are intended to protect a complainant as much as possible. We would have had no hesitation in directing that evidence be given in an alternative way, in a closed hearing room and in the presence of a support person.

[24] We are also concerned about the nuanced differences in the statements said to have been relayed to the five confidants by the alleged victim.[21] Two of the five confidants do not state precisely what they were told but express their own conclusions about what happened.[22] Evidence such as that could not be admitted on any basis.

[25] We consider that there is an unacceptable risk that the Practitioner could not meet the specific allegations made against him by the Committee, if one or more of the five confidants gave evidence of what was said to them. There is no statement from the alleged victim to provide a foundation from which the Tribunal could conclude whether what was said to the five confidants was consistent or inconsistent. None of the five confidants have any personal knowledge of what actually took place. There could be no meaningful cross-examination on the question whether [sexual misconduct – details suppressed].

[26] It will be for counsel for the Committee to consider whether there is sufficient other evidence from which he could invite us to draw an inference that [sexual

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20 *A Professional Conduct Committee of the Nursing Council of New Zealand v Health Practitioners Disciplinary Tribunal* [2020] NZCA 435 at para [46].

21 See para [6] above.

22 See para [6]3 and 4 above.

misconduct – details suppressed] did take place. Plainly, given the way in which Charges 6 and 7 have been framed, there was a course of conduct on the night of the party at the Practitioner's home that will need to be explored, both as to whether it represented unsatisfactory conduct or misconduct and, if so, the extent of the penalty that should be imposed. Mr Long, for the Practitioner did not demur, at the admissibility hearing, from our suggestion that it would be open to counsel for the Committee to cross-examine the Practitioner on the nature and extent of the whole of the conduct that occurred that night.

Result

[27] For those reasons, we hold that the hearsay statements from the five confidants are not admissible at the hearing of Charge 7.

DATED at AUCKLAND this 4th day of March 2021

Judge DF Clarkson
Chairperson