

**NAMES OF COMPLAINANTS AND CLIENTS NOT TO BE PUBLISHED,
PURSUANT TO S 240 OF THE LAWYERS AND CONVEYANCERS ACT 2006.**

**NEW ZEALAND LAWYERS AND
CONVEYANCERS DISCIPLINARY TRIBUNAL**

[2022] NZLCDT 46

LCDT 028/21

IN THE MATTER

of the Lawyers and Conveyancers
Act 2006

BETWEEN

**AUCKLAND STANDARDS
COMMITTEE 4**

Applicant

AND

PATRICK KENNELLY

Respondent

DEPUTY CHAIR

Dr J G Adams

MEMBERS OF TRIBUNAL

Mr S Hunter KC

Ms K King

Ms M Noble

Prof D Scott

HEARING 6 December 2022

HELD AT Specialist Courts and Tribunals Centre, Auckland

DATE OF DECISION 15 December 2022

COUNSEL

Mr P Davey for the Standards Committee

Mr M Atkinson and Mr L Taylor KC for the Respondent Practitioner

DECISION OF THE TRIBUNAL RE PENALTY

[1] In our 1 September 2022 decision we found two charges of misconduct were proved against Mr Kennelly. They are of quite different moment. The charge of being dilatory in distributing an Estate, if it had been a stand-alone charge, and if Mr Kennelly did not have a significant disciplinary history, would have attracted a fine. The other charge is of greater moment. When ordered by the Legal Complaints Review Officer (LCRO) to apologise to a complainant, Mr Kennelly wrote a letter that we found “mocks the order, inferentially insults the LCRO, and is purposefully designed to convey no remorse...”.¹

[2] Having heard submissions on 6 December, we retired to deliberate, and then made orders. The orders we made were:

1. Mr Kennelly is suspended from practice for 2 months commencing on a date of his choosing on or before 19 December 2022.
2. Mr Kennelly shall pay the Standards Committee costs which have been subsequently clarified at \$29,328.90.
3. Mr Kennelly shall reimburse the New Zealand Law Society for the Tribunal s 257 costs which are to be certified.

This decision explains our reasons for making those orders.

[3] Mr Davey’s written submissions contained the following passage which we adopt:

The starting point is to assess the gravity of the conduct and “fit the penalty to the profile of the practitioner”, while responding adequately to the need to reassure the public.”² The Tribunal also needs to consider the least restrictive outcome that is appropriate in the circumstances³ and any comparable cases.⁴

¹ *Auckland Standards Committee 4 v Kennelly* [2022] NZLCDT 31 at [22].

² *Auckland Standards Committee 5 v Stuhlmann* [2022] NZLCDT 16.

³ *Daniels v Complaints Committee 2 of the Wellington District Law Society* [2011] 3 NZLR 850 (HC Full Court) at [22].

⁴ *Johnson v Canterbury/Westland Standards Committee 3* [2019] NZHC 619, [2019] NZAR 816 at [94].

[4] Mr Davey found no previous case that was closely similar to this one. He sought a period of suspension because of the gravity of the inappropriate apology, Mr Kennelly's disciplinary history (including three warnings that suspension was imminent if he kept infringing), and the large fines already being carried from previous penalties. His written submissions sought suspension in the range of six to nine months. Mr Taylor KC sought to persuade us that a further fine would be adequate. When pressed, he allowed that suspension was a consideration but urged that it be no longer than one month, and that Mr Kennelly might be allowed to take it over the Christmas period.

[5] In oral submissions, Mr Davey noted that the "apology" was a deliberate act. This is Mr Kennelly's fourth Tribunal appearance in five years. Although the charges have not been identical, the element of contrariness in the "apology" performance has similarities with his failure to comply with an order to pay money to a client who had received poor service – the last preceding appearance. Mr Kennelly still owes \$75,000 in fines to the New Zealand Law Society which will take years to pay off. Fines have not proved effective. At this stage, a fine has little real impact, it simply "adds to the tab." Mr Davey pared back his ultimate submission to a "short" period of suspension.

[6] Although Mr Kennelly's affidavit for this hearing acknowledged his wrongdoing and expressed regret, those views are very late, and are at distinct odds with his stance at the liability hearing. The address of his affidavit was to the Tribunal, not to the complainant. His concern was more for his own distress than for that of the complainant.

[7] Mr Taylor properly made the point that Mr Kennelly wrote the offending letter before his last Tribunal matter in 2021. We do not think that takes much force from the warning about suspension he was then given. It was the third successive warning. If Mr Kennelly, having only recently written the "apology letter," had reflected on his then recent behaviour, he could have written a fresh, proper apology. As with the March 2021 matter, he demonstrates a truculent characteristic. We take the view that suspension is the least restrictive option in the present case. Our choice of suspension does not rely on the successive warnings he was given, although they provide relevant context.

[8] We were pleased to learn that Mr Kennelly has been attending counselling to help manage what controls his aberrant behaviours. This, and the fact he does legal aid work, are on the positive side of his ledger. We did not accept that Mr Kennelly should be credited with having concluded distribution of the estate “soon after the share distribution.” There was a considerable gap. Moreover, the date of share distributions was itself tardy, not a reliable marker of alacrity.

[9] We agree with Mr Davey that additional fines are not effective in this case as a deterrent. We are not persuaded by Mr Taylor that, because Mr Kennelly is late in his career, fines will be an enhanced deterrent because he has little time to clear them. We think fines are relatively ineffective in this case. Although Mr Kennelly’s charges, over the years, have been for different things, the frequency exhibited by his disciplinary record is alarming.

[10] We are unanimously of the view that a short term of suspension is an appropriate marker of Mr Kennelly’s wrongdoing, taking into account his previous disciplinary record, the warnings about suspension he has received, and the mountain of fines he has already accumulated. We are willing to accommodate him to some extent by having part of the period of suspension occur over the holiday period. We have considered the impact on his staff and clients.

[11] Mr Kennelly has been censured on some previous occasions. We see it as futile to add to that. The suspension carries an implication of censure.

[12] We have not ordered Mr Kennelly to write a better apology letter. It is wiser for both his interests and those of the complainant to let this matter go.

[13] We note that the earlier orders, for non-publication of names of the complainant or clients, continue because they were permanent orders.

Summary of orders

1. Mr Kennelly is suspended from practice as a barrister or solicitor for two months commencing on a date of his choosing on or before 19 December 2022, pursuant to ss 242(1)(e) and 244 of the Act. Mr Kennelly has confirmed he will commence his suspension on 19 December 2022.

2. Mr Kennelly shall pay the Standards Committee costs which have been subsequently clarified at \$29,328.90, pursuant to s 249 of the Act.
3. Mr Kennelly shall reimburse the New Zealand Law Society for the Tribunal s 257 costs which are certified in the sum of \$4,192.00, pursuant to s 249 of the Act.

DATED at AUCKLAND this 15th day of December 2022

Dr JG Adams
Deputy Chairperson