THERE IS AN ORDER FOR PERMANENT SUPPRESSION OF NAMES OF COMPLAINANTS AND FIRMS, AS RECORDED IN PARAGRAPH [65]. THE INTERIM ORDER FOR SUPPRESSION OF NAME OF THE PRACTITIONER AND HIS TOWN IS NOW A PERMANENT ORDER, AS RECORDED IN DECISION [2023] NZLCDT 27 DATED 18 JULY 2023. THESE ORDERS ARE MADE PURSUANT TO S 240 OF THE LAWYERS AND CONVEYANACERS ACT 2006.

NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2023] NZLCDT 14

LCDT 015/22

IN THE MATTER of the Lawyers and Conveyancers Act 2006

BETWEEN **NATIONAL STANDARDS COMMITTEE 2**
Applicant

AND **MR Q**
Respondent

DEPUTY CHAIR

Dr JG Adams

MEMBERS OF TRIBUNAL

Mr S Hunter KC

Ms N McMahon

Ms M Noble

Prof D Scott

HELD AT Specialist Courts and Tribunals Centre, Auckland

DATE OF HEARING 21 April 2023

DATE OF DECISION 2 May 2023

COUNSEL

Ms PK Feltham and Ms F Nizam for the Standards Committee

Mr P Morgan KC for the Respondent Practitioner

DECISION OF THE TRIBUNAL ON LIABILITY AND PENALTY

[1] Mr Q assaulted two employees of the law firm in which he was then a partner. Two assaults (one on each employee) were indecent assaults; the other assault was also, in context, sexualised.

[2] Mr Q does not dispute the facts. He admits one of the indecent assaults is misconduct. He argues that the other assaults should be treated as unsatisfactory conduct.

[3] This decision deals with liability and penalty under the following issues:

- What was the conduct?
- Do two of the assaults each amount to unsatisfactory conduct or misconduct?
- What is the appropriate penalty?
- Should we order compensation?
- Should Mr Q's name be suppressed?

[4] In describing Mr Q's conduct, we have thought carefully about whether we should use the word "assault". We have considered alternatives, such as "exploitative sexual contact" which was the term used by the High Court in *Gardner-Hopkins* (although counsel for the Standards Committee in that case referred to "sexual assault").

[5] Mr Q tried to put his hands between the thighs of one of his employees; in a separate incident with the same employee – who had strongly objected on the first

occasion – he ran his hand down her back to her buttocks; and he knelt down and tried to push apart the legs of a second employee while saying he intended to perform oral sex on her. Neither woman consented. Mr Q does not say he thought they had. We consider his conduct is properly described as assault. We note this was also the view of the Legal Complaints Review Officer who said at paragraph [167] of his decision that "[o]n any view of the facts, Mr Q appears to have assaulted both [women]."

What was the conduct?

[6] Each of the assaults occurred in homeward bound taxis following social functions for partners and staff. The functions and taxis were provided by the firm. The taxi journeys were long because the functions were held in [a nearby city] and the journeys took them back to [an Eastern North Island locality]. On each occasion, Mr Q had consumed alcohol to excess. Mr Q, then about sixty, had worked with the victims for years. Their previous interactions had seemed cordial and friendly, appropriate to the workplace. The assaults were uninvited, unexpected, and unwelcome. They did not occur within a context of mutuality or flirtation between Mr Q and either victim.

[7] The two assaults on Victim A occurred 16 months apart. In August 2018, when Mr Q and Victim A were the only passengers left in the taxi, Mr Q tried to put his hands between Victim A's thighs and was briefly irritatingly persistent with her. He stopped the behaviour at her request.

[8] On 20 December 2019, following an end-of-year Christmas function, Mr Q, Victim A and others (including Victim B) were sharing a taxi. It was a taxi van. He slipped his arm around Victim A's shoulder and lowered his hand down to her buttocks. She pushed his hand away and told him to "*fuck off and stop touching me."* She then asked to be dropped off first to avoid being left alone with him in the taxi.

[9] During the same journey, Mr Q started sliding his foot up Victim B's legs. She moved constantly and adjusted herself to avoid him. He put his legs up and his feet on her knees. When everyone had been dropped off except Mr Q and Victim B, he immediately got down on his knees in front of Victim B, put his hands on her knees and began to push her knees apart. She resisted by keeping her legs together and asked him "*What the fuck are you doing?"* He told her "*I'm going to give you the best orgasm of your life.*" She told him there was absolutely no way she would allow him to do that

to her. He got up and sat close with their thighs touching. He put his arm around her and told her she needed to have more sex. He said, "*Promise me you will have lots of sex these holidays.*" He spoke of "*giving the taxi driver a show*" and motioned touching her breasts by circling his arm in front of her chest. He tried to kiss her before he got out of the taxi.

Unsatisfactory conduct or misconduct?

[10] This case did not come directly to the Tribunal from the Standards Committee. The Standards Committee found all the conduct to be unsatisfactory conduct and fined Mr Q, censuring him and ordering him to pay compensation to the two victims. The New Zealand Law Society appealed to the Legal Complaints Review Officer who directed the Standards Committee to reconsider.

[11] Despite factual differences, the decisions of the Tribunal and the High Court in *Gardner-Hopkins*[1] are pertinent to this case. So are the Tribunal decisions in *Palmer.*[2] Although neither victim in this case is a junior, they were employees of Mr Q's firm. The context of travel home from a firm's function falls within the ambit of "providing legal services." The victims were entitled to be free from sexual assault by an employer.

[12] We agree with Mr Q that the indecent assault on Victim B is misconduct. Do the two assaults on Victim A also cross the threshold?

[13] We find that Mr Q's attempt, briefly persistent, to insert his hands between his employee's thighs, would reasonably be regarded by lawyers of good standing as disgraceful or dishonourable. He made the advance when they were alone (apart from the taxi driver). His victim was trapped in an enclosed space. It was opportunistic. No contextual basis supports any thought his actions might be welcome. It was an awful breach of the trust Victim A was entitled to have in her employer.

[14] The second assault must be understood in the context provided by what had occurred 16 months earlier. Mr Q's conduct may have appeared (for example, to other passengers in the taxi) in a more jocular (if misguided) vein were it not for the history

[1] *National Standards Committee 1 v Gardner-Hopkins* [2022] NZHC 1709.
[2] *National Standards Committee (No 1) v Palmer* [2023] NZLCDT 13.

which only he and his victim knew about. Her immediate reaction shows that she understood his unwelcome invasion of her personal space as an extension on his earlier conduct and, that being so, she made it clear that she was not willing to remain alone with him in the taxi. Mr Q cannot escape that context which is obvious to us as it was to Victim A. His failure to respect her boundaries, and his subsequent attempt to inveigle physical contact under the guise of light-heartedness, exacerbate the first incident. This conduct suggests a pattern of disrespect for sexual boundaries of employees.

[15] Victim A is a relatively unwilling participant in this disciplinary process. She does not support an adverse outcome for Mr Q. Despite Mr Morgan's submission that the assessment of the person who suffered the behaviour might be a sound measure of its gravity, we must take an objective view. We note Victim B's stance, which differs from that of Victim A in respect of the charges applicable to each. Our professional disciplinary process is itself very different from the personal processes through which victims must variously go, often in different paths, to move on in their own lives.

[16] We regard the gravity of the second assault on Victim A as like the first assault (because it imported the earlier experience). Therefore, we find charges 1 and 2 (relating to the assaults on Victim A) proven at the level of misconduct. Mr Q had already accepted charge 3 (relating to Victim B) as misconduct. We dismiss charge 4 which was a catch-all charge that adds nothing, now we have found charges 1, 2 and 3 as misconduct.

What is the appropriate penalty?

[17] This case was heard shortly before the penalty decision in *Palmer* was delivered. We adopt the Tribunal's approach in that case as set out in the following passage[3]:

> [13] It is now well established that the purpose of penalties imposed in professional disciplinary proceedings is not punitive. Rather, it reflects the purposes of the Lawyers and Conveyancers Act 2006 (LCA): the protection of the public, the upholding of professional standards and of the confidence that the public has in the legal profession.

[3] See above n 2.

> [14] As well as that, an assessment of proportionate penalty includes consideration of the following:
>
> (a) the principle of the least restrictive intervention, as enunciated in the *Daniels* decision;[4]
>
> (b) the principles of specific and general deterrence; and
>
> (c) consideration of the prospects of rehabilitation, in order that the risk of reoffending is reduced.
>
> [15] Having established the level of seriousness of the misconduct (because there is a continuum of gravity and a range of behaviours which may be established under the heading of "misconduct"), the Tribunal then goes on to consider aggravating factors, mitigating factors, and to undertake a comparison with similar cases which have previously been determined by the Tribunal or higher courts.

[18] Mr Q's conduct was offensive, invasive and demeaning. In the case of Victim A, Mr Q repeated his behaviour despite her objections on the first occasion. In the case of Victim B, his assault on her has had a profound impact.

[19] Mr Morgan submitted that Mr Q's misconduct was less grave than that in *Gardner-Hopkins*. Ms Feltham and Ms Nizam suggested that Mr Q's misconduct was less grave than that in *Palmer*. At least in terms of Mr Q's immediate actions, we do not agree with those assessments.

[20] In *Gardner-Hopkins*, there were more victims. They were younger than the victims in this case. They were eager to obtain permanent jobs: they were at a greater structural employment disadvantage than the victims in the present case who had permanent positions. Apart from one *Gardner-Hopkins* victim, the behaviour there can broadly be described as sexual groping done in a public setting. But it was, in magnitude, less crude, and it was less invasive than Mr Q's attempt to place his hands between Victim A's thighs, or his attempt to pull Victim B's knees apart with his surrounding rhetoric. Mr Q's victims were assaulted in vulnerable physical circumstances where they were isolated and trapped.

[21] In *Palmer,* there were more victims than in this case. The victims were younger than Mr Q's. The conduct spanned a longer period of time, and continued despite warning and a change of law firm. But none of the conduct came anywhere near the gravity of Mr Q's invasive, offensive assaults. The hair-stroking and touching of leg or

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

arm in *Palmer* falls well short of the physical and psychological invasion of Mr Q's misconduct.

[22] In comparing these cases, we focus on the quality and import of the conduct. Each of the three cases (*Gardner-Hopkins, Palmer, Q*) involved more than one employee; each case demonstrated a pattern of behaviour. The proposition that an assault on an employee of mature years is less unacceptable than one on a young employee invites an odious comparison. Rather than deflecting to assess the character of the victim, we are more concerned to categorise the conduct of the practitioner.

[23] Leaving aside the vexed area of comparing classes of victims, we note the victim responses differ in respect of the misconduct and these proceedings. Victim A cannot be described as a complainant even though she has sworn an affidavit for the Standards Committee. If Victim A had control of matters, she would have put it in her past, and not sought any disciplinary consequence for Mr Q. Victim A opposes publication of Mr Q's name whereas Victim B supports it. Victim A seeks no compensation; Victim B does. The impact of Mr Q's misconduct on Victim B, which we find to be perfectly understandable, is detailed in her affidavit evidence. The affidavit evidence of both victims is permanently suppressed. Both victims are entitled to the dignity of privacy as far as we can manage that.

[24] Although Mr Q desisted when first told by Victim A, he invaded her personal space again 16 months later. His desisting was on the first occasion, not a permanent respect for her boundary-setting. His leg-rubbing behaviour in the taxi van with Victim B escalated to his pushing her knees apart. His assessment of this as not being forceful, seems self-delusional. That he did not apply much physical force avoids confronting the obvious fact that he chose to behave in a sexually invasive, offensive manner with a victim who was (apart from the driver) trapped in the taxi van with him. One can understand why Victim A had insisted on getting out early to avoid being alone in the taxi van with Mr Q, that night. We cannot know what behaviour she feared but what happened to Victim B is arguably on that continuum of fear.

[25] Each incident involves a breach of trust. Mr Morgan submitted that the effective relationship was one of friends, a friendship developed over years of working cordially with one another. We accept Ms Feltham's submission that the operative relationship

was, at base, that of employer-employee. That provided the over-arching context. The victims had attended the firm's event. Ironically, the taxi van was provided to ensure their safe travel home. Although they had a previously good relationship (marred, in Victim A's case since the first assault on her), they were not in relationships with Mr Q that extended beyond being employees and members of the same town community.

[26] The employer-employee relationship situated the victims in a structurally subservient position. That they were not new or young makes some difference to the divide, but the polar structure is still evident. They relied on their employment. If they quit on bad terms, their ability to find work in the same area in their locality might have been compromised.

[27] We cannot believe that Mr Q thought the frame in which he carried out his assaults was one of friendship. However cordial their workplace, none of his taxi van misconduct seems to have been friendly. We cannot apply that character to the relationship he evidenced by his behaviour.

[28] Mr Q does not rely on the fact he had drunk to excess as an excuse. This issue was confronted in *Gardner-Hopkins* where it was treated as irrelevant to the conduct complained of. Mr Q says he drank heavily to mask feelings of social anxiety. His law partners of many years had not been advised about this formerly. We have seen no medical evidence to elevate this beyond feelings that many of us might experience. We do not find any mitigation in that aspect of his case. His experience of what happened with Victim A in August 2018 should have alerted him to be careful to prevent recurrent behaviour of that type. He failed to do so.

[29] When Victim B returned to work after the holidays, she found it impossible to be as she had been. She told another partner what had happened. The firm behaved appropriately to protect its staff, and to honour its obligations to the New Zealand Law Society. The remaining partners terminated the partnership, excluding Mr Q.

[30] Mr Q did not seek work elsewhere and, for nine months, was unemployed. Eventually, he was offered a position in another firm where he currently works. Before he took up that position, his new firm asked two employees, who had come from Mr Q's former firm, whether his arrival would cause them difficulty. They are reported to have acquiesced.

[31] We do not find the period of unemployment as a mitigating factor. It was a natural consequence of his conduct and, as indicated in the High Court decision in *Gardner-Hopkins*, irrelevant.[5]

[32] Mr Q accepted all the evidence of the victims. He is entitled to substantial credit for tailoring his defence in a manner that relieved his victims from the pressure of anticipating cross-examination. In addition, he is entitled to significant credit for his forty years as a practitioner who has no prior disciplinary history. He is entitled to credit for conduct as an employer that has been, apart for these matters, without blemish. Generally, it seems true that his relationships at work have not been problematic.

[33] Mr Morgan argues that, because our penalty response is not for punitive effect, there is no need for a period of suspension. It will serve no purpose, he argues. We disagree. The Tribunal and three judges of the High Court in *Gardner-Hopkins*, and more recently the Tribunal in *Palmer*, have determined suspension to be an appropriate disciplinary response to a law firm partner's conduct of this nature towards his employees.

[34] The purposes of disciplinary orders must be guided by s 3 of the Lawyers and Conveyancers Act 2006 (LCA). Public confidence in the profession requires penalty responses that are commensurate with the misconduct, and comparable to other cases. To treat Mr Q's misconduct merely by censure and fine would be to fall into the error of the Standards Committee. It would be wholly inadequate. We would find it impossible to square such an outcome with *Gardner-Hopkins* or *Palmer.* Guarding the ongoing reputation of the profession is an important purpose of suspension in a case like this.

[35] Deterrence of other practitioners is another factor in favour of suspension.

[36] Deterrence of Mr Q is probably a marginal feature here. We are not particularly fearful that he will behave like this again. These proceedings have been harrowing for him.

[37] Nonetheless, a period of suspension serves the purpose of allowing the practitioner to reconsider their behaviour, to undertake training or therapy. We shall

[5] See above n 1.

not order it, but Mr Q might consider undertaking some study in employer responsibilities, especially respect and dignity in gender relations. In our view, he seeks to minimise and exculpate his behaviour, to distance himself from his own aberrant conduct, and the consequences for his victims. This can be a natural response to being cast in a defensive position. Now is time for him to review his approach afresh.

[38] His victims are not only Victims A and B. His family members, his former partners and workmates, his friends who come to learn about these matters – are all victims. If the taxi driver was aware what was going on, that driver is a victim.

[39] What occurred in this case are not properly described as interactions. They were unilateral actions done by Mr Q against the victims. Victims A and B are blameless. We are not aware of anything they did that could have contributed to what occurred. Like bystanders struck by a vehicle that mounts the curb and strikes them, they are innocent. They should feel no shame.

[40] Similarly, Mr Q's former law partners were unaware of the situation. They behaved well. Others, such as his family members, may feel understandable embarrassment of association but they are not responsible for what occurred here.

[41] The Standards Committee suggested censure, compensation, costs and suspension of 12 to 18 months. Mr Morgan opposed any suspension and did not offer a counter-proposal. Having heard submissions, we have reflected on the requirements in this case, and its relativity to both *Gardner-Hopkins* and *Palmer.*

[42] *Gardner-Hopkins* resulted, after appeal in a three year suspension. We regard Mr Q's immediate actions (the assaults) in the present case to be the same or worse than in respect of most of the victims in *Gardner-Hopkins*. On the other hand, Mr Gardner-Hopkins' victims were young and, in some respects, more vulnerable. Mr Q has openly admitted all the facts which marks his penalty response better than *Gardner-Hopkins.*

[43] *Palmer* resulted in 18 months suspension for significantly less egregious conduct. The conduct there occurred over a longer period of time, with explicit warning.

[44] Mr Q's profile has remained free from taint other than that arising from these three charges. He is now 65 years old, and he has had an otherwise unblemished career. We do not consider that his misconduct should result in strike-off. After careful consideration, we regard the appropriate starting point as approaching two and a half years suspension. Mitigating features include: accepting the facts as stated by the victims; 40 years of prior unblemished record; and his reputation as a co-employer in all respects other than these charges. These call for a considerable credit.

[45] On balance, we allow a credit of one-third from a starting point of 30 months suspension which results in suspension of 20 months. We are comfortable with the relativity of that outcome, in all the circumstances of this case, with both the other cases to which we have compared.

[46] To enable Mr Q's current firm to adjust for the suspension order, it will take effect on 16 May 2023.

Should we order compensation?

[47] Victim A does not seek compensation for emotional harm. We should respect her stance.

[48] Victim B has filed a victim impact statement, the contents of which we permanently suppress. We accept her statement. The effect of the conduct on her directly and the consequent issues require compensation for emotional harm under s 156(1)(d). Mr Q accepts that an order of this kind could be made and did not oppose the figure of $4,000 set by the Standards Committee when it fined him.

[49] We note that a complainant in *Palmer* was awarded $10,000 for emotional harm in broadly comparable circumstances.

[50] We consider the harm done to Victim B was within a range only to be expected by Mr Q's misconduct. We refer to matters in Victim B's affidavit which is permanently suppressed. We order Mr Q to pay $10,000 compensation to Victim B.

Should Mr Q's name be suppressed?

[51] Our Tribunal hearings are public. There must be good reason before we will suppress the name of the practitioner. Section 240 LCA provides that we may make an order prohibiting the publication of the name or any particulars of the person charged or any other person "where we are of the opinion that it is proper to do so." Where application is made, we must balance the interests of the person who is to benefit from suppression against the public interest. That is the test; we must balance the opposing interests to discern whether it is proper to suppress or not.

[52] Mr Q seeks name suppression. He submits this will protect the privacy of the victims, avoid embarrassment to his family, and avoid embarrassment for himself and those who currently work with him. The New Zealand Herald, present at the hearing (albeit by AVL), opposes suppression. Victim B opposes name suppression for Mr Q. Victim A supports suppression for him.

[53] Mr Morgan submits there is no proper public interest in naming and shaming Mr Q.

[54] In December 2022, we made permanent orders to suppress the names of the victims. This is routine.

[55] At the same time, without opposition from the Standards Committee, we permanently suppressed the names of the two law firms incidentally caught up, namely the firm in which Mr Q was a partner, and the firm where he currently works. Permanent suppression of the firm names may have been unnecessary. Mr Q's original firm behaved commendably. The other firm has committed no offence by employing him. Neither of those firms is implicated by what Mr Q did. But we find we do not need to revisit that order.

[56] Promoting public confidence in the law profession is undermined if names are not published. Moreover, if practitioners who behave as Mr Q did escape publication, it encourages others to act covertly.

[57] The misconduct in this case is no fault of the victims. No shame should attach to them.

[58] It is evident that in two similar cases, *Gardner-Hopkins* and *Palmer,* the names of the practitioners were not suppressed by the end of the case. It is difficult to suppress the name of a practitioner who is to be suspended because that fact needs publication and many "in the know" will be able to join the dots. The fact that publication will embarrass the practitioner's colleagues, spouse, and children is unfortunately unexceptional.

[59] Mr Q lives and works in a country town, [an Eastern North Island locality]. If his name is published, he will suffer shame from people knowing what he has done. If his name is published, innocent people like his family members will feel embarrassment even though the conduct is something for which they are not responsible. We do not, however, consider this is markedly different from the effect of publication on a practitioner and their professional and personal circles in a larger town or city.

[60] If Mr Q's name is published, there may be local speculation about the identity of the victims whose names are suppressed. Even so, those suppression orders serve some valuable purpose even if a small circle might know who they are. They cannot be identified by internet searches. Their employment records will not be tagged. In any case, the most significantly affected victim supports publication.

[61] We find that the interests advanced by Mr Q do not outweigh the public interest. In this case, the ordinary course shall flow. We agree with Victim B that it is healthier all round for Mr Q's name to be associated with his conduct. There is no reason why doubt should fall on others. It is healthier for the legal profession generally that matters like this are aired, to avoid any perception that, in addition to their many other privileges, lawyers can escape detection or identification for egregious wrongdoing. To have it out in the open encourages other practitioners to behave in ways they are prepared to own publicly.

[62] The application for Mr Q's name to be permanently suppressed is declined.

[63] The interim order that the locality in which the practitioner practises shall be referred to as "an Eastern North Island locality" is discharged immediately suppression for Mr Q's name is lifted.

[64] Mr Q has signalled an intention to appeal refusal of name suppression. In order to protect his appeal rights, we extend interim suppression of his name and the town until four weeks from the date of this decision.

Orders

[65] The following orders are made:

1. Mr Q is suspended from practice as a barrister or solicitor, or as both, for a period of 20 months, pursuant to ss 242(1)(e) and 244 of the LCA, commencing 16 May 2023.

2. There is a Censure imposed. The form of censure is attached as Appendix 1 to this decision.

3. There is an order, pursuant to s 156(1)(d) of the LCA and 242(1)(a) awarding compensation to Victim B, who is able to be identified by the New Zealand Law Society who can arrange the facilitation of such payment. The award is in the sum of $10,000.00.

4. Mr Q is to pay the Standards Committee costs of $36,534.60.

5. The New Zealand Law Society is to pay the Tribunal costs under s 257 of the LCA, in the sum of $4,266.00.

6. Mr Q is to reimburse the New Zealand Law Society in full, for the Tribunal costs (pursuant to s 249 of the LCA).

7. There is an order for permanent suppression of the names of the complainants (Victims) and the name of the firms (pursuant to s 240 of the LCA).

8. In order to protect the practitioner's appeal rights, there is an order for interim suppression of his name and the town until four weeks from the date of this decision (pursuant to s 240 of the LCA).

9. The interim order that the locality in which the practitioner practises shall be referred to as “an Eastern North Island locality” is discharged immediately suppression for Mr Q’s name is lifted, as noted above in order number 8.

DATED at AUCKLAND this 2nd day of May 2023

Dr JG Adams
Deputy Chairperson

Appendix 1

Censure

Mr Q, after decades of unblemished practice, you have brought the legal profession into disrepute by sexually abusing two of your employees. Although it is conduct as an employer, it erodes the confidence that the public has in lawyers, that they are privileged community members of good standing whose conduct in managing their practices, should be honourable and beyond the level of reproach called for by your conduct.

Your record is permanently marked with this censure.