



New Zealand Lawyers and Conveyancers Disciplinary Tribunal

ANNUAL REPORT

For the 12 months ended 30 June 2015

Presented to the Minister of Justice, the Hon Amy Adams
The New Zealand Law Society
The New Zealand Society of Conveyancers

Pursuant to section 259 of the Lawyers and Conveyancers Act 2006

Judge Dale Clarkson

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New Zealand Lawyers and Conveyancers Disciplinary Tribunal

Introduction

The New Zealand Lawyers and Conveyancers Disciplinary Tribunal (“the Tribunal”) was established with effect from 1 August 2008.

The functions of the Tribunal are, broadly, to hear and determine: professional disciplinary charges of a more serious nature laid against a legal or conveyancing practitioner; applications to have persons restored to the roll or register of practitioners, or to allow their employment by a practitioner; appeals against a refusal to issue a practising certificate to a practitioner; and, various associated applications, including orders affecting non-practitioner employees of practitioners.

The Tribunal may impose a range of sanctions in relation to its determinations including suspension of a practitioner from practice, striking off from the roll of barristers and solicitors, cancelling registration as a conveyancing practitioner, the imposition of up to \$30,000 as a fiscal penalty, and the prohibition of employment in respect of non-practitioner employees working in a legal or conveyancing practice.

As can be seen, the Act has a more consumer oriented approach than its predecessor, the Law Practitioners Act. It also seeks to put in place a “more responsive regulatory regime”. This latter aspect is reinforced as part of s 231 “responsibilities of chairperson” where subsection (1)(a) refers to the “orderly and expeditious discharge of the functions of the Disciplinary Tribunal”.

The purposes of the Act are set out in s 3 as follows:

“3 Purposes

- (1) The purposes of this Act are—
 - (a) to maintain public confidence in the provision of legal services and conveyancing services;
 - (b) to protect the consumers of legal services and conveyancing services;
 - (c) to recognise the status of the legal profession and to establish the new profession of conveyancing practitioner.
- (2) To achieve those purposes, this Act, among other things, —
 - (a) reforms the law relating to lawyers;
 - (b) provides for a more responsive regulatory regime in relation to lawyers and conveyancers;
 - (c) enables conveyancing to be carried out both—
 - (i) by lawyers; and
 - (ii) by conveyancing practitioners;
 - (d) states the fundamental obligations with which, in the public interest, all lawyers and all conveyancing practitioners must comply in providing regulated services;
 - (e) repeals the Law Practitioners Act 1982.”

Executive Summary

This year has been less pressured than last, with a significant drop in the number of new cases filed. The Tribunal has taken the opportunity to ensure those cases which could be progressed quickly were heard at the earliest possible date. This is reflected in the 58% reduction in “cases on hand”.

Some administrative frustration occurs when events beyond the control of the Chair or Deputy Chair delay expeditious process. For example, the oldest live files relate to two lawyers who not only face disciplinary charges, but also charges in the criminal justice system. Because there is a risk of compromising the lawyers’ rights in the criminal trials to be held, the disciplinary process must await the conclusion of the criminal process. That wait has, so far, been in excess of five years.

We are acutely aware of the comments of the Court of Appeal in *Orlov v. Auckland Lawyers Standards Committee and Or*¹:

“[107].....almost five years later it has still not been resolved. Such a situation is totally unsatisfactory and contrary to the statutory policy that complaints are to be dealt with expeditiously. Delay can obviously prejudice fair hearing rights and cause staleness. Delay can amount to an abuse of process.”

Other examples of delay occur as a result of lawyers seeking to review the decision of a Standards Committee to lay charges with the Tribunal. The enormous workload, and consequent backlog in the determination of such reviews by the office of the LCRO² has delayed by many months (in one case, at least a year), the ability of the Tribunal to hear the charges.

Efficiency cannot be allowed to come at the expense of a practitioner’s right to legal representation and other natural justice principles. The Tribunal is always conscious that these are cases where a lawyer’s career (often lengthy) is at stake.

On the other hand, we are mindful of the clear statements of the higher courts about expeditious disposition. In the *Orlov*³ decision referred to above, the Court emphasised the statutory objectives:

“[166] As a legal practitioner, Mr Orlov is subject to his profession’s disciplinary regime. It exists primarily for the benefit of the consumers of legal services. That is, people who include Mr Orlov’s own clients. But it exists also for the benefit of all legal practitioners, not least Mr Orlov himself.

¹ *Orlov v. Auckland Lawyers Standards Committee and Or* [2013] NZCA 230, referring to a complaint that was almost 5 years old.

² Legal Complaints Review Officer.

³ See note 1 at [166 -169].

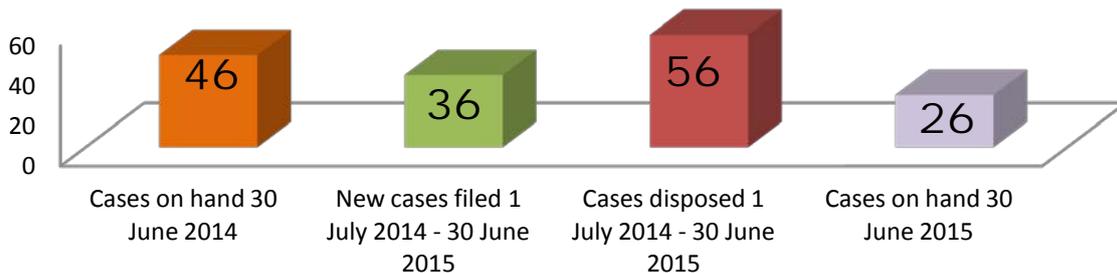
[167] We mentioned at the outset of this judgment, and we reiterate, that one of the central objectives of the Act is to provide for “a more responsive regulatory regime in relation to lawyers and conveyancers”.

[168] By raising the numerous procedural objections this judgment considers and rejects, Mr Orlov has thwarted and delayed the disciplinary process. He now complains of these largely self-inflicted delays.”

It is to be hoped that lawyers, and their counsel, appearing before the Tribunal, will take note of such clear direction. There are still, however, some examples of unmeritorious procedural applications which are brought, if not for the purpose, at least with the consequence of, delay.

It is also of assistance that it is now settled law that challenges by way of judicial review should await the completion of the substantive disciplinary process.⁴

Summary of Activity for the reporting period



New cases filed

Proceedings before the Tribunal fall into two categories:

- applications/appeals
- charges

The category break down of the **36** cases filed is as follows:

| Type of proceedings | Number of cases |
|--|-----------------|
| Charges | 33 |
| Application to practise on own account | 1 |
| Application for consent to employ | 1 |
| Appeal against refusal of practising certificate | 1 |

⁴ *Orlov v. New Zealand Law Society and Ors* [2013] NZSC 94 (Supreme Court).

The number of charges laid in each case is variable and may include charges laid in the alternative.

Cases disposed

The category breakdown of the **56** cases disposed is as follows:

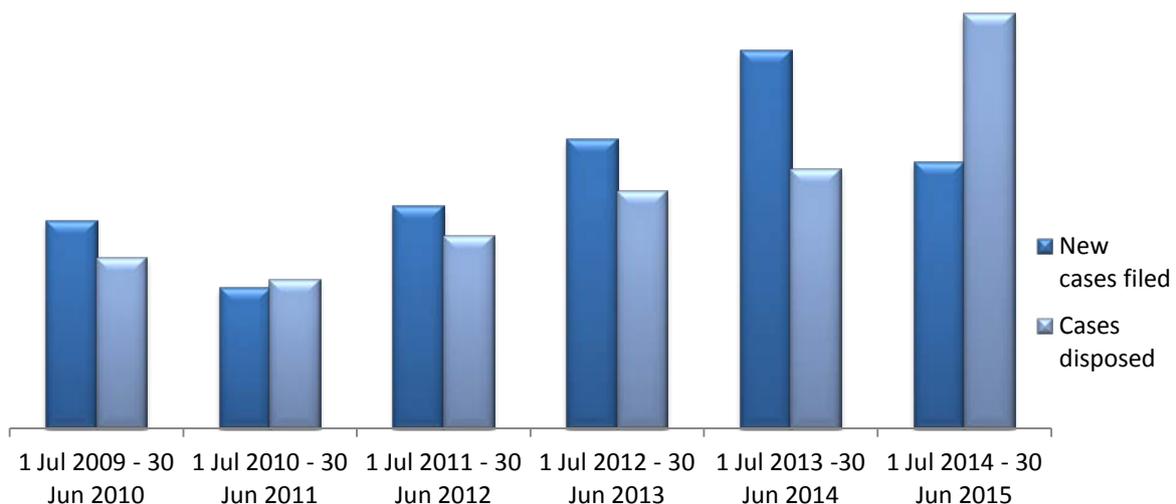
| Type of proceedings | Number of cases |
|--|-----------------|
| Charges | 53 |
| Application for restoration to the Roll | 1 |
| Application for consent to employ | 1 |
| Appeal against refusal of practising certificate | 1 |

Comparison table of cases filed and cases disposed

The table below shows the number of new cases filed and cases disposed over the past reporting periods.

| | 1 Jul 2014 – 30 Jun 2015 | 1 Jul 2013 – 30 Jun 2014 | 1 Jul 2012 – 30 Jun 2013 | 1 Jul 2011 – 30 Jun 2012 | 1 Jul 2010 – 30 Jun 2011 | 1 Jul 2009 – 30 Jun 2010 |
|-----------------|--------------------------|--------------------------|--------------------------|--------------------------|--------------------------|--------------------------|
| Number filed | 36 | 51 | 39 | 30 | 19 | 28 |
| Number disposed | 56 | 35 | 33 | 26 | 20 | 23 |

The chart below represents the information from the table above in a different format and a different order, starting with the 2009 year.



Comparison table showing type of person charged

The table below shows the breakdown of type of person charged over the past reporting periods:

| Type of person | 1 Jul 2014 – 30 Jun 2015 | 1 Jul 2013 – 30 Jun 2014 | 1 Jul 2012 – 30 Jun 2013 | 1 Jul 2011 – 30 Jun 2012 | 1 Jul 2010 – 30 Jun 2011 | 1 Jul 2009 – 30 Jun 2010 |
|-----------------|-----------------------------|-----------------------------|-----------------------------|-----------------------------|-----------------------------|-----------------------------|
| Lawyer | 25 | 39 | 28 | 23 | 20 | 15 |
| Former lawyer | 6 | 5 | 4 | 2 | 2 | 1 |
| Former employee | 2 | 2 | 2 | 3 | 3 | 0 |
| Total | 33 | 46 | 34 | 28 | 25 | 16 |

Case progress

Hearings are preceded by issues and/or setting down conferences which are usually conducted by telephone, to minimise costs.

In addition there are many interlocutory applications requiring adjudication prior to hearing, some of which (of a procedural nature) can be considered by the Chair alone, and some of which require the convening of the full, or reduced number Tribunal. The circumstances where a reduced quorum is permitted has been extended by recent amendment to the Act⁵, allowing a quorum of three to consider applications for Interim Suppression of Name or details.

This change has allowed speedier consideration of such applications at a considerably reduced cost. At times, in order to achieve both of these outcomes, and with agreement of the parties, such hearings have been held by telephone.

During the period the Tribunal held **56** face to face hearings.

The nature of the hearings are:

- the substantive hearing of defended charges;
- hearings as to penalty;
- applications including interlocutory applications;
- appeals against refusal of practising certificate.

These hearings varied in length from half a day to three days. On some days, more than one matter was heard, in order to best utilise the time of the members, and minimise travel costs.

The table below shows the number of face to face hearings by location, over this reporting period and past reporting periods.

⁵ Lawyers and Conveyancers Amendment Act 2012, ss 15 and 19.

Number of hearings by location

| Hearing location | 1 Jul 2014 – 30 Jun 2015 | 1 Jul 2013 – 30 Jun 2014 | 1 Jul 2012 – 30 Jun 2013 | 1 Jul 2011 – 30 Jun 2012 | 1 Jul 2010 – 30 Jun 2011 | 1 Jul 2009 – 30 Jun 2010 |
|------------------|--------------------------|--------------------------|--------------------------|--------------------------|--------------------------|--------------------------|
| Auckland | 32 | 45 | 22 | 20 | 15 | 15 |
| Hamilton | 2 | 1 | - | - | - | 2 |
| Rotorua | 2 | - | - | - | - | - |
| Napier | - | 1 | - | - | - | 1 |
| Hastings | 1 | - | 1 | - | - | - |
| New Plymouth | - | - | - | - | 1 | - |
| Wellington | 12 | 5 | 7 | 8 | 4 | - |
| Nelson | - | - | - | 5 | 1 | - |
| Christchurch | 4 | 5 | 4 | 1 | 1 | 1 |
| Dunedin | 3 | - | - | - | - | - |
| Total | 56 | 57 | 34 | 34 | 22 | 19 |

The Tribunal also dealt with some matters on the papers.

Decisions

During the period **75** decisions were issued. These were decisions on:

- liability (charges proven or dismissed);
- penalty;
- applications including interlocutory applications;
- appeals against refusal of practising certificate.

During the period **11** appeals of Tribunal decisions were filed in the High Court. On 30 June 2015, the status of those appeals was as follows – three were allowed; one was dismissed; one was abandoned; the remaining six were pending determination.

Penalty orders

The table below shows a breakdown of penalty orders made during this period.

| Type of order | Number of orders made |
|--|-----------------------|
| Struck off the Roll | 12 |
| Suspension from practice | 14 |
| Censure | 19 |
| Pay fine | 3 |
| Pay compensation | 5 |
| Reduce fees and/or refund monies | 3 |
| Undergo training or education | 4 |
| Supervision / mentoring / advice to be taken | 5 |
| Restriction on employment | 2 |
| Not able to practice on own account | 3 |
| Apology to complainant | 3 |
| Reimburse costs to the New Zealand Law Society | 35 |

Other outcomes / Orders made

| Type of application/appeal | Outcome |
|--|--|
| 1 Application for restoration to the Roll | Granted |
| 1 Application for consent to employ | Granted |
| 1 Appeal against refusal to issue practising certificate | Dismissed |
| <i>Auckland and National Standards Committees v Orlov</i> (3 applications for permanent stay) | Granted upon voluntary removal from the Roll |

Suppression

Normally, suppression of complainant's names and details is agreed. In addition, there are instances where personal or medical information about practitioners is not published. At times, suppression of the practitioner's name is also allowed.

The table below shows the number of applications received over this reporting period, for name suppression of the practitioner charged:

| Type of application | Received | Granted | Declined |
|---|----------|---------|----------|
| Application for interim suppression of name of practitioner | 6 | 5 | 1 |
| Application for permanent suppression of name of practitioner | 10 | 5 | 5 |

Once again, I record that all of the Tribunal's work has related to the legal profession, with no matters coming forward in respect of the relatively new, and small, conveyancing profession.

Cost recovery

The Tribunal made s 257 orders during the period for the New Zealand Law Society to reimburse the Crown for hearing costs, in the sum of \$204,722.

Membership and Recruitment

The Tribunal comprises of a Chair, Deputy Chair, law and conveyancing practitioners, and lay members. The practitioner members volunteer their services without reward, and their commitment and contribution is of enormous value to the Tribunal. They are senior practitioners who are appointed by the New Zealand Law Society. They have a broad range of experience and are located in different centres of the country. In convening a panel of members to sit, effort is made to use local members in order to minimise costs, provided no conflict of interest arises. Practitioners are advised in advance of the hearing of the composition of the Tribunal, to ensure an unanticipated conflict does not arise.

Appendix 1 lists the Tribunal members during the reporting period. Below is a summary of the backgrounds of the Chair and Deputy Chair.

Judge Dale Clarkson, Chair

Judge Clarkson is the first Chairperson of the Tribunal, having been appointed at its inception in 2008. Judge Clarkson retired as a full time District Court judge in 2006 but continues to hold an acting warrant and sits regularly in the Family Court. She graduated with a Bachelor of Laws from Auckland University in 1978 and was admitted to the Bar in 1979. She was appointed to the Bench in 1989 and has now served 26 years as a judicial officer. She is on the Editorial Board of Lexis Nexis Family Law Service and New Zealand Family Law Journal. She has presented papers on Family Law and Mediation topics nationally and internationally. She was the inaugural President of the New Zealand branch of the International Women Judges Association.

Judge Bernard Kendall (retired), Deputy Chair

Judge Kendall has 30 years of experience as a District and Family Court Judge. His further roles have been as a Parole Board - Panel Convenor, Chair of the Representation Commission defining Electoral boundaries, Chair of the District Licensing Committee under the Sale and Supply of Liquor Act 2012, Review Authority under the Legal Services Act 2011 and Chair of Professional Conduct Committee of Midwifery Council.

Member update

Lawyer members

Rachael Adams resigned in May 2015.

The New Zealand Law Society Board approved the appointment of Sally Fitzgerald for a period of three years from 5 June 2015.

Lay members

The following lay members were reappointed in May 2015:

Michael Gough, Alasdair Lamont, Ian McAndrew, Stephen Morris, Kenneth Raureti, Christine Rowe, Peter Shaw, and William Smith.

During the reporting period, Thursa Kennedy resigned, and the warrants of Jay Clarke and Sandy Gill expired after serving the Tribunal from its inception. The Chair and Deputy Chair wish to thank them all for their long and diligent service to the Tribunal.

The Chair and Deputy Chair both record their thanks to the members for their continued diligence and commitment to the difficult and important work of the Tribunal. In particular, it is to be noted that the lawyer members give their time without charge and willingly make themselves available, at times for extended periods, while still maintaining their busy practices.

Performance Standards of Members

During the year a Code of Conduct was developed to clarify the levels of professionalism and ethics expected of members. All members are provided with this Code, along with other training material, on appointment.

A training day was held November 2014 to review consistency of decision-making and discuss the implications of recent High Court and Court of Appeal decisions on disciplinary issues. Training days are always well-attended by members.

Administration

The Tribunal's Case Manager, Ms Susan Knight has continued to efficiently co-ordinate all of the administration including the complex task of organising 5-member hearings. The workload of this office has significantly increased, with the greater number of hearings and pre-hearing conferences.

The Chair and Deputy Chair wish to record their particular gratitude to Ms Knight for her exceptional performance in her role, and for the ongoing support she provides to all Tribunal members. Her personal skills are very much appreciated by all members. Ms Knight has now been with the Tribunal for a number of years, and her experience, in particular her attention to detail in proof-reading decisions is hugely valued.

The Tribunal sits in a number of different venues according to the location of the relevant practitioner, complaints and/or standards committee. The Tribunal lists upcoming hearings on the Ministry of Justice's Lawyers and Conveyancers Disciplinary Tribunal website.

The very peripatetic nature of the Tribunal and the large sitting numbers (a quorum of five members is required) does create difficulties for locating hearing rooms from time to time.

To ensure efficiency in dealing expeditiously with case load two divisions were established in 2009 under s 229 of the Act. The divisions are chaired by the Chair and Deputy Chair respectively. In December 2014 a further division, chaired by lawyer member Ms Mary Scholtens QC was established, under the statutory powers of delegation.

Determinations

The Tribunal posts its substantive determinations and decisions on the Ministry of Justice's Lawyers and Conveyancers Disciplinary Tribunal website so that they are generally accessible to the public and the profession. This requires careful editing to preserve anonymity in some cases, particularly to prevent the identification of complainants where suppression has been ordered.

The Chair and Deputy Chair aim to build up a body of consistent and credible decisions as an essential database for the Tribunal's work. The careful editing skills of the Tribunal's Case Manager are an integral part of this process.

There are significant public interest issues arising in the matters the Tribunal deals with in its substantive hearings, as well as at some of its pre trial hearings, particularly in relation to intervention and suppression. Members of the media are often in attendance to report proceedings.

Hearings often involve complex factual and legal issues, frequently involve Senior Counsel, and can extend for some days. That complexity is reflected in the length and style of the Tribunal's written judgments which frequently run to many pages to adequately deal with all issues raised by a case.

Tribunal judgments are normally written by the Chair or Deputy Chair in respect of hearings they have chaired, but I should also express my thanks and appreciation for the significant input of Tribunal members, both lay and professional, as their contribution is invaluable in completing any decision.

Performance of the Act

The consumer focus of the Act is a consistent theme in the determinations of the Tribunal and appellate court decisions. The Act would appear to be achieving its aims in this regard, but also in ensuring the continuing high reputation of the profession. It is well understood that the reputation of the legal profession is its greatest asset and that there is a collective responsibility amongst lawyers to uphold professional standards.

As stated in one of the leading cases in lawyers' discipline, a person entrusting a lawyer with possibly the most important transaction or problem of a lifetime, must be able to trust that lawyer "*to the ends of the earth*".⁶

⁶ *Bolton v Law Society* [1994] 2 All ER 486.

Looking ahead

The Tribunal is becoming more widely known as an independent statutory tribunal as it becomes involved in more professional disciplinary cases and applications. We note that the news media, and even members of the legal profession can refer to the Tribunal as the “Law Society Disciplinary Tribunal”, or similar.

There could perhaps be greater recognition by the media that we operate as a separate judicial body outside the regulatory organisations we oversee. That separation enhances public confidence in the disciplinary regime applicable to lawyers and conveyancers.

We observe that the New Zealand Law Society is very efficient at providing press releases following the release of Tribunal decisions, which assists the transparency of the process and provides important information to the public.

Judge D F Clarkson
Chair

Membership during the period 1 July 2014 to 30 June 2015

Chair

Judge Dale Clarkson

Deputy Chair

Judge Bernard Kendall (retired)

New Zealand Law Society Practitioner Members

Rachael Adams
Wayne Chapman
Sally Fitzgerald
Jacqui Gray
Stuart Grieve QC
Susan Hughes QC
Colin Lucas
Graham McKenzie
Sam Maling
Shelley Sage
Mary Scholtens QC
Todd Simmonds
Brent Stanaway
Ian Williams
Stuart Walker

Lay Members

Jay Clarke
Sandy Gill
Michael Gough
Thursa Kennedy
Alasdair Lamont
Dr Ian McAndrew
Steve Morris
Ken Raureti
Christine Rowe
Peter Shaw
William Smith
Pele Walker

NZ Society of Conveyancers Practitioner Members

Vicki Dempster
Stefanie Crawley
John de Graaf
Kim Matheson
Erin Rasmussen