LEGAL COMPLAINTS REVIEW OFFICER
ĀPIHA AROTAKE AMUAMU Ā-TURE

[2022] NZLCRO 001

Ref: LCRO 111/2021

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the [Area] Standards Committee [X]
BETWEEN	**NEW ZEALAND LAW SOCIETY** Applicant
AND	**AP** Respondent

DECISION

The names and identifying details of the parties in this decision have been changed.

Introduction

[1] In a determination dated 17 June 2021, the [Area] Standards Committee [X] made a finding of unsatisfactory conduct against Mr AP (the culpability determination). This followed an own-motion investigation it had carried out, triggered by a confidential report describing incidents that had occurred involving Mr AP and two female colleagues, during work-related social functions.

[2] The Committee issued a separate determination as to penalty, on 29 July 2021. It fined Mr AP $4,000, ordered him to pay costs of $3,000 and directed him to pay compensation of $4,000 to each of his two female colleagues. As well, the Committee directed anonymized publication of a summary of its 17 June 2021 determination.

[3] The New Zealand Law Society (NZLS) has applied to review the Committee's culpability determination.[1] It asserts that Mr AP's conduct raises the spectre of misconduct, warranting his referral to the New Zealand Lawyers and Conveyancers Disciplinary Tribunal (Tribunal).

[4] The NZLS submits that this should now occur pursuant to s 212 of the Act; that is to say, a Review Officer should frame and lay appropriate charges with the Tribunal.

Background:

The conduct

[5] In very large measure, the facts giving rise to the Committee's inquiry are not in dispute, and a summary of them can be quite simply stated.

[6] During August 2018 Mr AP, then a partner in the law firm [Law Firm G] (LFG), and a Ms B, then a secretary in that law firm, were with other [LFG] colleagues at a work social function. It is said that in a taxi at the end of the evening Mr AP touched Ms B inappropriately and without her consent, and that force was used by Ms B to stop him from doing so.

[7] During December 2019 [LFG] held another social function, attended by Mr AP, Ms B and a Ms A, then a legal executive in the firm, and their colleagues.

[8] At the end of the evening's social events, Mr AP, Ms B and Ms A were in a taxi together being taken to their respective homes.

[9] It is said that in the taxi Mr AP again inappropriately touched Ms B, without her consent. She emphatically rebuffed him. Ms B was dropped off at her destination.

[10] Mr AP then inappropriately touched Ms A also without her consent, positioned himself closely in front of her, endeavoured to part her legs and made an offensive comment. Once the taxi had arrived at Mr AP's home, he attempted to kiss Ms A before getting out.

[11] Mr AP was intoxicated at both the 2018 and 2019 social events.

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[1] Section 195(2)(c) of the Lawyers and Conveyancers Act 2006 provides that the NZLS may apply to review a Standards Committee's determination made following an own motion inquiry under s 130(c) of the Act.

[12] As indicated those facts are largely not in dispute. It was recorded that Ms A had initially said that Mr AP used force to try and part her legs. Mr AP does not accept that he would have done so.

Steps taken by [LFG]

[13] During January 2020, Ms H, a partner in [LFG], learned of the December 2019 incidents involving Ms B and Ms A.[2]

[14] Details of the August 2018 incident involving Ms B, emerged.

[15] [LFG] decided to investigate the matters. As part of that, it provided Mr AP with a copy of initial notes taken by Ms H. I attach a copy of those notes to this decision, as Schedule A. PAGE 23 SC FILE

[16] Mr AP was invited to respond to the matters set out in the notes, and did so in an email to Ms H dated 22 January 2020. I attach a copy of that email, as Schedule B. PAGE 24 SC FILE

[17] Eventually it was agreed that Mr AP would resign from [LFG].

Complaint, own motion investigation and decision

[18] In an email sent in mid-February 2020 to the New Zealand Law Society's Complaints Service (Complaints Service), Ms H said the following (the reporting letter):

> [Mr AP] is one of four partners in [[LFG]]. In January we were advised by a staff member that [Mr AP] had behaved inappropriately on the shared taxi-van on the way home after our firm Christmas party in December. Details of the alleged conduct follow below, and include details of what then came up in relation to an earlier party.
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> …
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> We gave a copy of the notes as set out below to [Mr AP], and asked for his response, giving him time to consider that. [Mr AP] came back to us advising he remembered almost nothing from the van ride home, but enough to have tried to apologise to [Ms A], and he accepted that what was described as likely to have happened.
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> He explained further that he has suffered from [redacted] for a number of years, and had self-medicated with alcohol when he had to socialise. He had come to realise that he was acting inappropriately after drinking, and had been to his doctor. He noted that he had been prescribed medication and advised to cease drinking alcohol altogether, and that he would stick to both of those.
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> [Ms A] in particular has suffered significant trauma from this.

[2] There was also reference to an incident involving a Ms Z, and although this initially formed part of the Committee's inquiry, it was not advanced further [see p 103 SC file].

[19] Ms H attached a copy of her initial notes to the reporting letter and summarised Mr AP's response to those notes (his email dated 22 January 2020).

[20] Ms H remained a point of contact between that firm, Ms B and Ms A.

Committee processes

[21] The Complaints Service referred the reporting letter to the Committee which, at its meeting on 25 February 2020, resolved to commence an own motion investigation pursuant to s 130(c) of the Act (the inquiry).

[22] The Committee informed Mr AP of this on 16 March 2020, and provided him with a copy of the reporting letter.

[23] Also on 16 March 2020, Ms H emailed the Complaints Service and said the following:

> We have spoken to [Ms B] and [Ms A]. [Ms B] is not prepared to be involved, commenting that the incident was not serious enough for her to raise a formal complaint and she felt she had dealt with it.

[24] On 20 March 2020, Ms H again emailed the Complaints Service and attached "further information about the investigation made, including [Mr AP's] response" (being Mr AP's 22 January 2020 email). Ms H noted that "[m]uch of the process was verbal." I attach as Schedule C, the further information referred to by Ms H in that email. PAGES 21-22 SC FILE

[25] As part of its inquiry, the Committee resolved to appoint an investigator. On 9 June 2020, Ms LV, a partner in a [City K] law firm, was formally appointed to that role by the Committee.

[26] On 20 July 2020, Ms LV met with and interviewed Ms A. She produced a transcript of that interview for the Committee.

[27] Consistent with what Ms B had told Ms H, she elected not to be interviewed.

[28] In a letter to Mr AP dated 31 July 2020, the Committee provided Mr AP with a copy of the transcript of Ms A's interview, and invited him to respond to the following specific matters:

> a. whether, following a staff midyear Christmas party and during [a shared taxi ride] on 17 August 2019, [Mr AP]:
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> i. inappropriately touched [Ms B], including by attempting to place [his] hand(s) between her thighs; and

ii. if so, whether [he] acted forcefully.

b. whether, following a staff Christmas party and during [a shared taxi ride] on 20 December 2019, [Mr AP]:

i. inappropriately touched [Ms B] including by placing [his] hand on her leg(s) and/or buttock(s) and, if so, whether [he] only stopped doing so when [Ms B] told you to "*fuck off and stop touching me*" or words to that effect;

ii. inappropriately touched [Ms A] including by placing [his] hand(s) on her legs;

iii. knelt in front of [Ms A], spread and held her knees apart and said "*I am going to give you the best orgasm you have ever had in your life*" or words to that effect;

iv whether at any time [he] instructed the taxi driver to take a route other than the most direct route to the next destination; and

v whether [he] attempted to kiss [Ms A] when leaving the taxi.

Mr AP's response

[29] In a letter to the Complaints Service dated 17 August 2020, Mr AP provided a comprehensive response to the matters raised by the Committee.

[30] In summary Mr AP said:

(a) he had no memory of acting or speaking inappropriately on either occasion (2018 and 2019).

(b) In relation to the 2019 events, he recalls Ms B saying "fuck off" but not the context of her saying that.

(c) He had no desire to "defend the indefensible." He "allowed [himself] to become unduly intoxicated."

(d) He has admitted that his behaviour "was utterly inappropriate [and has never] argued otherwise."

(e) He has recognised the effect of his actions and has not attempted to avoid or mitigate the consequences for himself or his family. He endeavoured to apologise to Ms A.

(f) He first raised his [redacted] and alcohol issues with the partners at [LFG] in January 2020. He did not do this to "distance [himself] from [his] behaviour … but … in an effort to explain how [he] got himself into a situation where [his] behaviour was unacceptable."

Ms A

(g) Despite being intoxicated, he believes that he "would never use force in any circumstance". He said that in the transcript of her interview, Ms A appears to say that he did not use force.

(h) His conduct towards Ms A was completely at odds with their long and incident-free professional association.

(i) His attempt to kiss Ms A goodnight must be seen in the context that "[i]t was not unusual for there to be a hug/kiss between staff and partners at the end of year functions, in a polite manner, not sexual." However when Ms A made it clear that it was inappropriate, he acknowledged this and got out of the taxi.

Ms B

(j) He is concerned about the allegation that he used force, and as with his response in connection with Ms A, maintains that this would not be in his nature.

(k) Ms B is "an absolute force of nature who would have no compulsion putting anyone in their place, including a partner (in [LFG])." The two have worked together for 20 years.

(l) It is likely that Ms B would have regarded him as "an embarrassing drunk [and] treated [him] accordingly and that would have been the end of it."

(m) Ms B appears to have "handled the matter and did not want it taken any further."

Other matters

(n) [LFG] made it clear that he had no choice but to exit their partnership. This was a shock. At that time he had 37 years' experience "with no record of any inappropriate behaviour of any nature".

(o) Since his early 20s, he has suffered from [redacted] for which he has never received adequate counselling or treatment. External social events have always been very difficult and he resorts to "alcohol as [his] coping agent."

(p) On these two occasions he "obviously got the balance of anxiety/alcohol terribly wrong". Given that he cannot recall either evening's events, he now "accept[s] alcohol is the issue."

(q) Symptoms of [redacted]. It is "an hour-by-hour, day-by-day affliction." In a controlled working environment he has been able to manage it.

(r) Over the Christmas/New Year period of 2019/2020, he consulted his doctor on becoming aware of the behaviour. Anti-depressant medication and care with alcohol consumption, together with family scrutiny, have considerably assisted. As well, he is undertaking counselling. The counsellor has assured him that he has "none of the indicators or characteristics of someone likely to repeat that behaviour."

Impacts

(s) This has been very difficult for him and his family. It weighs heavily on his wife and children, particularly in a [redacted]. He has "let down so many people in 10 minutes of drunkenness [but is not] in any way blaming alcohol."

(t) The circumstances of his departure from [LFG] are not publicly known. This creates difficulty in the [redacted]. He and his family have also been "significantly compromised financially."

Notice of Hearing

[31] At its meeting on 28 August 2020, the Committee resolved to set the matter down for a hearing on the papers.

[32] On 10 November 2020 the Committee issued a Notice of Hearing and invited responses from Mr AP and [LFG].

[33] The Notice of Hearing is a detailed document, and rather than reproduce it in full in the text of this decision, it is attached as Schedule D. SC FILE PAGES 268 – 271.

Responses

[LFG]

[34] On [LFG]'s behalf Ms H provided a response to the Notice of Hearing in a letter to the Complaints Service dated 30 November 2020. Relevantly, she said the following:

(a) The Law Society "has committed to targeting and eliminating sexual harassment in the legal profession. [Ms A], as a victim of harassment, has been brave enough to speak up and seek accountability."

(b) The Committee must assess Mr AP's conduct "with reference to the purpose of the regulatory framework … and the need for public confidence in the profession."

(c) Mr AP, in 20 years of partnership at [LFG], has never disclosed his [redacted] and this "is surprising, particularly when he attended various social functions involving alcohol."

(d) The effect of Mr AP's conduct on [Ms A] has been profound. "There is no question that his behaviour was both unwelcome and offensive from [Ms A's] perspective". She considered reporting Mr AP's conduct to the police and would have made a complaint to the Complaints Service if [LFG] had not done so.

(e) Any of the consequences to himself and his family, described by Mr AP, "are a direct result of his behaviour."

Mr AP

[35] Mr AP provided a 14-page response to both the Notice of Hearing and to Ms H's letter, in a letter to the Complaints Service dated 20 January 2021.

[36] To avoid making what will be a relatively lengthy decision any more so, I will briefly summarise Mr AP's submissions. In doing so, I mean him no disrespect. I have very carefully read those submissions.

[37] However, because the facts are largely undisputed, and occurred over relatively short periods of time, detailed repetition is unnecessary for these purposes.

[38] Mr AP made the following points:

(a) on both occasions, all parties had been drinking.

(b) Ms B has made it clear that she did not want to pursue a complaint. Indeed, in late 2020 Mr AP and Ms B met in the street, hugged and chatted. Ms B has said that when she described Mr AP's conduct as being "quite forceful", she meant that she regarded him as being "irritatingly persistent" but nevertheless "had control of the situation and did not feel under any kind of threat."

(c) He did not disclose his [redacted] to the partners at [LFG], because it was a deeply personal and private matter.

(d) His responses to [LFG] during January 2020, were made under considerable pressure and at a time when he was deeply distressed.

(e) He denies touching Ms B's buttocks during the December 2019 event, because she was seated at the time and thus it would not have been possible for him to do so.

(f) In relation to Ms A, he disputes that he intended to spread her knees apart or touch her breasts. The evidence suggests that when questioned or told to stop whatever he was doing or suggesting, he did so immediately.

(g) He does not recall making the comment that he would "give [Ms A] the best orgasm [she had] ever had in [her] life" but "[recognises] it [as a] completely self-depreciating [sic] saying from university days [that is] Pythonesque in nature, designed to be so outrageous, it was supposed to be funny, not something said with any intent."

(h) He accepts that Ms A did not see that comment in that light and that he was "pushing boundaries too far and inappropriately." Nevertheless, his "intent (albeit misplaced) was one of humour, not something predatory or malicious."

(i) He denies using force because it is not in his nature. The reference to "force" comes from [LFG] and not Ms A. She has said otherwise.

(j) There are no other witness statements to corroborate events one way or the other.

(k) He accepts that his conduct is unsatisfactory, but he has not behaved in a disgraceful or dishonourable manner.

(l) He was not made aware of the August 2018 events, until there had been disclosure of the December 2019 events.

(m) The humiliating consequences of these events have been devastating for Mr AP and his family, which includes school-age children. There has been significant financial hardship. This has been the most significant episode in his life, personally and professionally. He profoundly regrets the behaviour. He has taken, and continues to take, steps to ensure that nothing of this nature occurs again.

(n) The conduct does not warrant charges being laid with the Tribunal.

The Standards Committee's determination

[39] After setting out the factual background and its procedural steps, the Committee held:[3]

(a) It was not satisfied on the balance of probabilities that Mr AP acted forcefully towards either Ms B or Ms A. Evidence of force is contained in [LFG]'s notes, the provenance of which is unclear. Whereas, Ms B and Ms A have both directly suggested otherwise.

(b) It was unnecessary to resolve the question of whether or not Mr AP touched Ms B on her buttocks during the December 2019 events.

(c) Mr AP's conduct was to be assessed against r 10 of the Lawyers and Conveyancers Act (Conduct and Client Care) Rules 2008 (the Rules). This requires all lawyers to "promote and maintain proper standards of professionalism in [their] dealings."

(d) Mr AP's conduct clearly requires a disciplinary response:[4]

> On the accepted facts, Mr AP engaged in repeated unwanted and unsolicited behaviour of a sexual nature directed towards two employees of the law firm of which he was a partner. Such conduct has no place in the legal profession and would undoubtedly be considered by lawyers of good standing as being unacceptable and clearly rises to a breach of [r 10].

[3] Standards Committee determination (17 June 2021) at [20]–[30].
[4] At [24].

(e) Mr AP's conduct was aggravated because it persisted after he was made aware that it was unwelcome and unwanted.

(f) "By a very fine margin" the Committee determined not to refer the matter to the Tribunal. Instead, findings of unsatisfactory conduct under both ss 12(b) and (c) of the Act, were appropriate.

(g) In coming to that conclusion, the Committee "[acknowledged] that some practitioners could reasonably consider that Mr AP's conduct was disgraceful and/or dishonourable and therefore misconduct as defined by s 7 of the Act."

(h) Informing the Committee's conclusions were the following factors:

(i) Ms B did not wish to participate in the inquiry and her view was that the conduct was not serious enough to warrant disciplinary response.

(ii) Ms A told the investigator that by "being able to say [her] piece, [she feels like she is] getting a bit of justice back."

(iii) There was an absence "of any forceful element of Mr AP's conduct."

(iv) Alcohol played a role in contributing to the conduct which, although not excusing it, was "a significant contributing factor." Mr AP has taken steps to address his [redacted], and there was thus a "low risk of Mr AP repeating such conduct".

(v) Mr AP has a "long and otherwise unblemished professional record."

[40] Finally, the Committee provided a detailed account of Ms A's description of the effects on her of Mr AP's conduct, describing those as being "significant detrimental consequences for Ms A."[5]

[41] As indicated, the Committee issued a separate determination as to penalty.

[5] At [29].

Application for review

[42] On behalf of the NZLS, Mr RJ lodged an application for review on 29 July 2021. He submitted:

(a) The NZLS considers that Mr AP's conduct potentially amounted to misconduct, and not unsatisfactory conduct, and that the Committee ought to have referred the matter to the Tribunal.

(b) The Committee's observations about the conduct were such that it ought properly have referred the matter to the Tribunal.

(c) The Committee's decision was inconsistent with the decisions of the National Standards Committee 1 which has referred "lawyers engaging in similar conduct to the Disciplinary Tribunal". One of those referrals resulted in the Tribunal's decision in *National Standards Committee No 1 v Gardner-Hopkins*.[6]

[43] Mr RJ said that the review application:

> … raises important issues about the level of professional culpability applicable to sexual harassment of the sort that was found to have occurred in this case and the need for consistency of decisions by Standards Committees in this area.

[44] By way of outcome, Mr RJ sought a reversal of the Committee's determination, and that a Review Officer frame and lay appropriate charges against Mr AP, with the Tribunal.

Response

[45] Mr AP responded, in a letter to the Case Manager received on 7 September 2021. He said:

(a) The Committee carefully considered whether his behaviour "crossed the threshold" and, "having weighed the various factors, … concluded that it did not."

(b) The conduct was "isolated and contained within specific circumstances."

[6] [2021] NZLCDT 21.

(c) He "acted inappropriately in a social work environment with people who had no idea [that he had] a [redacted] or that [he] used alcohol to be able to cope."

(d) Apart from challenging the allegation that he had used force, which both Ms B and Ms A have confirmed he did not, Mr AP has not challenged the evidence.

(e) In relation to the December 2019 events, there were five others in the taxi when the conduct concerning Ms B, occurred. None of those people have been interviewed.

(f) Ms B made it clear that she did not want to be involved, and reluctantly accepted the compensation that the Committee directed she should receive.

(g) His [redacted] that arose as a result of these events, have not been given appropriate weight.

(h) This has been exacerbated by the Committee's inquiry process, and the review application. The Committee's inquiry took some 17 months.

(i) The [redacted] "is a significant factor which contributed to [his] behaviour."

(j) The NZLS decision to review the Committee's determination, and the timing of that, caused "significant shock, stress and emotional harm."

(k) The Committee clearly gave proper weight to the fact that members of the legal profession would be "absolutely appalled" by the conduct, but nevertheless concluded that "most members of the profession would consider the assessment of [the] conduct, and the penalties imposed, by the Committee was the correct decision."

(l) The Tribunal's decision in *Gardner-Hopkins* was issued after the Committee issued its determination in the current matter. Nevertheless, there are significant differences between the facts in *Gardner-Hopkins* and the facts in this matter, with the conduct in *Gardner-Hopkins* being "much more serious, ongoing and more disturbing."

(m) The Standards Committee decision in *ZTUVK* is more relevant (and the conduct more serious) and resulted in findings of unsatisfactory conduct.[7]

[46] Mr AP attached a letter from a Mr BT, an accountant who had been [LFG]'s financial controller for over 40 years, and part of its management team.

[47] Mr BT's letter was unsolicited.

[48] Mr BT said that he had known Mr AP for many years whilst the latter was a partner in [LFG] "and during that time [Mr BT has] never witnessed any inappropriate actions in the work environment."

[49] He described Mr AP as becoming "effusive" in "an alcohol present social environment" and would "sometimes fail to realise the boundary between being friendly and going overboard."

[50] Mr BT described Mr AP's conduct in the December 2019 events as being "totally inappropriate and unacceptable", however the actions of the other partners in [LFG] in seeking Mr AP's resignation have bordered "on vindictive".

Nature and scope of review

[51] The nature and scope of a review was discussed by the High Court in 2012, which said of the process of review under the Act:[8]

> … the power of review conferred upon Review Officers is not appropriately equated with a general appeal. The obligations and powers of the Review Officer as described in the Act create a very particular statutory process.
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> The Review Officer has broad powers to conduct his or her own investigations including the power to exercise for that purpose all the powers of a Standards Committee or an investigator and seek and receive evidence. These powers extend to "any review" …
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> … the power of review is much broader than an appeal. It gives the Review Officer discretion as to the approach to be taken on any particular review as to the extent of the investigations necessary to conduct that review, and therefore clearly contemplates the Review Officer reaching his or her own view on the evidence before her. Nevertheless, as the Guidelines properly recognise, where the review is of the exercise of a discretion, it is appropriate for the Review Officer to exercise some particular caution before substituting his or her own judgment without good reason.

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[7] [Unnamed] Standards Committee, 25 October 2018. The Committee directed anonymised publication of a summary of its determination, saying that there is a public interest in doing so "to reiterate the seriousness with which Standards Committees take reported instances of sexual harassment by lawyers." The determination is referred to as *ZTUVK*.

[8] *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41] (citations omitted).

[52] In a later decision, the High Court described a review by a Review Officer in the following way:[9]

> [2] … A review by [a Review Officer] is neither a judicial review nor an appeal. Those seeking a review of a Committee determination are entitled to a review based on the [Review Officer's] own opinion rather than on deference to the view of the Committee.
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> …
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> [19] … A "review" of a determination by a Committee dominated by law practitioners, by the [Review Officer] who must not be a practising lawyer, is potentially broader and more robust than either an appeal or a judicial review. The statutory powers and duties of the [Review Officer] to conduct a review suggest it would be relatively informal and inquisitorial while complying with the principles of natural justice. The [Review Officer] decides on the extent of the investigations necessary to conduct a review in the context of the circumstances of that review. The [Review Officer] must form his or her own view of the evidence. Naturally [a Review Officer] will be cautious but, consistent with the scheme and purpose of the Act … those seeking a review of a Committee determination are entitled to a review based on the [Review Officer's] own opinion rather than on deference to the view of the Committee. That applies equally to review of a [decision] under s 138(1)(c) and (2) [of the Act].
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> [20] … While the office of the [Review Officer] does not have the formal powers and functions of an Ombudsman, it can be expected to be similarly concerned with the underlying fairness of the substance and process of the Committee determinations in conducting a review.
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> [21] A review by the [Review Officer] is informal, inquisitorial and robust. It involves the [Review Officer] coming to his or her own view of the fairness of the substance and process of a Committee's determination.

[53] Given those directions, my approach on this review has been to:

(a) independently and objectively consider all the available evidence afresh;

(b) consider the fairness of the substance and process of the Committee's determination;

(c) form my own opinion about all of those matters.

Hearing in person

[54] The hearing of this matter proceeded before me on 25 November 2021, by way of AVL (audio video link). Mr RJ appeared on behalf of the NZLS together with Mr DM from the NZLS. Mr TR QC appeared on Mr AP's behalf, together with Mr AP.

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[9] *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475.

[55] I record that I have carefully read the Standards Committee's inquiry file, the review application and response to that. Both counsel filed written submissions in advance of the hearing, spoke to those submissions during the hearing and answered questions from me.

[56] As well, at the conclusion of the hearing Mr AP made brief remarks at my invitation.

Discussion

[57] I begin this part of my decision by briefly summarising the oral submissions made by counsel at the hearing. Those submissions were in turn a summary of their written submissions.

[58] I mean no disrespect to counsel in providing a brief summary of their submissions. The issues engaged by both the Committee's inquiry and this review application have been thoroughly canvassed in written material, and in the Committee's determination itself.

Mr RJ's submissions

[59] Mr RJ's submissions are in three parts and can be succinctly summarised.

[60] First, Mr RJ submitted that the Tribunal's decision in *Gardner-Hopkins* has established a benchmark for the appropriate disciplinary response to conduct which involves sexual harassment by a lawyer.

[61] Mr RJ put it this way:[10]

> The point of the reference to *Gardner-Hopkins* and the supporting reasons for this review was not to suggest that the Standards Committee should have been influenced by that decision, to refer [Mr AP] to the Tribunal. Clearly it could not have been, because of the chronological order of events. Rather, the [NZLS's] point is that the result in *Gardner-Hopkins* demonstrated the inconsistency of the treatment of serious incidents of sexual harassment and roughly equivalent circumstances, by different Standards Committees. The result in *Gardner-Hopkins* indicates that equivalent incidents of sexual harassment, once they are found to have occurred or are admitted, are misconduct and not unsatisfactory conduct.

[62] Mr RJ also referred to what he described as an awakening awareness of the insidious nature of sexual harassment, and how that reflects poorly on the legal profession when that conduct occurs. He referred to the 2018 report by

[10] Mr RJ's memorandum of submissions (11 November 2021) at [5.1], referring to Mr RJ's case management memorandum (27 September 2021) at [4](b).

Dame Silvia Cartwright,[11] and the subsequent and significant amendments to the Rules to provide specifically for conduct of this nature.[12]

[63] Secondly, on any view of the facts Mr AP's conduct raises the spectre of misconduct and he ought therefore be referred to the Tribunal so that it can make the appropriate assessment about that.

[64] Mr RJ submitted that the Committee erred by conflating mitigation with culpability. He said that conduct should not be downgraded for reasons other than the conduct itself.

[65] Thirdly, the appropriate pathway to the Tribunal is by means of a Review Officer framing charges and laying them with the Chairperson of the Tribunal.

[66] Anticipating that Mr RJ might make that submission, at a pre-hearing stage I indicated my reservations about it.[13]

[67] Mr RJ's rationale for the approach he contends for is two-fold.

[68] First, referring the matter back to the Committee with directions will raise an issue as to whether those directions might leave little room for it to apply an unfettered re-appraisal to the facts. In other words, the sub-text of any referral back and associated directions would be that the Committee ought to make a prosecution determination.

[69] Alternatively, referring the matter to a fresh Committee would delay matters which, given the subject matter of the conduct issues and the inevitable stress on all of the parties caused by that delay, ought to be avoided if at all possible.

[70] Mr RJ submitted that a newly constituted Standards Committee would need to begin afresh, meaning scrupulous compliance with the rules of natural justice including allowing the parties to make further submissions, and provide responses. He rightly identified the potential for not insignificant delay in those circumstances.

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[11] Silvia Cartwright, New Zealand Law Society Working Group, *Report of the New Zealand Law Society Working Group: To enable better reporting, prevention, detection, and support in respect of sexual harassment, bullying, discrimination and other inappropriate workplace behaviour within the legal profession* (New Zealand Law Society, Wellington, 2018) <https://www.lawsociety.org.nz/assets/News-and-publications-documents/Other-Reports/Report-of-the-NZLS-Working-Group-December-2018.pdf>.

[12] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Amendment Rules 2021 (1 July 2021).

[13] Pre-hearing Minute to the parties (29 September 2021) at [2](g).

Mr TR's submissions

[71] Mr TR's submissions can also be succinctly summarised.

[72] Mr TR submitted that the Committee – made up of experienced lawyers and at least one lay person – brought their collective knowledge and wisdom to bear when assessing the conduct, and unanimously concluded that it fell within the range of unsatisfactory. He submitted that this assessment ought not lightly be interfered with.

[73] Relevant to that, Mr TR noted that the Committee was in possession of substantial material in which the conduct was explicitly described, as well as the way in which the incidents were managed including Mr AP's responses and the steps taken by him.

[74] Mr TR submitted that the Committee's finding was made in a clear and distinct way. He noted the severity of the financial penalty (some $15,000) which included compensation for Ms B and Ms A.

[75] Mr TR cautioned against automatically deferring to *Gardner-Hopkins* in every case in which there is an allegation of sexual harassment by a lawyer.

[76] In any event, Mr TR submitted that the conduct for which Mr Gardner-Hopkins was found guilty was significantly more serious than Mr AP's conduct.

[77] Mr TR also noted that the current regulatory regime (i.e. the Act, various regulations and the Rules) is described as being more "responsive" than earlier legislative and regulatory frameworks.[14] He submitted that this must mean not only responsive to consumer interests, but also to the particular circumstances of lawyers who face disciplinary inquiry as well as the views of those who are affected by a lawyer's conduct.

[78] Mr TR submitted that the Committee's determination was a very good example of that responsiveness in action. Proper account was taken by the Committee of Ms B's and Ms A's views, as well as Mr AP's unique personal circumstances.

[79] Finally, Mr TR urged a comparison with the Standards Committee's decision in *ZTUVK*. He submitted that a comparison between the facts in that case and those in Mr AP's case, reveal a consistent approach being taken by Standards Committees to what could be described as roughly similar conduct.

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[14] Section 3(2)(b) of the Act.

[80] Mr TR submitted that in the present case there has been a serious and appropriate response to Mr AP's conduct. He noted that a finding of unsatisfactory conduct in these circumstances was a significant disciplinary outcome which has left a stain on Mr AP's otherwise long, commendable and unblemished legal career.

[81] Responding to the criticism that the Committee had wrongly conflated mitigation with culpability, Mr TR disagreed and said that it was appropriate for a Standards Committee to take those matters into account when making an overall assessment about the proper disciplinary response to a lawyer's conduct. He said that not only was a Standards Committee entitled to take that approach, it would be expected that a Committee would do so.

Analysis

[82] First, I propose to briefly deal with three preliminary matters, the first two of which were extensively canvassed by counsel in their submissions: the significance of *Gardner-Hopkins* in the present matter, the relevance of *ZTUVK* and the issue of regulated services.

The relevance of Gardner-Hopkins

[83] In my view, the relevant passages of *Gardner-Hopkins* are as follows:

> [172] … This decision affirms what has always been the case, namely that indecent, un-consented or unwelcome touch by a lawyer on another, breaches the standards of conduct expected of a member in the profession. Intimate non-consensual touch connected with the workplace, on someone that the lawyer has power over, has always been unacceptable.
>
> [173] This is the case whether the lawyer intentionally touches the subordinate, or has failed to self-manage to the extent that the lawyer's conduct is inappropriately disinhibited. The profession expects of its members that those who work with lawyers are respected and safe. A basic behaviour expected of lawyers towards those they work with is that they are respectful and do not abuse their position of power. There is no place for objectification of women or indeed any person, by those in the profession of law.

[84] I do not necessarily read *Gardner-Hopkins* as saying that, in every case of proven sexual harassment by a lawyer, the appropriate disciplinary response will be misconduct. It will always be a question of fact, and every case will be different in one way or another. Reducing the issue to minutely analysing those differences can tend to overlook the essential nature of the conduct itself, compellingly identified by the Tribunal in the passage above.

[85] Indeed, and as the Tribunal itself observed in *Gardner-Hopkins*, the observations made do not represent the birth of new or enlightened values. Unwanted sexual attention in any area of life has always rightly been seen as repugnant. The legal profession has never been exempted from that societal value.

ZTUVK

[86] In dealing with this matter, I do not necessarily find *ZTUVK* to be of particular assistance.

[87] In *ZTUVK* the Committee found the conduct to be unsatisfactory, and not justifying a prosecution determination.

[88] There were two incidents. Both occurred in a law firm social setting. The protagonist was Mr X, then a partner.

[89] The first incident involved Mr X touching a female lawyer's leg and telling her that she was "very attractive." The female lawyer was upset, and departed.

[90] Mr X was spoken to by senior lawyers and the firm. He could not recall the incident but did not deny that it had taken place. He described an "alcohol-induced memory loss or blackout".[15]

[91] The second incident also occurred in a work-related social setting, at an external venue. Mr X is said to have "directed unwanted attention towards a non-lawyer female employee of the firm".[16]

[92] Mr X pinched the employee's bottom on two separate occasions (leaving a bruise after the first occasion). Sometime after that, Mr X asked the employee if she was going to join him. Later, he grabbed her wrist "and forcibly squeezed her hand against his groin while saying 'this is for you'".[17] A male colleague intervened and removed Mr X.

[93] Mr X was described as being "visibly intoxicated … slurring his speech and walking unsteadily".[18] Upon inquiry by the firm's partners, Mr X did not deny these events but again said he had no recollection of them.

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[15] *ZTUVK* at [5].
[16] At [6].
[17] At [8].
[18] At [7].

[94] Mr X resigned from the firm, took steps to ensure his conduct would not be repeated and took time out from the law. He explained that at the relevant times he had "experienced an intense personal crisis [which] had a profound impact on his well-being and mental health", and was receiving counselling from a clinical psychologist.[19]

[95] By a majority, the Committee held that Mr X's conduct occurred at a time when he was providing regulated services.

[96] The Committee unanimously held that the conduct was unsatisfactory. The majority was satisfied that Mr X's conduct:[20]

> … would be regarded by lawyers of good standing as being unacceptable [s 12(b) of the Act] [and was] a breach of r 10 of the Rules, being a failure to promote and maintain proper standards of professionalism in his dealings as a lawyer.

[97] The Committee held that neither incident, whether on a regulated services basis or not, was "sufficiently serious to amount to [misconduct under either of ss 7(1)(a)(i) or 7(1)(b)(ii) of the Act]."[21]

[98] The Committee relied on the following particular facts to support their conclusions:[22]

> (a) Mr X sexually harassed two employees, by inappropriately touching them and by making inappropriate sexual comments to them;
>
> (b) Mr X allowed himself to become so heavily intoxicated that he had no recollection of the incidents and his unacceptable behaviour towards both employees;
>
> (c) Mr X accepts his conduct is unsatisfactory; and
>
> (d) Mr X accepts his conduct was wilful, and his intoxication did not obviate intent.

[99] Several pages could be devoted to a close analysis of the facts in *ZTUVK*, and the facts in the present matter.

[100] The first incident involving Mr X, when compared to the first incident involving Mr AP and Ms B in August 2018, could be said to be less serious. Mr AP is said to have attempted to put his hands between Ms B's thighs. This seems to be more invasive than Mr X's conduct in the first incident.

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[19] At [20].
[20] At [53]–[54].
[21] At [53] and [58].
[22] At [59] (citation omitted). The Committee adopted the definition of sexual harassment in s 62 of the Human Rights Act 1990.

[101] The victim in Mr X's first incident, was able to leave and did so. In relation to the 2018 incident involving Mr AP and Ms B, she had to remain in the taxi until arrival at her destination.

[102] On one view of the conduct in the second incident, Mr X's behaviour could be said to be similar to Mr AP's 2019 conduct in relation to Ms A.

[103] However, Mr X's victim was apparently spared his further attentions by the intervention of a colleague; whereas there was only Mr AP and Ms A in the taxi at the relevant time (putting to one side the driver, who may have been unaware of what was taking place or otherwise reluctant to become involved).

[104] It may also be relevant to note that the 2019 events also involved unwanted attention towards Ms B before she departed the taxi.

[105] It might be said that Mr X's conduct was in the open and able to be managed to a degree; Mr AP's occurred in a confined setting with troubling overtones of opportunism.

[106] It cannot be overlooked that in both cases the lawyers assaulted the females in question: they intentionally applied force to the females in circumstances where none could remotely be said to have consented to it.[23]

[107] In both cases, the lawyers had acknowledged alcohol and other [redacted].

[108] On yet another view of the matters, it could be said that Mr X was extended a degree of mercy by the Committee, in circumstances where it might be argued that the conduct warranted assessment by the Tribunal as to whether s 7 of the Act had been breached.

[109] Both Committees were influenced by the personal issues referred to by me above.

[110] Ultimately, whilst there are similarities between the two cases, there are also differences.

[111] Nevertheless, my task is to independently review the determination of the Committee in the current matter, having regard to all of the material that was before it.

[112] Because of the approach I intend to take in this case, a close comparison with *ZTUVK* does not materially assist.

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[23] See the definition of "assault" at s 2 of the Crimes Act 1961.

Regulated services

[113] I note that there is no issue that at the relevant times, Mr AP was engaging in conduct connected with the provision of regulated services.[24]

[114] That is to say, although there was no lawyer/client relationship involved in the conduct, it occurred in the context of two work-related social events attended by staff and paid for by [LFG].[25]

[115] This is to be contrasted with conduct which involves "purely personal actions."[26]

[116] The core business of a lawyer and the law firm for whom they work is the provision of regulated services. Social events for staff occur in that context: they reward, promote harmony and contribute to job satisfaction.

[117] This was not Mr AP in his personal life. There was an inextricable link between Mr AP as a lawyer, and the two social events.

[118] As indicated, this view of where the conduct sits in the disciplinary framework is not disputed.

The Committee's conduct inquiry

[119] An inquiry into an alleged conduct breach by a lawyer should begin with an analysis of the facts. What has the lawyer done and does that engage the statutory, regulatory and rules-based framework?

[120] This can loosely be termed the culpability inquiry.

[121] The dual principles underpinning the Act of maintaining public confidence in the provision of legal services, and consumer protection,[27] make it tolerably clear that lawyers can expect to be held to high standards of conduct.

[122] Therefore, external factors such as personal circumstances or other matters unconnected with the core facts of an alleged conduct breach, should not generally be

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[24] See *Orlov v New Zealand Lawyers and Conveyancers Disciplinary Tribunal* [2014] NZHC 1987 at [97] and following. This approach has been followed in the Tribunal: see *Canterbury Westland Standards Committee 2 v Eichelbaum* [2014] NZLCDT 68 at [30].
[25] In *Mr A v Canterbury Westland Standards Committee 2* [2015] NZHC 1896 it was held at [60] that "conduct 'that occurs at a time when the lawyer is providing regulated services' … does not require there to be a subsisting lawyer/client relationship with a particular client."
[26] See *Auckland Standards Committee 1 v Fendall* [2018] NZLCDT 26 at [44].
[27] Section 3(1)(a) & (b) of the Act.

factored into the culpability inquiry. Doing so risks conduct being mitigated rather than measured against statutory, regulatory or rules-based obligations which exist for the dual reasons referred to immediately above.

[123] In a recent decision the Tribunal had this to say about the issue:[28]

> We note the practitioner's evidence that she was under considerable work related pressure at the time. She was carrying a significant workload and said this was a disorganised file. We recognise that this practitioner has taken responsible steps, not only in the re-organisation of her own practice in order to ensure that this never reoccurs, and that she has accepted responsibility for failures in supervision in this matter, which is to her credit. However, these are matters which are more relevant to the question of penalty than with the assessment of level of culpability. This is a promising and impressive practitioner, however she has made such serious errors that they cannot be minimised to recognise what she has later done to prevent reoccurrence. We recognise that a professional under significant pressure may not be a safe practitioner.

[124] In relation to this Committee's inquiry, I consider that it has wrongly allowed unrelated issues of mitigation to affect its assessment of Mr AP's culpability for the conduct which occurred, and which for the most part has been accepted by him as having occurred.

[125] I say this because in my view there is no direct connection between Mr AP's conduct and the mitigating factors relied upon by the Committee when it made an overall assessment of that conduct.

[126] Whilst I accept without question Mr AP's description of the particular condition from which he has suffered for many years and for which he has tended to self-medicate with alcohol, that approach to managing the condition was nevertheless a choice that he has routinely made, when there were clearly other choices available to him.

[127] Indeed, in his letter to the Committee dated 17 August 2020, Mr AP acknowledged that he "allowed [himself] to become unduly intoxicated."

[128] However, there is no suggestion that whenever Mr AP has self-medicated in this way to overcome [redact], he routinely behaves inappropriately.

[129] Although Mr BT, whose letter on Mr AP's behalf is referred to by me above, said that Mr AP could become "effusive" when drinking alcohol in a social setting, and sometimes go "overboard", he did not appear to suggest that this was regular or otherwise approaching conduct of the nature involved in this matter.

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[28] *National Standards Committee 1 v Reed* [2021] NZLCDT 23 at [35].

[130] These events do appear to be isolated. However, this tends to diminish the submission that there is a connection between Mr AP's personal circumstances and the conduct on these two occasions. Self-control even when intoxicated does not seem to be an issue for Mr AP in most social settings.

[131] It would seem to be the case that Mr AP has, since these events, taken steps to replace resorting to alcohol with more benign strategies, including properly prescribed medication and limiting alcohol intake. Whilst that is to be commended, it is a step that, to be blunt, has always been available to Mr AP.

[132] I also have reservations about factoring in alcohol related issues, to the culpability analysis. This could be seen as making allowances for a lawyer who claims to have acted uncharacteristically because of alcohol. As was observed by the Tribunal in *Gardner-Hopkins*, referring to one of its own decisions:[29]

> This Tribunal said in the *Deobhakta* case:
>
> The essential feature of misconduct under s7(1)(a) [of the Act] is that the conduct be of a nature that indicates a serious deficiency in observing normally accepted standards.
>
> (Citations omitted).

[133] In conventional jurisprudence, over-indulgence in alcohol as a factor leading to anti-social behaviour is seldom if ever regarded as providing mitigation. At best, it is an explanation only to be assessed once culpability has been established.

[134] I am concerned that by taking that particular issue into account, the Committee has placed insufficient emphasis on the conduct breaches, which must, first and foremost, be looked at qualitatively.

[135] Mr TR has also argued that by factoring in the views of Ms B and Ms A, the Committee has introduced the necessary element of responsiveness to its determination.

[136] Ms A considered that Mr AP's conduct deserved a disciplinary response, whereas Ms B did not consider that one was warranted.

[137] Indeed, Mr AP has said that Ms B informed him that he has "already paid a very high price without any further consequences being necessary."[30]

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[29] *Gardner-Hopkins* at [112].
[30] Letter from Mr AP to the Complaints Service (20 January 2021) at [19].

[138] I consider that the different views of Ms B and Ms A reflect their personal characteristics rather than providing any useful indication in a disciplinary inquiry about the nature of the conduct in question.

[139] Yet another view has been expressed by the partners of [LFG], through Ms H, when responding to the Committee's Notice of Hearing.[31]

[140] Again, those are views of parties directly affected by the conduct and are not necessarily an indicator of its seriousness.

[141] This perhaps illustrates the danger of mixing the views of affected parties with an objective assessment, for disciplinary purposes, of a lawyer's culpability for alleged conduct.

[142] They are views to be more appropriately taken into account when assessing penalty, assuming a conduct breach is established.

[143] It is significant that the Committee described its decision not to make a prosecution determination, as having been arrived at "[b]y a very fine margin." Further, the Committee acknowledged that "some practitioners could reasonably consider that Mr AP's conduct was [misconduct]".[32]

[144] However, I consider that the Committee has allowed its assessment of Mr AP's conduct to be influenced by factors unrelated to the conduct itself and in so doing it has not carried out a proper qualitative assessment of that conduct, stripped of those factors.

[145] I am also not to be taken as saying that a proper assessment – that is to say, one in which the mitigating factors referred to by the Committee were not taken into account – would inevitably have led to a prosecution determination.

[146] That will require reassessment but without regard to extraneous factors.

[147] There is one other aspect of the Committee's determination which troubles me, and which in my view has contributed to what I consider was its flawed approach.

[148] It concerns the issues of whether Mr AP used force on Ms A, and was "quite forceful" with Ms B during the August 2018 events.

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[31] Letter from Ms H to the Complaints Service (30 November 2020).
[32] Standards Committee determination at [27] and [28].

Ms A

[149] The record of what Ms A said when she initially spoke about the December 2019 events is:

> [Ms A] was the last/alone in the taxi with [Mr AP] – he was inappropriately touching her legs.
>
> [Mr AP] knelt down on his knees in front of [Ms A], spread and held her knees apart using force and said "I am going to give you the best orgasm you have ever had in your life."
>
> …
>
> When taxi arrived [at Mr AP's] address he tried to kiss [Ms A] goodbye before exiting the taxi.

[150] Mr AP's response, in his email to Ms H dated 22 January 2020, was essentially to say that he had no recollection of the events and did not challenge what either Ms B or Ms A had said about the 2018 and 2019 events.

[151] When responding to the Committee's advice of its inquiry, Mr AP's comment about the allegation of force was, in effect, that he doubted it because it was not in his character to behave in that way.

[152] That was not exactly a vigorous denial.

[153] Mr AP has said that in her interview with Ms LV, Ms A rejected the suggestion that he had used force. She said:

> [Investigator] … So when you talk about … him kneeling in front of you and he's forcefully trying to push your legs …
>
> [Ms A] Well I wouldn't, he didn't pull them, but certainly the, the intention was there, you know, like his hands were there and he, he didn't rip them apart or anything but, and I stopped him and said what the fuck are you doing.

[154] I acknowledge that in the written record of her interview Ms A appears to equivocate on the issue of force. Surprisingly the investigator did not pursue the issue or ask Ms A to clarify what she meant, when this might have been a helpful next step.

[155] There is, perhaps, a degree of uncertainty about the extent of any force used by Mr AP towards Ms A. However, this is an issue which might benefit from further inquiry as it may assume relevance to an assessment of the seriousness of the conduct.

[156] For his part, Mr AP considers that the way in which [LFG] carried out its initial investigation in January 2020 was unfair and unbalanced, and lacking any proper rigour. He points to the fact that Ms A was not asked to give a written statement at the time, and that the interview notes which accompanied the reporting letter could very well be inaccurate.

[157] Mr AP is right to be critical about that.

[158] That issue was never, it would seem, considered by the Committee in any great detail.

[159] Overall I consider that the Committee dealt with the question whether and to what extent Mr AP used force on Ms A, a little too glibly by resort to the standard of proof.

[160] That is an entirely acceptable approach in some circumstances.

[161] However, in a situation such as this where the issue of force is finely balanced and involves what might be seen as an aggravating feature of the conduct, I consider that a contestable evidential issue such as this requires further exploration.

[162] This is after all a disciplinary inquiry underpinned by the critical values of confidence in the legal profession and protection of consumers. As I have said, lawyers are rightly held to a higher standard. Occasionally, inquiry about a lawyer's conduct demands more rigorous analysis of competing evidence, particularly when the allegations are serious.

Ms B

[163] The question of what Ms B meant by the expression "quite forceful" in relation to the August 2018 events, is also unresolved. Mr AP has said that in a discussion with him, she said that she simply meant that he was "irritatingly persistent".

[164] Despite Mr AP's description of his relationship with Ms B as being lengthy and close, yet always professional, both the 2018 and 2019 events would appear to represent a complete departure from that.

[165] It is difficult to know why Ms B offered the description of "irritatingly persistent" having once said "quite forceful".

[166] There is an uneasy dynamic when the person who has behaved inappropriately endeavours to engage with the person on the receiving end, in circumstances where there is also a concurrent disciplinary inquiry.

[167] None of these are trivial matters. On any view of the facts, Mr AP appears to have assaulted both Ms B and Ms A. Ms A is said to have been deeply affected by what occurred.

[168] When assessing precisely what has happened in order to gauge its seriousness, issues such as the use, or the extent, of force require careful and critical assessment.

[169] A Committee has power to receive evidence, on oath, in person and this may be one of those situations in which consideration could have been given to that.[33]

[170] Alternatively, if the view is that the conduct warrants assessment by the Tribunal, that process involves evidence being given and tested in the conventional way.

[171] And so, where to from here.

Next steps

[172] Mr RJ urges me to trigger s 214 of the Act and frame and lay charges with the Tribunal. This is on the basis that in his submission, Mr AP's conduct, objectively viewed and without regard to irrelevant considerations, raises the spectre of misconduct and thus may only be assessed by the Tribunal.

[173] Mr RJ submits that referring the matter back to the Committee under s 209 of the Act is difficult, as the sub-text of that step might be that the Committee ought to issue a prosecution determination. This would be a fetter on its task to consider the matter afresh and come to an independent conclusion about culpability and disposition.

[174] As well, Mr RJ submitted that referral to a differently constituted Committee would cause significant delays, which is not in the interests of any of the parties.

[175] I have given those submissions careful consideration. However, in the end I have concluded that the proper approach is to return the matter to the Committee, with directions as to a re-assessment of the conduct issues.

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[33] Section 151(1)-(3) of the Act.

[176] This is not because I consider that the spectre of misconduct has been raised by Mr AP's conduct, and the Committee is the proper body to prosecute that before the Tribunal.

[177] I deliberately refrain from expressing a view about Mr AP's conduct, one way or the other. Quite apart from anything else, the evidential analysis is incomplete.

[178] My concern is that the Committee has been influenced by irrelevant considerations when assessing Mr AP's conduct. It conflated issues of mitigation unconnected with the conduct itself, when assessing culpability.

[179] Review Officer decisions are intended, in part, to provide some guidance to Standards Committees as to approaches to be taken when undertaking a disciplinary inquiry. This is a proper function of an appellate or review jurisdiction.

[180] I certainly agree with Mr RJ's submission that referral back to a differently constituted Standards Committee will unreasonably delay disposition of the matter, which is contrary to the interests of all parties.

[181] I consider that any reassessment can be carried out by the same Committee. Because I have not indicated any view about where the conduct might be said to sit, difficulties with directions associated with referring it back to the Committee fade away.

[182] I acknowledge that referral back to the same Committee will also cause delay, but my view is that this factor is outweighed by the importance of ensuring that proper, first-instance consideration is given to the conduct issues.

[183] Moreover, I consider that a direction by me that this matter is given priority by the Committee sufficiently manages the issue of delay.

[184] As to process, I note that in its first inquiry the Committee adopted a conventional approach by initiating an own motion investigation and ultimately setting the matter down for a hearing on the papers. This would undoubtedly have been on the basis that the conduct issues did not lend themselves to early disposition under s 138 of the Act.

[185] I anticipate that the Committee will begin its reconsideration by adopting its earlier Notice of Hearing, inviting submissions and considering the issues afresh but without reference to the mitigating factors referred to in the determination under review. I have held that those factors are unconnected to the conduct itself and a proper assessment of Mr AP's culpability.

[186] Of course, it remains open to the Committee to seek clarification of any matters. That step is consistent with the unfettered fresh-look approach that I am directing.

Decision

[187] Pursuant to s 209 of the Lawyers and Conveyancers Act 2006 I direct the Committee to generally reconsider the whole of the matter to which the application for review relates, taking into account the following directions:

(a) the Committee is to reconsider the conduct issues recorded in its Notice of Hearing dated 10 November 2020.

(b) In doing so the Committee is to afford the matter priority with the expectation being that a final determination might be issued within the first one-third of 2022.

(c) In reconsidering the conduct issues the Committee may invite further submissions from Mr AP and take such other steps as may be necessary to assist with its inquiry into the conduct issues.

(d) The Committee is directed that it may not take into account considerations that are more properly to be assessed when determining an appropriate disciplinary response to a conduct breach by a lawyer. In the present case these include issues such as the steps taken by Mr AP after the events in question, in connection with his [redacted], as well as the views of Ms B and Ms A as to the appropriate disciplinary response; these being considerations that are unconnected to the conduct itself.

(e) In assessing culpability for the conduct issues that the Committee has identified it remains open for it to conclude that Mr AP's conduct does not raise the spectre of misconduct.

[188] It follows that the Committee's penalty determination dated 29 July 2021, falls away.

Anonymised publication

[189] Pursuant to s 206(4) of the Act, this decision is to be made available to the public with the names and identifying details of the parties, and the attached Schedules, removed.

DATED this 10TH day of January 2022

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R Hesketh
Legal Complaints Review Officer

In accordance with s 213 of the Lawyers and Conveyancers Act 2006 copies of this decision are to be provided to:

New Zealand Law Society as the Applicant
Mr RJ as counsel for the Applicant
Mr AP as the Respondent
Mr TR QC as counsel for the Respondent
[Area] Standards Committee [X]