

What a 'merciful approach' to lawyers' discipline in New Zealand reveals and conceals

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Benefits of examining tribunal decisions

- Distinctive composition in comparison with court
- Barometer of threshold for misconduct
- Scope of our Marsden project
 - Lawyers & Conveyancers Disciplinary Tribunal (LCDT)
 - Teachers Disciplinary Tribunal (TDT)
 - Health Practitioners Disciplinary Tribunal (HPDT)



Auckland Standards Committee 3 v Ms W [2023]

- Applied a ‘merciful approach’ when assessing practitioner’s misconduct and health issues
- Of interest because we are studying if, and how, tribunals take account of rehabilitation conditions
 - Mentoring, monitoring, supervision, education, training, health assessment and/or treatment

Ms W

- Misconduct: deceptive conduct 8/19 - 2/21
 - Reported to *client* that delays were due to other lawyers' conduct
 - Reported to opposing lawyers that delays due to her client's health issues
- Decision detailed
 - Lengthy reproductive difficulties and treatment, some during period of misconduct
 - Reports by a psychiatrist and a psychologist
 - Lawyer's inability to disclose ill health to colleagues

Diminished responsibility and infanticide

- “While by no means a perfect analogy, the criminal law itself recognises the effect on the mental health of a woman not having fully recovered from the effect of giving birth to a child-the position must be (at least) equally so when a woman has gone through IVF for some five years”. [20]

Merciful approach to penalty

LCDT: “If there was no basis for a merciful approach, conduct would amount to gross breach of duty. Cumulative effects of health conditions explained, but did not excuse, the conduct”. [12]

“In light of the physiological and mental ill-health”
[32]:

Censure, suspension 2 months, prohibited from practising on her own account unless authorised.

What this approach reveals

- Absence of early stage in Lawyers and Conveyancers Act 2006 of specific provision/pathway for impaired practitioners
- Previous decisions acknowledged this gap
- Other international jurisdictions have a dual pathway
- NZ *health* practitioners have this framework
- How is this compassionate approach translating in subsequent LCDT decisions?

Reporting

- Admission: practitioners must self-report 'mental or physical health condition' that renders them 'unable to perform functions required for practice of law'. Lawyers and Conveyancers Act 2006, s 55(1).
- Annual renewal: declare as part of 'fit and proper person' declarations. Lawyers Practice Rules Cl 8.
- But only mandatory reporting of colleagues for *misconduct* (not ill health). LCA, s 7.
- See Moore, et al., 2015.

Pro-therapeutic response by LCDT to fill this gap?

- Re W demonstrates HPDT crafted compassionate response at penalty stage
- Subsequent evidence that the LCDT is adopting rehabilitative responses?
- Reviewed additional decisions outside Marsden data scope
- Reviewed 32 subsequent decisions to 30.9.24 for reference to “rehabilitation”. 12 decisions included “rehabilitation”
- Select cases for discussion

National Standards Committee 2 v Murray John Tingey [2023] NZLCDT 43 (10 October 2023).

- “The applicability of other important sentencing principles such as deterrence and rehabilitation” and “least restrictive intervention must be taken into account” by the LCDT. [p 3]
- “Need for and prospect of rehabilitation is important consideration”. [27]
- Domestic violence 12-14 years prior. Took steps and suspension would not positively achieve rehabilitation. Fine \$15k.
- **“Less weight is accorded to personal circumstances in this jurisdiction than in others”. [31]**

Auckland Standards Committee 2 v Sheat (2023) NZLCDT 50 (7 November 2023)

- Overcharging and not sending invoices to client
- Censure, suspended 6 months, prohibited from practising on own account unless authorised
- “We have considered, among other things, our **duty** to think of rehabilitation”. [27]

Auckland Standards Committee 3 v Mr G [2024]NZLCDT 16 (31 May 2024)

- **“There are some professional disciplinary cases which cry out for a rehabilitative approach. If that can be achieved without in any way putting the consumer of legal services at risk, we will adopt it. This is one such case”. [1]**
- Young lawyer’s first job. Within 3 months, + 50 cases added. Failed to copy emails to supervisor. Fearful, he altered emails.
- Censure, Advocacy Ethics + Stress Management courses, mentor, disclose to employers 24 months, costs.
- “Unlikely he had resources or mentors to call upon, which might be available to other young lawyers in early stages of their careers”. [3]

Auckland Standards Committee 2 v Devoy [2024] NZLCDT 22 (1 August 2024)

- “Inclined to be merciful” [20] (due to Standards Committee error in reporting she failed to relay file to another practitioner)
- But 2 new charges upheld. Mental health was raised.
- “Unwellness can affect any lawyer at any time. Our message to the public and the profession is that, where unwellness intrudes, the professional obligation to obtain help, transfer work, and alert the Law Society to the difficulties, must be observed”. [15]
- NB: Onus on practitioner. No health pathway exists.

Otago Standards Committee v Elder

[2024] NZLCDT 30 (17 September 2024)

- Fifth disciplinary event. Did not act in timely and competent manner
- Standards Committee proposed penalties to promote “accountability and **rehabilitation**/improvement”. [17]
- She and Standards Comm. to identify suitable practitioner (approved by Law Society) for mentoring and supervision of practice management. Every 2 months for 12 months. Supervisor to report on engagement and improvement to Law Society.

Trajectory

- After Ms W's decision, multiple explicit references to merciful and compassionate penalties in 2023- 2024.
- LCDT: sentencing principle, duty
- Intermittent reporting that the LCDT considered rehabilitation
- How consistently does the LCDT report on their deliberations regarding rehabilitation?
- With regards to tribunals building a culture of consistency, (see Whitaker, Gottheil, Uhlmann, 2008).



Benefits of a health pathway

- Provide humane response to emerging evidence of NZ lawyers in distress (Patel, 2024)
- Offer early intervention to support practitioners and avert misconduct
- Create alignment with NZ's health pathway for registered health practitioners (Moore, et al., 2015; Diesfeld et al, 2024).



Further reflections

- In the absence of a health pathway, rehabilitation conditions may restore practitioners to safe, competent practice
- LCDT's emerging "rehabilitative lens" indicates its appetite for compassionate responses to misconduct
- To be critiqued: the culture of the profession itself, that contributes to ill health (Moore et al., under review)
- Collaborate with our international colleagues regarding multiple forms of compassionate support for legal professionals

References

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- Moore, J., Buckingham, D., Diesfeld, K. (2015) Disciplinary tribunal cases involving New Zealand lawyers with physical or mental impairment, 2009-2013. *Psychiatry, Psychology and Law*, 22(5), 649-672.
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- Schulz, J., Forster, C., Diesfeld, K. (under review) Suicide in the Australian and Aotearoa New Zealand legal professions: Distilling lessons from the coronial jurisdiction.

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- Surgenor, L. J., Diesfeld, K., & Rychert, M. (2023). Practitioner rehabilitation following professional misconduct: A common practice now in need of a theory? *Laws*, 12(3), 59.
- Whitaker, K., Gottheil, M., Uhlmann, M. (2008) Consistency in tribunal decision making: What really goes on behind closed doors...”. In L. Jacobs and A. Mactavish (eds.) *Dialogue between Courts and Tribunals: Essays in Administrative Law and Justice (2001-2007)*. Montreal: Les Éditions Thémis. 351-372.

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- **Legislation**
- Lawyers and Conveyancers Act 2006
- **Cases**
- Auckland Standards Committee 3 v Ms W [2023] NZLCDT 35 (17 August 2023)
- National Standards Committee 2 v Murray John Tingey [2023] NZLCDT 43 (10 October 2023)
- Auckland Standards Committee 2 v Sheat [2023] NZLCDT 50 (7 November 2023)
- Auckland Standards Committee 3 v Mr G [2024]NZLCDT 16 (31 May 2024)

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- Auckland Standards Committee 2 v Devoy [2024] NZLCDT 22 (1 August 2024)
- Otago Standards Committee v Elder [2024] NZLCDT 30 (17 September 2024)

Thank you

- Please note the author takes responsibility for the content.
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