



New Zealand Lawyers and Conveyancers Disciplinary Tribunal

ANNUAL REPORT

For the 12 months ended 30 June 2017

Presented to the Minister of Justice, the Hon Andrew Little
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 by the Lawyers and Conveyancers Act 2006 (“the Act”).

The formal 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.

Indirectly, however, it is to be hoped that the processes and determinations of the Tribunal assist the two professions in maintaining the high standards of conduct, which the public are entitled to expect.

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 a fine 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 1982. 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 continued to see a steady stream of charges filed by the Standards Committees. No charges were received from the LCRO¹.

The Tribunal has taken the opportunity to ensure those cases which could be progressed quickly were heard at the earliest possible date.

Some administrative frustration occurs when events beyond the control of the Chair or Deputy Chair delay expeditious process.

Delay can occur as a result of a lawyer 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, at times, delayed the ability of the Tribunal to hear the charges by many months. It is pleasing to note the efforts of that office to reduce that backlog over recent times.

Efficiency cannot be allowed to come at the expense of a practitioner's right to legal representation and other natural justice principles. Where criminal charges are extant concurrently with disciplinary charges, the practitioner's right to silence may mean delay in hearing the latter.

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, 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.

[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.

¹ Legal Complaints Review Officer.

² See note 1.

³ *Orlov v. New Zealand Law Society and Ors* [2013] NZCA 230 at [166]-[169], referring to a complaint that was almost five years old.

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, including the penalty phase.⁴

Summary of Activity for the reporting period 1 July 2016 – 30 June 2017



New cases filed

Proceedings before the Tribunal fall into two categories:

- applications/appeals
- charges

The category break down of the **34** cases filed is as follows:

Type of proceedings	Number of new cases
Charges	32
Appeal against refusal to issue practising certificate	2

Of the **32** new cases filed which were charges, **30** of these cases were charges against lawyers/former lawyers, **2** of these cases were charges against non-lawyers.

The number of charges laid in each case is variable and may include charges laid in the alternative. The charges laid have arisen either from complaints or own motion investigations of the New Zealand Law Society.

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

Cases disposed

The category breakdown of the **25** cases disposed is as follows:

Type of proceedings	Number of cases disposed
Charges	24
Application to practise on own account	1

Comparison table of cases filed and cases disposed

The table below shows the number of new cases filed and cases disposed over the current and past reporting periods as at 30 June of the year shown.

	2017	2016	2015	2014	2013	2012	2011	2010
New	34	23	36	51	39	30	19	28
Disposed	25	28	56	35	33	26	20	23

Comparison table showing type of person charged

The table below shows the breakdown of type of person charged over the current and past reporting periods as at 30 June of the year shown.

	2017	2016	2015	2014	2013	2012	2011	2010
Lawyer/former lawyer	30	20	31	44	32	25	22	16
Non-lawyer	2	1	2	2	2	3	3	0
<i>Total</i>	32	21	33	46	34	28	25	16

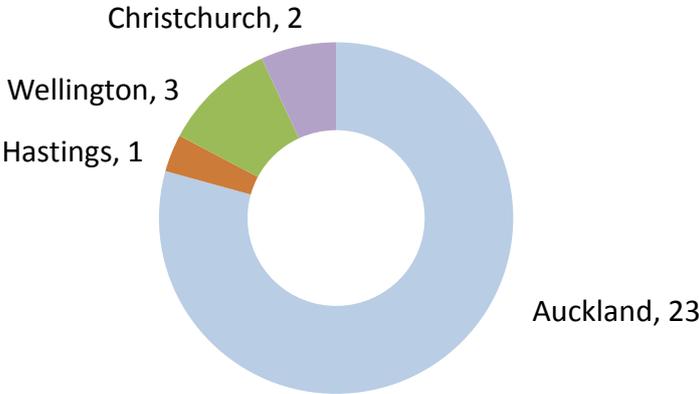
Case progress

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

In addition, there are often 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. A reduced quorum is permitted, consisting of three members (Chair, one lay member and one lawyer member) to consider applications for Interim Suppression of Name and for Interim Suspension Orders.

These provisions allow 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.

Upcoming hearings are listed on the Tribunal’s website. During the period the Tribunal held **29** face to face hearings, held **1** telephone hearing and determined **1** matter on the papers. The pie chart below shows the number of face to face hearings by location over this period.



The nature of the hearings held were:

- substantive hearings of defended charges
- hearings as to penalty for admitted or proven charges
- interlocutory matters (various)
- applications for interim suspension
- application for permanent stay
- appeal against refusal to issue practising certificate

These hearings varied in length from one hour 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 a comparison table of face to face hearings by location, for the current and past reporting periods as at 30 June of the year shown.

Number of face to face hearings by location

	2017	2016	2015	2014	2013	2012	2011	2010
Auckland	23	23	32	45	22	20	15	15
Hamilton	-	-	2	1	-	-	-	2
Tauranga	-	1	-	-	-	-	-	-
Rotorua	-	-	2	-	-	-	-	-
Napier	-	-	-	1	-	-	-	1
Hastings	1	-	1	-	1	-	-	-
New Plymouth	-	-	-	-	-	-	1	-
Wellington	3	5	12	5	7	8	4	-
Nelson	-	-	-	-	-	5	1	-
Christchurch	2	1	4	5	4	1	1	1
Timaru	-	1	-	-	-	-	-	-
Dunedin	-	-	3	1	3	-	-	1
Invercargill	-	-	-	-	1	-	-	-
<i>Total</i>	29	31	56	58	38	34	22	20

Note: The table in the annual report for the period ending 30 June 2015 was incomplete as showed a lesser number of hearings than had been held, for the periods ending 30 June 2014, 2013 and 2010. The table has been amended.

Decisions

During the period **39** decisions were issued.

These were decisions concerning:

- liability (charges proven or dismissed)
- penalty
- appeal against refusal to issue practising certificate
- interlocutory applications
- applications for interim suspension
- application to practice on own account
- application for permanent stay

Penalty and other orders

The table below shows a breakdown of penalty and other orders made during this period, in respect of lawyers/former lawyers and non-lawyers.

Type of order	Number of orders made
Struck off the roll of barristers and solicitors	4
Suspended from practice as a barrister, solicitor, or both	10
Interim suspension from practice (pending determination of charge)	2
Censure	9
Pay fine to the New Zealand Law Society	6
Pay compensation	1
Pay/contribute to the New Zealand Law Society costs	21
New Zealand Law Society to pay the Tribunal costs	21
Reimburse the New Zealand Law Society for the Tribunal costs	20
Not able to practice on own account	1
Restriction on employment	1
Undergo training	1
Other	1

Other outcomes

Appeal against refusal to issue practising certificate: **1** allowed
 Application to practice on own account: **1** dismissed
 Application for interim suspension of practitioner: **1** declined
 Charges withdrawn at request of the Standards Committee: **1** case
 Charges permanently stayed: **1** case *

*Due to practitioner's ill-health and consequent inability to instruct counsel

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. Less frequently, suppression of the practitioner's name is also granted.

During the period:

Application for interim name suppression: **2** granted
 Application for permanent name suppression: **1** declined, **2** granted

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.

Appeals

During the period 6 appeals were filed in the High Court. These appeals are awaiting determination.

The 4 appeals which were awaiting determination at the end of the previous reporting period were determined during this reporting period:

- 1 partially allowed, partially dismissed
- 1 struck out
- 1 allowed
- 1 dismissed in respect of liability (penalty orders amended)

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 \$203,566.00.

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. Parties 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 28 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

Anne Callinan was appointed during the period. Anne is a partner at Simpson Grierson.

Sally Fitzgerald was appointed to the High Court bench. Sally will be greatly missed by the Tribunal and is thanked for her very solid contribution to the Tribunal's work during her tenure.

Lay members

No changes during the period.

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

No training took place during the period. Training is scheduled for November 2017.

Members are kept apprised of recent decisions and a comparative summary of decisions assist them in achieving consistency of decision-making. In training we have discussed the implications of recent High Court and Court of Appeal decisions on disciplinary issues. Training days are always well-attended by members, both lawyer and lay 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 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.

Determinations

The Tribunal posts its substantive 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 attend at times 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 decisions 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 lawyer, 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".⁵

The very small number of lawyers (0.2%)⁶ appearing before the Tribunal in comparison with the total number of lawyers practising in New Zealand suggests that these high standards are being upheld.

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, however, that the news media, and even members of the legal profession can refer to the Tribunal as the "Law Society Disciplinary Tribunal", or similar, which tends to confuse the independent nature and role of the Tribunal.

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

⁵ *Bolton v Law Society* [1994] 2 All ER 486.

⁶ Statistic provided by the New Zealand Law Society

Membership during the period 1 July 2016 to 30 June 2017

Chair

Judge Dale Clarkson

Deputy Chair

Judge Bernard Kendall (retired)

New Zealand Law Society Practitioner Members

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

Lay Members

John Bishop
Fay Freeman
Michael Gough
Alasdair Lamont
Hector Matthews
Dr Ian McAndrew
Steve Morris
Ken Raureti
Chris Rowe
Peter Shaw
William Smith
Pele Walker

NZ Society of Conveyancers Practitioner Members

Vicki Dempster
Stefanie Crawley
John de Graaf
Kim Matheson
Erin Rasmussen