NZLS CLE Ltd
Continuing Legal Education
New Zealand Law Society

LIVE WEB STREAM

# NEW CONDUCT & CLIENT CARE RULES

**DATE**

*May 2021*

**PRESENTERS**

*Michael Hodge*
*Katie Rusbatch*

# PRESENTERS

### Michael Hodge, Partner, Meredith Connell, Auckland

Michael specialises in professional standards litigation, public and regulatory law, and civil litigation with a particular focus on agency and trusts. He regularly appears as counsel in the Lawyers and Conveyancers Disciplinary Tribunal and has acted on a wide range of other professional disciplinary proceedings relating to financial advisors, real estate agents, teachers, builders, plumbers and gasfitters, immigration advisors and on various sporting codes. Michael also regularly appears in the High Court and Court of Appeal in public law cases and other civil proceedings. Prior to joining Meredith Connell, he worked at the Crown Law Office in Wellington and before that in litigation practice in the United Kingdom and New Zealand. Michael is the author of the chapter on the Lawyers and Conveyancers Disciplinary Tribunal in the Thomson Reuters textbook *New Zealand Tribunals Law and Practice*.

### Katie Rusbatch, General Manager Professional Standards, The New Zealand Law Society | Te Kāhui Ture o Aotearoa, Wellington

Katie joined the Law Society as the General Manager Professional Standards (Regulatory) at the start of this year. She was previously Head of Competition at the Commerce Commission and also held the roles of Competition Manager and Senior Legal Counsel at the Commission. Before joining the Commission in 2011, Katie was Assistant Director of Litigation at the Office of Fair Trading in the United Kingdom and Assistant Senior Director at the Competition and Consumer Commission of Singapore. She also worked as a lawyer at the Government Legal Department in the United Kingdom and in private practice in New Zealand.

# CONTENTS

# 1. WHAT THIS LIVE WEB STREAM IS ABOUT

This live web stream and paper are intended to provide an understanding of the changes to the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (RCCC) and the (Lawyers: Ongoing Legal Education – Continuing Professional Development) Rules 2013 (CPD Rules) which will come into force on 1 July 2021.

These changes include clearer conduct and reporting obligations and allow for the introduction of a mandatory CPD component. The new rules will affect all lawyers and persons employed or engaged by lawyers practising on their own account, whether as part of a law firm or otherwise. This live web stream and paper are provided to assist lawyers in complying with their obligations and to increase understanding of lawyers and those who work with or for lawyers of their rights to a safe professional environment.

# 2. THE RCCC AMENDMENTS AS PART OF THE COMPLAINTS AND DISCIPLINE SCHEME

## The New Zealand Law Society | Te Kāhui Ture o Aotearoa Working Group Report

### Amendments to the RCCC as part of the response

In March 2018, the New Zealand Law Society | Te Kāhui Ture o Aotearoa (NZLS) established the NZLS Working Group chaired by Dame Silvia Cartwright following public reports of serious sexual misconduct, bullying and other inappropriate behaviour occurring within the legal profession in Aotearoa New Zealand.

The Law Society asked the Working Group to inquire into and report on the current regulatory framework so as to enable better reporting, prevention, detection, and support in respect of the types of behaviour that had been publicly reported.

The Working Group provided its report in December 2018 and noted that, in addition to sexual violence, bullying and harassment, many men and women within the legal community had shared experiences of: racist comments; inappropriate observations about appearance, family status, and sexual orientation; threats, and intimidation. Physical harm was also part of this behaviour, including unwanted touching, assault, and sexual violation.

The Working Group concluded that it was beyond doubt that these behaviours were a serious problem in the legal community. An important aspect to the prevalence of the behaviour was identified as being the lack of trust in the regulatory framework to effectively address the issues. A lack of confidence in the regulatory framework facilitated a culture of impunity in which those affected are reluctant to report misconduct because they are not confident perpetrators will be held to account.

The Working Group's report included the following recommendations and conclusions in relation to the regulatory framework under the Lawyers and Conveyancers Act 2006 (LCA):

- A need for closer regulation of workplace obligations.
- Enhanced lawyer reporting obligations with adequate protections in place for those reporting.
- Making the Lawyers Complaints Service and the Standards Committee process more flexible and responsive.
- Changes to the RCCC to expressly refer to and prohibit the types of behaviour that are the subject of the Working Group's report.
- Changes to the LCA to ensure the statutory definitions of "misconduct" and "unsatisfactory conduct" clearly capture sexual violence, sexual harassment, bullying and discrimination (irrespective of whether the conduct is "connected with" the provision of regulated services).

While it did not prove possible to obtain legislative change to the LCA, the 2021 amendments to the RCCC addressed in this live web stream and paper are an important part

of the Law Society's response to implement the changes recommended by the Working Group.

In this chapter we will briefly consider some of the fundamental features of the complaints and discipline scheme in Part 7 of the LCA in order to place the amendments to the RCCC in their wider context.

## Complaints and discipline scheme under the LCA

Covering all relevant features of the complaints and discipline scheme is a topic well beyond the scope of this live web stream. The Law Society website has helpful material for lawyers and members of the public and there are a number of available textbooks that address this area of the law. [1]

What follows is a summary of certain features of the complaints and discipline scheme which are important to an understanding of the amendments to the RCCC in their wider context.

### Purpose

Section 3(1) of the LCA provides that:

> (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.

Section 3(2) of the LCA provides that one of the ways in which the LCA achieves these purposes is by having a more responsive regulatory regime in relation to lawyers.

The maintenance of proper professional standards is how the regulatory regime achieves the purposes of consumer protection and maintenance of public confidence in the provision of legal services. The maintenance of proper professional standards is the key objective of professional disciplinary proceedings as part of a complaints and discipline regime. [2]

A disciplinary decision maker will always be concerned about the protection of the public from the risk of harm. Even in cases where there is no future risk of harm disciplinary proceedings may still be appropriate to enforce professional standards for the purpose of maintaining public confidence in the profession. It is for this reason, for example, that disciplinary proceedings may still be appropriate against a lawyer who has decided that they do not intend to continue in legal practice.

### Two-tier system

Disciplinary action under the LCA resulting in a formal finding against a lawyer is not possible without the involvement of a Standards Committee. Standards Committees are established by the Law Society and are comprised of lawyer members and lay members.

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1 https://www.lawsociety.org.nz/professional-practice// See also *Ethics, Professional Responsibility and the Lawyer* Web, Dalziel, and Cook, *Professional Responsibility in New Zealand* Palmer (ed) (see in particular chapter 6 on statutory discipline structure and procedures and chapter 11 on the RCCC by Paul Collins) and *New Zealand Tribunals Law and Practice* Gibbons and Duggal (eds) (chapter 7 on the Lawyers and Conveyancers Disciplinary Tribunal by Michael Hodge).

2 *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1.

A Standards Committee may find a lawyer guilty of unsatisfactory conduct. Unsatisfactory conduct is defined in s 12 of the LCA as follows.

> **12 Unsatisfactory conduct defined in relation to lawyers and incorporated law firms**
>
> In this Act, **unsatisfactory conduct**, in relation to a lawyer or an incorporated law firm, means—
>
> (a) conduct of the lawyer or incorporated law firm that occurs at a time when he or she or it is providing regulated services and is conduct that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer; or
>
> (b) conduct of the lawyer or incorporated law firm that occurs at a time when he or she or it is providing regulated services and is conduct that would be regarded by lawyers of good standing as being unacceptable, including—
>
> (i) conduct unbecoming a lawyer or an incorporated law firm; or
>
> (ii) unprofessional conduct; or
>
> (c) conduct consisting of a contravention of this Act, or of any regulations or practice rules made under this Act that apply to the lawyer or incorporated law firm, or of any other Act relating to the provision of regulated services (not being a contravention that amounts to misconduct under section 7); or
>
> (d) conduct consisting of a failure on the part of the lawyer, or, in the case of an incorporated law firm, on the part of a lawyer who is actively involved in the provision by the incorporated law firm of regulated services, to comply with a condition or restriction to which a practising certificate held by the lawyer, or the lawyer so actively involved, is subject (not being a failure that amounts to misconduct under section 7).

If a Standards Committee considers that a lawyer's conduct is more serious than unsatisfactory conduct, then the Committee may file a charge in the Lawyers and Conveyancers Disciplinary Tribunal (LCDT). The decision-making power shifts from the Standards Committee to the LCDT.

The available charges under the LCA are set out in s 241.

> **241 Charges that may be brought before Disciplinary Tribunal**
>
> If the Disciplinary Tribunal, after hearing any charge against a person who is a practitioner or former practitioner or an employee or former employee of a practitioner or incorporated firm, is satisfied that it has been proved on the balance of probabilities that the person—
>
> (a) has been guilty of misconduct; or
>
> (b) has been guilty of unsatisfactory conduct that is not so gross, wilful, or reckless as to amount to misconduct; or
>
> (c) has been guilty of negligence or incompetence in his or her professional capacity, and that the negligence or incompetence has been of such a degree or so frequent as to reflect on his or her fitness to practise or as to bring his or her profession into disrepute; or
>
> (d) has been convicted of an offence punishable by imprisonment and the conviction reflects on his or her fitness to practise, or tends to bring his or her profession into disrepute, -

it may, if it thinks fit, make any 1 or more of the orders authorised by section 242.

Misconduct, referred to in s 241(a), is relevantly defined in s 7 of the LCA as follows.

> **7 Misconduct defined in relation to lawyer and incorporated law firm**
>
> (1) In this Act, **misconduct**, in relation to a lawyer or an incorporated law firm, -
>
> (a) means conduct of the lawyer or incorporated law firm that occurs at a time when he or she or it is providing regulated services and is conduct—
>
> (i) that would reasonably be regarded by lawyers of good standing as disgraceful or dishonourable; or
>
> (ii) that consists of a wilful or reckless contravention of any provision of this Act or of any regulations or practice rules made under this Act that apply to the lawyer or incorporated law firm or of any other Act relating to the provision of regulated services; or
>
> (iii) that consists of a wilful or reckless failure on the part of the lawyer, or, in the case of an incorporated law firm, on the part of a lawyer who is actively involved in the provision by the incorporated law firm of regulated services, to comply with a condition or restriction to which a practising certificate held by the lawyer, or the lawyer so actively involved, is subject; or
>
> (iv) that consists of the charging of grossly excessive costs for legal work carried out by the lawyer or incorporated law firm; and
>
> (b) includes—
>
> (i) conduct of the lawyer or incorporated law firm that is misconduct under subsection (2) or subsection (3); and
>
> (ii) conduct of the lawyer or incorporated law firm which is unconnected with the provision of regulated services by the lawyer or incorporated law firm but which would justify a finding that the lawyer or incorporated law firm is not a fit and proper person or is otherwise unsuited to engage in practice as a lawyer or an incorporated law firm.

The Standards Committee process is confidential, subject to certain exceptions.[3] If a Standards Committee finds a lawyer guilty of unsatisfactory conduct and censures the lawyer, the Standards Committee may direct publication of its decision identifying the lawyer, with the prior approval of the Board of the Law Society.[4]

In contrast, the process before the LCDT is a public process. The LCDT's hearings are in public, unless the LCDT orders otherwise, and similarly its decisions identifying the lawyer are published unless the LCDT orders otherwise.

[3] LCA, s 188.
[4] *NZLS v B* [2013] NZAR 970.

### Special nature of the jurisdiction

Disciplinary proceedings under the LCA have been recognised as having a special character. The following passage from *Orlov v New Zealand Lawyers and Conveyancers Disciplinary Tribunal*[5] helpfully sets out a number of the special features of the jurisdiction.

> [57] In our view, whilst we accept that there is scope for some form of no case to answer jurisdiction, it should be recognised as being very limited. This is not a criminal trial, and there is a long-standing principle that practitioners are expected to co-operate.
>
> [58] In *Re C (A Solicitor)*, a full Court of Hutchison, Haslam and Leicester JJ observed that it: [6]
>
> > … did not accept Mr Arndt's submission that a case before the Disciplinary Tribunal is to be dealt with on the same basis as a criminal trial. When a practitioner is charged before the Disciplinary Committee with professional misconduct and a prima facie case is made against him, the practitioner is not justified in simply saying the charge is not proved beyond reasonable doubt but must be prepared to answer the charge against him.
>
> [59] The full Court noted that its conclusions mirrored those of the English Court of Appeal in *Re A Solicitor* where Scott LJ noted: [7]
>
> > Whether the proceedings can properly be described as quasi-criminal or not, in our opinion there is nothing in the statutes or rules which binds the disciplinary committee to the rules of criminal law.
>
> [60] To like effect are the observations of the New South Wales Court of Appeal in 1966 where it was observed: [8]
>
> > From the earliest times, and as far back as the recollection of the individual judges of this Court goes, disciplinary proceedings in this jurisdiction in this State have always been conducted upon affidavit evidence and not otherwise. They are not conducted as if the Law Society … was a prosecutor in a criminal cause or as if we were engaged upon a trial of civil issues at *nisi prius*. The jurisdiction is a special one, and it is not open to the respondent when called upon to show cause, as an officer of the Court, to lie by and engage in a battle of tactics, as was the case here, and to endeavour to meet the charges by mere argument.
>
> [61] In the judgment earlier referred to, Katz J made these observations with which we agree: [9]
>
> > [29] Parliament has provided that the Tribunal is free to set its own procedure. Obviously it must do so in a way that is consistent with the discharge of its statutory functions and does not cut across any express statutory or regulatory provisions. Subject to those constraints, the Tribunal has been given a high degree of procedural flexibility in the exercise of its important statutory functions.
> >
> > [30] As one Australian commentator has noted, this flexible procedure for a disciplinary tribunal means it is *sui generis*. It is neither strictly adversarial nor inquisitorial in nature, reflecting that

5 *Orlov v New Zealand Lawyers and Conveyancers Disciplinary Tribunal* [2014] NZHC 1987, [2015] 2 NZLR 606.
6 *Re C (A Solicitor)* [1963] NZLR 259 (SC) at 259.
7 *Re A Solicitor* [1945] 1 KB 368 at 374 (CA).
8 *Re Veron* [1966] 1 NSWR 511 (NSWCA) at 515.
9 *Orlov v National Standards Committee 1* [2013] NZHC 1955.

> disciplinary proceedings are aimed at protection of the public as well as discipline of the practitioner. As the New South Wales Court of Appeal observed in *Malfanti v The Legal Profession Disciplinary Tribunal & Anor*: [10]
>
> It is impossible in my view to lay down a rigid rule. The Tribunal is bound to mould its procedures to enable it efficiently and effectively to carry out its functions in an expeditious manner ….

A particular feature of the jurisdiction is that the focus of disciplinary proceedings under the LCA is on the conduct of the lawyer. Proof of harm or loss is not required unless the case against the lawyer is framed in a way to make proof of harm or loss a required element of the disciplinary charge. [11]

Consistently with this, the new provisions in the RCCC expressly prohibiting lawyers from engaging in behaviour that amounts to bullying, harassment, and other prohibited forms of behaviour, do not make proof of actual harm a required element in any disciplinary case for a breach of one or more of these new provisions.

### Disciplinary proceedings are not a substitute for criminal or private civil litigation

While a disciplinary case may significantly overlap with criminal proceedings dealing with the same overall conduct, the purpose and focus of disciplinary proceedings is different. [12]

A disciplinary investigation is not a substitute for a police investigation. Police have powers that are not available to Standards Committees and have specialist investigative units, such as Adult Sexual Assault Teams or the National Organised Crime Group, which have a level of expertise in their specialist areas that an occupational regulatory body such as the Law Society does not have.

From the perspective of a lawyer who is subject to an investigation, the lawyer has a right to silence when subject to a police investigation that they do not enjoy in the disciplinary process. A lawyer may maintain silence in disciplinary proceedings, but in contrast to the criminal law, it is possible that adverse inferences may be drawn from the lawyer's silence.

Nor are disciplinary proceedings a substitute for private civil proceedings, although again there may be significant overlap. A private litigant conducts their case for their own purposes. A Standards Committee bringing a disciplinary case in the LCDT does so in the public interest for the statutory purposes referred to above. While a Standards Committee's case may broadly align with the complainant's interest in the case, this will not always be the case. For example, a complainant may have resolved their dispute with the lawyer and prefer that the disciplinary process come to an end, but the Standards Committee may consider that it is in the public interest for the disciplinary case to proceed.

As noted previously, the focus of the disciplinary jurisdiction is on the conduct of the lawyer, not whether proof of actual harm or loss exists. However, where proof of loss is readily established as part of the charge, for example in a case involving misappropriation of client funds that should have been held on trust until paid to the client, jurisdiction exists under the LCA for a compensation order to be made up to a cap of $25,000. However, as all civil litigators know, issues of causation and harm/loss are often among the most difficult and time-consuming issues arising in private civil litigation. It is not the function

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10 *Malfanti v Legal Profession Disciplinary Tribunal* [1993] NSWCA 171 at 5.
11 For example, if the charge against the lawyer is one of misappropriation of funds from a client.
12 See *Z v Dental Complaints Assessment Committee*, fn 2.

of the complaints and discipline scheme to operate as a substitute for the civil litigation system in dealing with these types of issues.

In the same vein, the complaints and discipline process is not a substitute for the employment law jurisdiction or for proceedings under the Health and Safety at Work Act 2015. Key remedies under the Employment Relations Act 2000, such as reinstatement and compensation for humiliation, loss of dignity, and injury to the feelings of an employee, are not available under the LCA.

### Sequencing with other proceedings

Standards Committees must be mindful of how their processes interact with related investigations or proceedings. Generally speaking, when a Standards Committee is seized of a complaint in relation to conduct that is also the subject of criminal proceedings, the Standards Committee will adjourn and wait for the disposition of the criminal case. [13]

There is greater scope for Standards Committee processes to go forward in parallel with civil litigation, but it may be appropriate for the disciplinary process to be adjourned depending on the circumstances. Relevant factors include: [14]

- How far advanced the proceedings are in each forum.
- Whether the termination of one proceeding is likely to have a material effect on the other.
- Consideration of circumstances relating to witnesses, the burden on the parties in having to litigate in multiple forums.
- The law should strive against permitting a multiplicity of proceedings in relation to the same or similar issues.
- The advantages/prejudice caused to each party.
- Public interest factors (including the seriousness of the alleged disciplinary conduct).

The 2021 amendments to the RCCC that are addressed in the subsequent chapters of this paper place employment related issues much more squarely in the complaints and discipline scheme of the LCA. The Law Society will more frequently receive reports or complaints about matters that are subject to parallel employment law processes. Standards Committees will need to exercise judgement when deciding whether to move forward with the complaints and discipline process or wait until the completion of employment processes. As an example, a report may have been made to the Law Society about the conduct of a lawyer towards their employee in circumstances where the working relationship may not be beyond repair and the parties are working through an employment process to assess the best way forward. It may be best to let the employment process run its course before deciding how the report should be dealt with under the complaints and discipline system.

[13] This is not always necessary. It may be that the complaints and discipline process can move forward, for example after a guilty plea, even though the criminal proceeding has not been finally determined. In some cases it is possible that public protection may require an application for interim suspension to be made to the LCDT prior to the determination of the criminal proceeding.

[14] See *Mackay Refined Sugars (NZ) Ltd v New Zealand Sugar Co Ltd* [1997] 3 NZLR 476; *Snowdon v Radio New Zealand* (2006) 7 NZELC 98, 494.

# 3. BULLYING, HARASSMENT AND OTHER PROHIBITED BEHAVIOUR

## New definitions

### Preliminary

The definition of "behaviour" in the RCCC makes clear that the use of language (whether written or spoken), the use of digital or visual material, as well as physical behaviour, is included.

The former definition of "practice" has been revoked and it its place "law practice" has been defined as meaning:

- an individual lawyer practising on that lawyer's own account; or
- an entity that provides regulated services to the public.

"Entity" is defined as meaning:

- an entity operated by a partnership of lawyers; or
- an incorporated law firm.

This means that the new practice rules in Chapter 11 apply to individual lawyers practising on their own account, such as barristers or sole practitioners, and to law firms which have more than one lawyer practising on their own account, whether operated as a partnership or as an incorporated firm.

### Bullying and harassment

The terms bullying and harassment are often used in conjunction with each other. There is considerable overlap between this conduct as defined in the RCCC but there are also important differences.

#### *Bullying*

The RCCC defines bullying as follows.

> ***bullying*** *means repeated and unreasonable behaviour directed towards a person or people that is likely to lead to physical or psychological harm.*

The definition is closely aligned with but not identical to WorkSafe's definition of bullying, which is as follows: "Workplace bullying is: repeated and unreasonable behaviour directed towards a worker or a group of workers that can lead to physical or psychological harm."

The first difference is obvious: the WorkSafe definition relates to behaviour directed at workers or a group of workers whereas the RCCC definition is broader, being behaviour directed to any person or persons. Bullying by a lawyer that is directed towards their client is within the RCCC definition, for example.

The other key difference is that the RCCC definition refers to a likelihood of the behaviour leading to physical or psychological harm whereas the WorkSafe definition refers to behaviour that can lead to physical or psychological harm.

The use of "likely" in the RCCC definition is designed to ensure consistency with other new definitions of prohibited forms of behaviour in the RCCC, which variously refer to behaviour that is likely to have a harmful effect, or is likely to be unwelcome or offensive. In keeping with the purposes and special nature of the disciplinary jurisdiction, proof of actual harm or loss – in the case of bullying behaviour, proof of actual physical or psychological harm having been caused by the behaviour – is not required. The focus is on the conduct of the lawyer and whether the lawyer's conduct was of a kind that is likely to have this effect.

The use of the term "likely" in this and other of the new definitions is addressed further below.

### *Harassment*

Harassment is defined in the RCCC as follows:

> ***harassment*** *–*
>
> *(a) means intimidating, threatening, or degrading behaviour directed towards a person or group that is likely to have a harmful effect on the recipient; and*
>
> *(b) includes repeated behaviour but may be a serious single incident.*

Behaviour that is harassment may also constitute bullying behaviour. WorkSafe notes in relation to its definition of bullying that:

> Unreasonable behaviour means action that a reasonable person in the same circumstances would see as unreasonable. It includes victimising, humiliating, intimidating or threatening a person.
>
> Bullying may also include harassment, discrimination or violence.

The overlap between bullying and harassment here is clear. However, behaviour may be bullying under the RCCC even though it does not rise to the level of harassment as being intimidating, threatening or degrading behaviour. Equally, harassment as defined may not constitute bullying; para (b) of the definition of harassment specifies that a serious single incident may constitute harassment, whereas bullying is defined as being repeated behaviour rather than a single incident.

### Discrimination

> ***discrimination*** *means discrimination that is unlawful under the Human Rights Act 1993 or any other enactment.*

Section 21 of the Human Rights Act 1993 sets out the prohibited grounds of discrimination under that legislation as being:

- sex;
- marital status;
- religious belief;
- ethical belief;
- colour;
- race;
- ethnic or national origins;

- disability;
- age;
- political opinion;
- employment status;
- family status;
- sexual orientation.

It is worth noting here that a lawyer who engaged in discriminatory behaviour in their professional practice that is prohibited under the Human Rights Act may have been liable for that conduct as being unsatisfactory conduct or misconduct under the LCA even before the amendments to the RCCC. This is also true of other newly defined forms of prohibited conduct, for example, a lawyer found to have engaged in workplace bullying under the Health and Safety at Work Act 2015 could have been liable for that conduct as unsatisfactory conduct or misconduct under the LCA. However, by expressly including discrimination, bullying and the other prohibited forms of behaviour in the RCCC, it is put beyond doubt that the complaints and discipline scheme of the LCA applies to that behaviour and that disciplinary action can be taken whether or not prior findings have been made by the Human Rights Review Tribunal, in health and safety proceedings, or otherwise.

### Racial and sexual harassment

#### *Racial harassment*

Surveys conducted for the Law Society show that 35% of lawyers who do not identify as European/Pākehā have personally suffered racial discrimination within the legal profession, compared with only 4% of European/Pākehā lawyers. In addition, some behaviour may not be directly or expressly linked to race, but nevertheless indirectly affects ethnic minority groups because, statistically, they are more likely than European/Pākehā lawyers to experience bullying and harassment. For example, the Law Society has data showing that Māori lawyers of all genders were more likely to have experienced sexual harassment.

The RCCC defines racial harassment as follows.

> ***racial harassment*** *means behaviour that –*
>
> *(a) expresses hostility against, or contempt or ridicule towards, another person on the ground of race, ethnicity or national origin; and*
>
> *(b) is likely to be unwelcome or offensive to that person (whether or not it was conveyed directly to that person).*

This definition closely aligns with the prohibition against racial harassment in s 63 of the Human Rights Act.[15] However, there are two key distinguishing features:

- Under the RCCC it is not necessary to prove that the behaviour was unwelcome or offensive to the affected person but rather that it was likely to be.

[15] There is also significant alignment with s 109 of the Employment Relations Act 2000, although the requirement in that provision that the behaviour must have had a detrimental effect on the victim's employment is not present in the RCCC definition.

- There is no requirement to prove that the behaviour was either repeated or of such a significant nature that it had a detrimental effect on the affected person.

The behaviour does not need to be conveyed directly to the person affected. A lawyer engages in racial harassment if they express to a person (person A) hostility against, or contempt or ridicule towards another person (person B) on the ground of race, ethnicity, or national origin, if that is likely to be unwelcome or offensive to person B, whether or not it was conveyed directly to person B.

Examples of racial harassment will include:

- making offensive remarks or jokes about a person's race;
- copying or making fun of the way a person speaks;
- calling people by racist names;
- deliberately mispronouncing or mocking people's names.

*Sexual harassment*

> ***sexual harassment*** *means –*
>
> *(a) subjecting another person to unreasonable behaviour of a sexual nature that is likely to be unwelcome or offensive to that person (whether or not it was conveyed directly to that person); or*
>
> *(b) a request made by a person of any other person for sexual intercourse, sexual contact, or other form of sexual activity, that contains an implied or overt promise of preferential treatment or an implied or overt threat of detrimental treatment.*

This definition similarly aligns with the prohibition against sexual harassment in s 62 of the Human Rights Act (HRA) and as with racial harassment the key differences between the HRA definition and the RCCC definition relate to proof of harm.[16]

- The RCCC definition does not require proof that the unreasonable behaviour of a sexual nature was unwelcome or offensive to the affected person but rather that it was likely to be.
- There is no requirement that the behaviour either be repeated or of such a significant nature that it has a detrimental effect on the person.

Examples of sexual harassment include (but are not limited to):

- sexually suggestive comments or jokes that are offensive;
- inappropriate staring or leering that is intimidating;
- intrusive questions about a person's personal life or physical appearance that are offensive;
- unwelcome touching, hugging, cornering or kissing;
- repeated or inappropriate invitations to go out on dates;
- repeated or inappropriate advances on email, text, social networking websites or internet chat rooms by a work colleague;

[16] Again there is significant alignment with the Employment Relations Act (s 108), with the most obvious difference being a requirement for proof of a relevant effect on the victim's employment.

- sexual gestures, indecent exposure or inappropriate display of the body;
- sexually explicit emails, texts of social media messages;
- requests or pressure for sex, or other sexual acts; and
- implied or actual threats of differential treatment if sexual activity is not offered.

### Use of "likely" in definitions

We have seen that the definitions of bullying, harassment, and racial and sexual harassment do not require that there must have been actual harm caused, or that the lawyer's behaviour must have been unwelcome or offensive to the affected person as a matter of fact, but rather that the relevant consequence was "likely". This is consistent with the focus of disciplinary proceedings being on the conduct of the lawyer rather than on proof of actual harm or loss.

This raises questions about the standard of proof required to show that specified consequences are likely, and the extent to which the personal characteristics of the victim and the lawyer's knowledge of those characteristics are relevant.

#### *Standard of proof*

It is generally accepted that "likely" does not mean "more likely than not" and instead imposes a test of "real and substantial risk".

In *Wall v Fairfax New Zealand Ltd* the Human Rights Review Tribunal noted three Court of Appeal authorities as providing for the "real and substantial risk" test in terms of conduct "likely to excite hostility against or bring into contempt any group of persons" on racial/ethnic/national origin grounds under s 61 of the Human Rights Act 1993. [17] The High Court endorsed the Tribunal's approach to "likely". [18]

This approach has been applied across a variety of different contexts. See for example, *Bay Cities Real Estate Ltd v Re/Max New Zealand Ltd* (misrepresentation) citing *Commerce Commission v Woolworths Ltd* (business acquisitions likely to substantially lessen competition). [19] See also *R v Atkins* (test for witness anonymity order under Evidence Act) and *Commissioner of Police v Ombudsman* (withholding of official information because "likely to prejudice a fair trial"). [20]

#### *Personal characteristics and knowledge*

In *Attorney-General v Gilbert* [21] the Court said: "Severity of harm, the current state of knowledge about its likelihood … all have to be assessed"; and "Foreseeability of harm and its risk will be important in considering whether an employer has failed to take all practicable steps to overcome it." [22]

> [91] In some cases, a risk may not be apparent without specific information about the vulnerability of a particular employee. That was the reason the plaintiff in *Gillespie*

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17 *Wall v Fairfax New Zealand Ltd* [2017] NZHRRT 17, (2017) 11 HRNZ 165 at [212], citing *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385 (CA) at 391; *Port Nelson Ltd v Commerce Commission* [1996] 3 NZLR 554 (CA) at 562; and *R v Atkins* [2000] 2 NZLR 46 (CA) at [15] and [16].

18 *Wall v Fairfax New Zealand Ltd* [2018] NZHC 104, [2018] 2 NZLR 471 at [61].

19 *Bay Cities Real Estate Ltd v Re/Max New Zealand Ltd* HC Napier CIV-2010-441-134, 8 June 2011 at [27], citing *Commerce Commission v Woolworths Ltd* [2008] NZCA 276, (2008) 8 NZBLC 102,336 at [63].

20 *Atkins* at [15].

21 *Attorney-General v Gilbert* [2002] 2 NZLR 342; [2002] 1 ERNZ 31.

22 At [83].

> failed and why the plaintiff in *Walker* was successful only for injury suffered after the employer became aware that he had already suffered one breakdown. [23]
>
> [92] After Mr Gilbert returned to work in October 1995 after extended sick leave, there can have been no doubt about his vulnerability to stress. But it does not follow that in all cases the risk will need to be matched to the particular employee. If the risk is one which applies generally, then knowledge of specific vulnerability may be irrelevant. If the employer unreasonably fails to take all steps practicable to remove or manage the risk and it is reasonably foreseeable that any employee may suffer harm as a result, then the employer will be in breach of the term of the contract to maintain safe working conditions. It was not necessary in the circumstances for there to be "direct warning of imminent breakdown on the part of the [employee]" …

The test is ultimately objective, but the standard is necessarily adjusted where the employer has knowledge about the particular vulnerability of an employee.

### Violence

> ***violence*** *includes the following –*
>
> *(a) physical violence:*
>
> *(b) psychological violence:*
>
> *(c) sexual abuse:*
>
> *(d) sexual assault.*

The terms physical violence and sexual assault are relatively straightforward. Physical violence will occur where the lawyer applies physical force to another person without their consent. Sexual assault will be any sexual act committed against a person without their consent. Given the use "assault", and the separate form of prohibited behaviour that is sexual harassment, it seems clear that a sexual assault constituting violence must involve a physical act.

The definition provides for sexual abuse as a separate category of violence. This must be taken to mean something different from a sexual assault. Sexual abuse is commonly associated with a person in a position of power or authority taking advantage of another person's trust, and their respect for the perpetrator's authority, to get them to take part in sexual activity. A lawyer who conducts a sexual relationship with a vulnerable client may be guilty of sexual abuse. So may a partner or director of a law firm who conducts an inappropriate relationship with a junior member of staff employed by that partner/director. As with all complaints and discipline cases, the particular circumstances will determine whether the relationship constitutes a sexually abusive one.

Psychological violence is not itself defined. Ministry of Justice statistics refer to types of psychological violence that most commonly arise in personal relationships, but certain types of behaviours that are considered to be psychological violence – such as following or keeping track of a person, in person or online – can arise in the workplace. It may be expected that behaviour that is psychologically violent will also be bullying or harassment or racial or sexual harassment, but there may be instances of behaviour that do not fit well within the latter definitions, or that are otherwise so extreme as to justify being identified as psychologically violent.

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[23] *Gillespie v Commonwealth of Australia* (1991) 104 ACTR 1 (ACTSC); and *Walker v Northumberland County Council* [1995] 1 All ER 737 (QB).

### Victimisation

Rules 2.10.1 and 2.10.2 define victimisation in the context of making a complaint or a report under rr 2.8 or 2.9 of the RCCC.

> *2.10.1 A lawyer must not victimise any person who, in good faith –*
>
> *(a) makes a complaint or a report under rule 2.8 or 2.9; or*
>
> *(b) is otherwise connected with a complaint or a report under rule 2.8 or 2.9.*
>
> *2.10.2 For the purposes of this rule, examples of victimisation include (but are not limited to) –*
>
> *(a) unwarranted adverse employment-related actions;*
>
> *(b) unwarranted withdrawal of instructions;*
>
> *(c) conduct that amounts to 1 or more of the following:*
>
> *(i) bullying:*
>
> *(ii) harassment:*
>
> *(iii) lack of professional co-operation:*
>
> *(iv) racial harassment:*
>
> *(v) professional disparagement:*
>
> *(vi) sexual harassment.*

The purpose of this rule is to ensure that a person who makes a complaint or a report about another lawyer's conduct, under rr 2.8 or 2.9 of the RCCC, does not suffer adverse consequences as a result of doing so. Equally, a person otherwise connected with a complaint or a report under rr 2.8 or 2.9, should not suffer adverse consequences. A person otherwise connected with a complaint or a report most obviously includes, but is not limited to, the victim of the alleged conduct by the lawyer if the victim is not the person who made the complaint or report.

The definition of victimisation in r 2.10.2 is not exhaustive. For example, r 2.10.2(c) does not refer to discrimination or to violence as being victimisation, but there can be little doubt that a lawyer who subjects a person who has made a complaint or report to discriminatory or violent behaviour would be guilty of victimising that person and therefore of breaching r 2.10.1.

# 4. REPORTING MISCONDUCT OR UNSATISFACTORY CONDUCT

## Rules 2.8 and 2.9

### Complaints vs reports

Any member of the public, including any lawyer or employee of a law practice, may make a complaint to the Law Society about a lawyer. A complaint must be referred by the Complaints Service to a Standards Committee. A Standards Committee may then:

- decide to take no action on the complaint, with the result that there is no inquiry into the complaint; [24]
- commence an inquiry, but then decide to take no further action; [25]
- make a determination after conducting an inquiry, in which case the determinations a Standards Committee may make are to:
  - take no further action; [26]
  - find that the lawyer engaged in unsatisfactory conduct and then determine what, if any, orders to impose; [27]
  - refer a charge to the LCDT. [28]

In addition to receiving complaints, the Complaints Service also receives confidential reports from lawyers under rr 2.8 and 2.9 of the RCCC. Rule 2.8 provides that a lawyer must make a confidential report if they have reasonable grounds to suspect that another lawyer may have engaged in misconduct, subject to limited exceptions. Rule 2.9 provides that a lawyer may make a confidential report if they have reasonable grounds to suspect that another lawyer may have engaged in unsatisfactory conduct.

If a lawyer makes a confidential report under rr 2.8 or 2.9 of the RCCC it is for the Complaints Service to decide whether to refer that report to a Standards Committee. If the report is referred to a Standards Committee, it is then for the Standards Committee to decide whether it will inquire into the matters that are the subject of the report and make a determination on those matters. The determinations that may be made against a lawyer who is the subject of a confidential report are the same as those that may be made against a lawyer who is the subject of a formal complaint, namely:

- no further action;
- a finding that the lawyer engaged in unsatisfactory conduct with a consequential determination of what, if any, orders to impose;
- referral of a charge to the LCDT.

A lawyer who makes a report under rr 2.8 or 2.9 takes no further part in the Standards Committee process (assuming a Standards Committee process occurs as result of the report) other than as a possible witness to matters that are relevant to the Standards Committee's

[24] LCA, s 138(1).
[25] LCA, s 138(2).
[26] LCA, s 152(2)(c).
[27] LCA, s 152(2)(b) and s 156.
[28] LCA, s 152(2)(a).

inquiry. A lawyer who wishes to participate in and be heard as a party to the Standards Committee process is advised to make a formal complaint to the Law Society.

### Mandatory reporting

The Working Group considered that it is essential for the integrity and reputation of the profession that conduct by a lawyer that may amount to bullying, discrimination, harassment, or other types of prohibited behaviour is treated as a professional issue. Mandatory reporting requirements are one way of maintaining confidence in the legal profession and go towards achieving a safe environment for the provision of legal services. The Working Group further identified that:

> Reporting obligations also provide a mechanism for lawyers to use their privileged position to protect others from those who do not live up to the common values held by the legal profession. [29]

Rule 2.8 is the rule providing for mandatory reporting and has been amended to provide as follows.

*2.8 Subject to the obligation on a lawyer to protect privileged communications, a lawyer who has reasonable grounds to suspect that another lawyer may have engaged in misconduct must make a confidential report[1] to the Law Society at the earliest opportunity.*

*2.8.1 This rule applies despite the lawyer's duty to protect confidential non-privileged information.*

*2.8.2 If a report by a lawyer to the Law Society may breach the lawyer's duty to protect confidential non-privileged information, the lawyer should also advise the lawyer's client of the report.*

*2.8.3 A report submitted in accordance with rules 2.8 and 2.9 must –*

*(a) be in written form; and*

*(b) identify –*

*(i) the person making the report; and*

*(ii) the person or persons to whom the report relates; and*

*(c) specify details of the alleged conduct; and*

*(d) be supported by any appropriate documentation held by or available to the person making the report.*

*2.8.4 This rule does not apply to –*

*(a) a lawyer who has received information in the course of providing confidential advice, guidance, or support to another lawyer, including a member of a panel under a "friend" system, unless disclosure of the information is necessary to –*

*(i) prevent the anticipated or proposed commission of a crime or fraud; or*

*(ii) prevent a serious risk to the health or safety of any person; or*

*(b) a lawyer who is a victim of the suspected misconduct; or*

[29] At pp 39-40.

> *(c) circumstances where a lawyer reasonably believes the disclosure would pose a serious risk to the health (including mental health) or safety of a victim.*

[1] The confidentiality of a report made under r 2.8 or 2.9 is subject to exceptions contained in the Protected Disclosures Act 2000 and the Lawyers and Conveyancers Act 2006.

The amendments to r 2.8 make the following key changes:

- amended threshold for mandatory reporting;
- confidentiality is now expressly subject to exceptions;
- form of the report; and
- exceptions to mandatory reporting.

### *Threshold for reporting*

Rule 2.8 requires lawyers to make a confidential report to the Law Society, at the earliest opportunity, if they have *reasonable grounds to suspect that another lawyer may have engaged in misconduct*.

Previously r 2.8 required that the lawyer must have reasonable grounds to suspect that another lawyer has been guilty of misconduct. The Law Society's experience was that some lawyers were uncertain about whether the rule required a lawyer to have evidence that is sufficient to prove the other lawyer's guilt before the threshold for mandatory reporting was met. This uncertainty meant that some conduct issues that should have been reported were not.

The change to the threshold puts beyond doubt that proof of guilt is not part of the threshold test. At the same time, the key requirement that there must be "reasonable grounds to suspect" remains in the rule. This means that the obligation to report is not triggered by mere rumour or speculation, there must be evidence that provides "reasonable grounds to suspect" before the mandatory requirement to provide a report to the Complaints Service is engaged.

So, for example, the fact that a lawyer hears an office rumour about a senior lawyer in the firm acting in a sexually inappropriate way towards a more junior lawyer does not itself trigger the mandatory reporting obligation. But if the lawyer observed the behaviour or it was disclosed to the lawyer by the victim of the behaviour, then the obligation is clearly triggered (subject to any applicable exception to mandatory reporting).

### *Confidentiality*

A lawyer who makes a report under rr 2.8 or 2.9 has the right to maintain confidentiality (subject to the exceptions referred to below) but doing so will likely mean that it is not possible for a Standards Committee to inquire into and make a decision on the matters that are the subject of the report. It is not generally possible for a Standards Committee to preserve confidentiality, by withholding the report or the identity of the lawyer who made the report from the lawyer who is the subject of the report, and also comply with the rules of natural justice.

While it is generally necessary for the report and the identity of the person making the report to be disclosed to the subject lawyer if an inquiry is to proceed, confidentiality is otherwise maintained to the following extent:

- Standards Committees, their delegates (typically Complaints Service employees), and investigators (whether employees of the Law Society or not) are subject to strict confidentiality requirements subject only to limited exceptions. [30]
- Standards Committee decisions are published in anonymised form (subject to possible publication of the identity of a lawyer who is guilty of unsatisfactory conduct).
- If a charge has been filed with the LCDT by a Standards Committee the LCDT may make non-publication orders.

*Exceptions to confidentiality*

If the reporting lawyer wishes to maintain complete confidentiality (including from the subject lawyer) there is now reference to the fact that:

> The confidentiality of a report made under Rule 2.8 or 2.9 is subject to exceptions contained in the Protected Disclosures Act 2000 and the Lawyers and Conveyancers Act 2006.

Confidentiality provisions in the Lawyers and Conveyancers Act 2006 permit disclosure to be made to a Police employee or member of the Serious Fraud Office acting in the performance of his or her duty. A confidential report that provides evidence of the possible commission of a crime may be disclosed to the Police or the Serious Fraud office.

Relevant exceptions to confidentiality in the Protected Disclosures Act 2000 also apply. Confidential information may be disclosed under the Protected Disclosures Act if the person who has acquired knowledge of the protected disclosure reasonably believes that disclosure of identifying information is essential:

- to the effective investigation of the allegations in the protected disclosure;
- to prevent serious risk to public health or public safety or the environment; or
- having regard to the principles of natural justice.

While these exceptions are apparently broad, they only apply to a confidential report about conduct by a lawyer that meets the level of "serious wrongdoing" as defined in the Protected Disclosures Act. The definitions of serious wrongdoing in that Act that are most likely to be relevant to lawyers are those of "an act, omission, or course of conduct that constitutes a serious risk to public health or public safety" or "an act, omission, or course of conduct that constitutes an offence".

A serious risk to public health or public safety is unlikely to cover the interpersonal relational behaviour that forms the basis of many instances of discrimination, harassment, sexual harassment, bullying and other inappropriate behaviour within the legal workplace. However, disclosures of wider, organisation-level behaviour, such as an organisational culture of tolerating misconduct by senior lawyers, would likely tip into the category of "serious risk to public health or public safety".

There is a new Protected Disclosures Bill currently before Parliament which, if passed, will repeal and replace the Protected Disclosures Act 2000. By virtue of s 22(2) of the Interpretation Act 1999, the reference to the Protected Disclosures Act 2000 in the RCCC will be treated as a reference to the new Protected Disclosures legislation.

[30] LCA, s 188.

*Form of report*

Rule 2.8.3 now includes provisions as to the required form of report. These requirements are self-explanatory. Whilst straightforward, the change is an important one. The Law Society's experience has been that reports are sometimes made in a form which cannot be used by the Law Society, due to a lack of sufficient detail and lack of identification of the person making a report, sometimes preventing the Law Society from making follow up enquiries to obtain more detail.

*Exceptions to mandatory reporting*

Lawyers are not required to make a report if: [31]

- They have received information about the misconduct in the course of providing confidential advice, guidance or support to another lawyer, including as a member of a "friend" panel system, unless disclosure of the information is necessary to:
  - prevent the anticipated or proposed commission of a crime or fraud; or
  - prevent a serious risk to the health or safety of any person.
- They are the victim of the misconduct.
- The circumstances are that disclosure of the misconduct would pose a serious risk to the health or safety of a victim. The RCCC state that this exception specifically includes serious risk to mental health.

Lawyers who are themselves the victims of misconduct are not under an obligation to report the misconduct. This is to remove the burden on the people actually suffering the harm.

Lawyers are exempt from the obligation to make a report if they consider that doing so would pose a serious risk to the health or safety of the victim.

It is anticipated this exemption will most commonly apply to situations where there is a serious risk to the victim's mental wellbeing and ability to cope with a report of misconduct being made to the Law Society.

This exception only applies where the lawyer has a genuine concern that reporting the misconduct would cause the victim harm based on their discussions with and/or observations of the victim. A general concern, without more, that the victim may find the process challenging, does not come within the exception.

Lawyers who have received information of alleged misconduct confidentially are also exempt from the reporting obligation, subject to exceptions if disclosure is necessary to:

- prevent the anticipated or proposed commission of a crime or fraud; or
- prevent a serious risk to the health or safety of any person.

The exception that requires a report to be made to prevent a serious risk to health and safety, even if the information was received in confidence, requires the following threshold conditions to be met:

- reasonable grounds to suspect that another lawyer may have engaged in misconduct based on information received while providing confidential advice, guidance or support to another lawyer;

[31] RCCC, r 2.8.4.

- a serious risk to the health and safety of any person (including but not limited to the victim); and
- making a report to the Law Society involving disclosure of the information received in confidence is necessary to prevent that risk.

### Non-disclosure agreements

The Law Society considers that a non-disclosure agreement between a law practice and an employee cannot prevent a person from making a complaint to the Law Society. A provision in an agreement which expressly seeks to prohibit a person from exercising their right to complain to the Law Society is likely unenforceable as being against public policy and could breach a lawyer's obligation to uphold the rule of law. This view has been endorsed by the Legal Complaints Review Officer (LCRO).

Non-disclosure agreements are common and may legitimately form part of the settlement of a dispute between an employer and employee. There is no requirement that they expressly include a "carve-out" exception for the right to complain to (in the case of lawyers) the Law Society. What is not permitted is to purport to expressly remove the right to complain.

A confidentiality or non-disclosure clause does not absolve a lawyer from the obligation to report misconduct under r 2.8.

### Reporting unsatisfactory conduct

Under r 2.9, a lawyer who has reasonable grounds to suspect that another lawyer may have engaged in unsatisfactory conduct has discretion to make a report.

> *2.9 Subject to the obligation on a lawyer to protect privileged communications, a lawyer who has reasonable grounds to suspect that another lawyer may have engaged in unsatisfactory conduct may make a confidential report to the Law Society.*
>
> *2.9.1 This rule applies despite the lawyer's duty to protect confidential non-privileged information.*

The changes discussed above apply to r 2.9 in relation to:

- the threshold for reporting (removal of the reference to a lawyer being "guilty" of unsatisfactory conduct).
- exceptions to confidentiality.
- required form of report.

The new provisions in r 2.8 creating exceptions to the mandatory reporting requirement are obviously not relevant to r 2.9 which makes the reporting of unsatisfactory conduct a matter of discretion for a lawyer.

It is recommended that a lawyer who has reasonable grounds to suspect that another lawyer may have engaged in conduct that is at least unsatisfactory conduct, but who is not sure whether the more serious disciplinary standard of misconduct is engaged, errs on the side of caution and makes a confidential report to the Law Society to ensure that they are satisfying their obligations.

A lawyer making a report can expressly record that they are doing so in order to ensure that they are meeting their obligation under r 2.8 if it is engaged by the facts of the case, but that having done so, they now leave it for the Law Society whether to take any further steps in relation to the matter. As set out above, this is the effect of making a report rather than a formal complaint in any event, but reporting lawyers may wish to expressly record this to make their intended position clear and distinguish their position from the making of a formal complaint.

# 5. PROFESSIONAL STANDARDS

## Chapter 10 of the RCCC

### A lawyer must promote and maintain professional standards

The heading to Chapter 10 of the RCCC has been changed from "Professional dealings" to "Professional standards" and r 10 now simply states that a "lawyer must promote and maintain professional standards". Previously r 10 previously stated that a "lawyer must promote and maintain proper standards of professionalism in the lawyer's dealings".

The heading to the chapter and r 10 are therefore now stated as simply as possible with the reference to a lawyer's "dealings" removed.

Professional standards include both the quality of work carried out by a lawyer and also how they conduct themselves as a lawyer. It does not include conduct by a lawyer in their personal life.

Legislative change to the LCA would have been required if the RCCC were to apply to conduct by a lawyer that is solely in their personal life. Sections 7 and 12 of the LCA, set out above, make this clear. The various tests for misconduct and unsatisfactory conduct in those sections are tied to the provision of regulated services by the lawyer. Further, the empowering provision for the making of the RCCC is s 94 of the LCA. Rules made under s 94 must be made for the "[c]onduct of practice by practitioners" and (relevantly to the RCCC) must be made in relation to "standards of professional conduct and client care" in order to be *intra vires* the LCA.

Parliament has expressly provided for conduct in a lawyer's personal life which may be subject to the complaints and discipline regime in the LCA. Section 7(1)(b)(ii) provides that conduct by a lawyer which is unconnected with the provision of regulated services may be subject to discipline as misconduct under the LCA if it:

> … would justify a finding that the lawyer … is not a fit and proper person or is otherwise unsuited to engage in practice as a lawyer.

The policy choice made by Parliament in the LCA is clear. A variety of different threshold tests apply to behaviour which amounts to unsatisfactory conduct or misconduct under the LCA when a lawyer's conduct is at a time that they are providing regulated services, but when the lawyer is engaged in conduct that is unconnected with regulated services (ie, solely in their personal rather than professional life), then the high threshold in s 7(1)(b)(ii) must be met.

The courts and other disciplinary decision making bodies under the LCA have shown a willingness to take an expansive approach to the question of whether conduct has occurred at a time when regulated services are being carried out or is in connection with regulated services.[32] Most relevantly in the present context, the National Standards Committee has previously decided that inappropriate sexual conduct by a lawyer at a work social function is conduct that is connected with the provision of regulated services.[33] This reflects the reality that work social functions are part of professional life.

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[32] See *Young v NSC* [2019] NZHC 2779, *Deliu v NSC* [2017] NZHC 2318, *Orlov* at fn 5.

[33] Notice of Determination by Standards Committee on own motion investigation concerning Mr X case reference ZTUVK (dated 25 October 2018).

### Respect and Courtesy

> *10.1 A lawyer must, when acting in a professional capacity, treat all persons with respect and courtesy.*

Previously r 10.1 was limited to a requirement on lawyers to treat other lawyers with respect and courtesy. The rule has been broadened to require that lawyers acting in their professional capacity must treat all persons with respect and courtesy.

Rule 12 requires lawyers to treat third parties with respect and courtesy when acting in a professional capacity. Notwithstanding the apparent general applicability of that rule, it is helpful that r 10.1 has been broadened to put beyond any doubt that employees, contractors, volunteers and any other persons who are engaged by, work with, or instruct lawyers must be treated with respect and courtesy. This is in the context where Chapter 10 of the RCCC deals with professional standards generally, and contains the new express prohibition against bullying, discrimination, and harassment (and other forms of prohibited conduct), whereas Chapter 12 of the RCCC is more specifically directed towards dealings with self-represented litigants, experts and other professionals.

### Reputation of profession

Rule 10.2 creates a new obligation on lawyers.

> *10.2 A lawyer must not engage in conduct that tends to bring the profession into disrepute.*

The integrity and reputation of the profession has always been a matter of legitimate concern for the complaints and discipline system, bearing in mind the statutory purpose of maintaining public confidence in the provision of legal services. There are specific provisions in the LCA which incorporate the concept of bringing the profession into disrepute. Section 7(1)(b)(ii) is an example, as is the ground on which serious negligence or incompetence may be proved under s 241(c) of the LCA. However, there was not previously a standalone rule expressly prohibiting lawyers from engaging in conduct that tends to bring the profession into disrepute.

Rules against bringing the profession into disrepute or otherwise discrediting the profession are found in complaints and discipline schemes for other professions. In *Collie v Nursing Council of New Zealand*[34] Gendall J held as follows in relation to a charge against a nurse for breach of the obligation.

> To discredit is to bring harm to the repute or reputation of the profession. The standard must be an objective standard with the question to be asked by the Council being whether reasonable members of the public, informed and with knowledge of all the factual circumstances, could reasonably conclude that the reputation and good standing of the nursing profession was lowered by the behaviour of the nurse concerned.

The following are examples of cases in other professions where it has been found that a professional person has brought their profession into disrepute, remembering that the particular features of each individual statutory scheme and the particular features of the profession concerned, must be taken into account before being applied in the LCA context.

[34] *Collie v Nursing Council of New Zealand* [2001] NZAR 74 at [28].

- In *Re Kora*[35] the Health Practitioners Disciplinary Tribunal (HPDT) found that sending sexually explicit text messages to patients was likely to bring the nursing profession into disrepute.
- In *Re Tiller*[36] the HPDT found that Ms Tiller's advertisement, which accused other pharmacists of "price gouging" and "profiteering", could bring the profession into disrepute.
- In *CAC v Coad*[37] the Teachers Disciplinary Tribunal found that a teacher had brought the profession into disrepute by "engaging in and/or encouraging inappropriate communication with his former Year 12 students at St Kentigern College, by sending and/or receiving text and photographic message in a group conversation on Instagram where the subject matter of the conversation included references to sex and/or prostitution and alcohol and drugs".
- In *CAC v Teacher K*[38] the Teachers Disciplinary Tribunal held that teaching while under the influence of alcohol brought the profession into disrepute.

### Bullying, discrimination, and harassment

Rule 10.3 contains the prohibition on lawyers engaging in types of behaviours discussed above that are now expressly defined in the RCCC.

> *10.3 A lawyer must not engage in conduct that amounts to 1 or more of the following:*
>
> *(a) bullying:*
>
> *(b) discrimination:*
>
> *(c) harassment:*
>
> *(d) racial harassment:*
>
> *(e) sexual harassment:*
>
> *(f) violence.*

The prohibition is unequivocal. Conduct by a lawyer that amounts to one or more of the prohibited behaviours listed in subparas (a) to (f) of r 10.3, as defined in r 1.2, is a contravention of the RCCC. Such conduct that is directed to any person will be in breach of the rule.

It is then the provisions of the LCA, rather than the RCCC, which determine whether a contravention of the r (and of any of the rules in the RCCC) amounts to unsatisfactory conduct or misconduct.

Section 7(1)(a)(ii) provides that conduct is misconduct:

> … that consists of **a wilful or reckless contravention of any** provision of this Act or of any regulations or **practice rules made under this Act** that apply to the lawyer or incorporated law firm … [emphasis added].

35 *Re Kora* HPDT 19/1/2012 (432/Nur11/192P).
36 *Re Tiller* HPDT 9/12/2011 (425/Phar11/195P).
37 *CAC v Coad* NZTDT 2020/18.
38 *CAC v Teacher K* NZTDT 2018/88.

Section 12(c) of the LCA provides that unsatisfactory conduct is:

> … conduct consisting of **a contravention** of this Act, or **of any** regulations or **practice rules made under this Act** that apply to the lawyer or incorporated law firm, or of any other Act relating to the provision of regulated services (not being a contravention that amounts to misconduct under section 7) … [emphasis added].

This means that a contravention of one or more of the prohibitions contained in r 10.3 that is wilful or reckless is misconduct. A contravention of r 10.3 that is neither wilful nor reckless is unsatisfactory conduct, albeit noting that not every contravention of the RCCC that is found proved by a Standards Committee must necessarily result in a finding of unsatisfactory conduct. [39]

The question of whether a contravention of the rule is a willful or reckless contravention is not determined by whether the lawyer knew of the existence of the particular rule and consciously decided to act in contravention of it: [40]

> In my opinion, practitioners who are granted practising certificates by the Institute are bound as a matter of professional duty to keep themselves abreast of the Rules. It would be counter-productive to allow them to claim ignorance of the very rules which are put there to regulate their conduct in the public interest.
>
> …
>
> It matters not, then, that he was unaware of [the] specific requirements [of the rules] on the occasion of this particular transaction; for if, as I think, he must be taken to have been aware that there were rules in this area, he must be taken also to have appreciated the possibility that, if he proceeded without looking to see what those rules required of him, he might put himself in breach. To go ahead, then, without checking the rules was to take that risk; it was to proceed with reckless indifference as to whether what he was doing was or was not in contravention of such rules as were relevant.

In the case of some of the types of prohibited behaviour, it is difficult to see how a lawyer could contravene r 10.3 other than wilfully or recklessly. Threatening behaviour amounting to harassment is an example. Even more so would be an act of physical violence or sexual assault. Other types of prohibited behaviour may be carried out thoughtlessly, as a result of a lack of taking proper care and consideration. Repeated and unreasonable behaviour amounting to bullying may result from a lawyer acting thoughtlessly in making demands of a team member. The decision maker, whether it is a Standards Committee, the LCRO, the LCDT, or the Courts on appeal, must assess the state of mind of the lawyer who engaged in the prohibited behaviour to determine whether they acted wilfully or recklessly.

It is possible that a lawyer may be guilty of disgraceful or dishonourable conduct and is therefore guilty of misconduct under s 7(1)(a)(i) of the LCA, if acting with a sufficiently serious lack of care rather than recklessly. The well-known dicta in *Pillai v Messiter* [41] has been held to be applicable in determining whether a lawyer's conduct is disgraceful or dishonourable. [42] Conduct is disgraceful or dishonourable that is:

> … a deliberate departure from accepted standards or such serious negligence as, although not deliberate, would portray indifference and an abuse of the privileges which accompany registration.

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39 *Keene v LCRO* [2021] NZCA 43.

40 *Zaitman v Law Institute of Victoria* [1994] VicSC 778 (9 December 1994).

41 *Pillai v Messiter* (No 2) (1989) 16 NSWLR 197.

42 See *Complaints Committee 1 of ADLS v C* [2008] 3 NZLR 105; *S v New Zealand Law Society (Auckland Standards Committee No 2)* High Court, Auckland, 1/6/2012, CIV-2011-404-3044 Winkelmann J.

This threshold is a high one, indeed it is close to a recklessness standard, but it does allow for the possibility of a finding of disgraceful or dishonourable conduct (misconduct) as a result of sufficiently serious negligence by a lawyer that has resulted in a contravention of r 10.3. Seriously negligent conduct in breach of r 10.3 may also result in a charge being filed with the LCDT under s 241(c) of the LCA.

### Dealings with Law Society

Rule 10.14 is a new provision in relation to lawyers' dealings with the Law Society.

> *10.14 A lawyer must –*
>
> *(a) respond to inquiries from the Law Society respectfully and in a timely manner; and*
>
> *(b) act in a way that does not obstruct or hinder the regulatory functions of the Law Society.*
>
> *10.14.1 Nothing in this rule requires a lawyer to breach privilege held by the lawyer's client that has not been waived by that client.*

These requirements reflect what all reasonable lawyers would understand to be expected of them in any event, namely responding to inquiries from the Law Society respectfully and timeously, and not acting so as obstruct or hinder the regulatory functions of the Law Society.

The requirements are also consistent with the High Court's decision in *Parlane v NZLS*.[43]

> [106] I was not referred to any case with similar facts to the present. *Bolton* does not specifically refer to conduct such as that of Mr Parlane in refusing to comply with the requirements of the Standards Committee to produce relevant files in response to the lawful requests that he do so, thereby hindering its ability to carry out the statutory function of inquiring into complaints. I have set out above the record of what took place extensively, because it demonstrates not only Mr Parlane's wilful refusal to comply with the lawful requirements of the Standards Committee, but also shows the truculent and abusive nature of his dealings with the representatives of the Law Society.
>
> [107] That conduct was maintained over a period of over a year as noted in the various charges brought against him. In my view, the conduct was such as can properly be characterised as a failure to meet the standards of integrity that ought to be met by all practitioners.
>
> [108] The purposes of the Lawyers and Conveyancers Act include maintenance of public confidence in the provision of legal services, protection of consumers of legal services and recognition of the status of the legal profession. To achieve those purposes the Act provides for what it described as "a more responsive regulatory regime in relation to lawyers and conveyancers". The provisions of Part 7 of the Act dealing with complaints and discipline are central to achieving the purposes of the Act. I consider that legal practitioners owe a duty to their fellow practitioners and to the persons involved in administering the Act's disciplinary provisions (whether as members of a Standards Committee or employees of the New Zealand Law Society) to comply with any lawful requirements made under the Act. There must also be a duty to act in a professional, candid and straightforward way in dealing with the Society and its representatives. It is completely unacceptable for a practitioner to engage in what appears to have been an abusive campaign such as Mr Parlane conducted here.

[43] *Parlane v NZLS* High Court, Hamilton, 20/12/2010, CIV-2010-419-1209, Cooper J.

[109] The duties to which I have referred do not exist to protect the sensibilities of those involved in administering the Act's disciplinary provisions. While courtesy is a normal aspect of professional behaviour expected of a practitioner, it is not an end in itself. The purpose of the disciplinary procedures is to protect the public and ensure that there is confidence in the standards and probity met by members of the legal profession. It is therefore axiomatic that practitioners must co-operate with those tasked with dealing with complaints made, even if practitioners consider that the complaints are without justification. Not only did Mr Parlane fail to co-operate with the various inquiries which were required to take place under the legislation, but he chose to vilify those who were carrying out their statutory duties. The result was obviously to put obstacles in the way of the performance of those duties. Mr Parlane's conduct was egregious.

# 6. PROPER PROFESSIONAL PRACTICE

## Chapter 11 of the RCCC

### Lawyers practising on own account

*11 A lawyer practising on their own account must ensure that –*

*(a) their law practice is administered in a manner that ensures that each of the following duties is adhered to:*

*(i) the overriding duty to the court:*

*(ii) the duties to persons engaged or employed by the law practice, including all persons who perform legal and non-legal services (whether paid or otherwise) at or for the law practice, whether under a contract of employment, under a contract for services, as a volunteer, or otherwise:*

*(iii) the duties to existing, prospective, and former clients; and*

*(b) the reputation of the legal profession is preserved.*

The key change to r 11 is the inclusion at r 11(a)(ii) of the duties owed to persons engaged or employed by the law practice.

This reflects the emphasis in the Working Group's report that lawyers' professional standards need to include a focus on the way in which lawyers practising on their own account engage with employees, contractors, and volunteers who work for the law practice as well as on their duties to the court, to clients and on the need to preserve the reputation of the profession.

### Supervision and management

Rule 11.1 is a redrafting of r 11.3 and provides as follows.

*11.1 A lawyer practising on their own account must take all reasonable steps to ensure that–*

*(a) the operation of the law practice (including separate places of business) is at all times competently supervised and managed by a lawyer who is practising on their own account; and*

*(b) the conduct of all persons engaged or employed by the law practice is at all times competently supervised and managed by a lawyer who is practising on their own account.*

The amendment of the RCCC makes it timely for all lawyers practising on their own account who engage or employ staff to review their supervision and management systems and policies and make improvements where required. The redrafting of the rule makes it clearer that there are two key aspects that arise:

- The supervision and management of the operation of the law practice as a whole (including separate places of business); and
- The supervision and management of all persons engaged or employed by the law practice.

For a small law practice it will be the same person or persons responsible for both of these aspects. For medium and large law practices, there will be a manager or management team with primary responsibility for the supervision and management of the operation of the law practice as a whole, with a wider leadership team responsible for the individual supervision and management of all persons engaged or employed by the law practice.

The level of supervision within a law practice should be tailored to the nature and circumstances of that practice. Too little supervision will likely breach the practice's obligations. On the other hand, too much supervision is commercially unrealistic and needlessly duplicative, and may serve to inhibit the development by junior lawyers of necessary expertise and experience.

There are two fundamental aspects to good supervision and management:

- Good systems, policies, and processes in place for exercising supervision and management within the law practice, including the setting of minimum expectations.
- A flexible application of the appropriate level of guidance, direction and control to each individual task.

Examples of good supervision and management in practice may include:

- An assessment of the appropriate level of supervision that considers:
  - the level of competence of the supervisee involved – training and work history;
  - any actual or potential problems or issues with the task; and
  - the level of risk and cost associated with the task.
- Provision of training in key and common aspects of a supervisee's role.
- Adequate instructions and guidance on tasks.
- Review and sign off of final work products.
- Accompanying the supervisee to external meetings and Court fixtures as appropriate.

### Policies and systems to protect persons engaged or employed by law practices

Rule 11.2 introduces a new requirement in the RCCC, although it reflects a requirement that persons in control of a law practice should generally have met anyway in compliance with health and safety obligations. Rule 11.2 provides as follows:

> *11.2 A lawyer practising on their account must ensure that the lawyer's law practice has effective policies and systems in place to prevent and protect all persons engaged or employed by the law practice from the effects of unacceptable conduct, including conduct that amounts to 1 or more of the following:*
>
> *(a) bullying:*
>
> *(b) discrimination:*
>
> *(c) harassment:*
>
> *(d) racial harassment:*
>
> *(e) sexual harassment:*
>
> *(f) violence.*

There is no one size fits all approach to appropriate policies and systems that a law practice may have in place to comply with this obligation. Much will depend on the nature and size of the law practice.

Policy documents may be prescriptive, but this is not necessarily required.[44] Indeed, r 11.2 refers to policies *and* systems to reflect the reality that not all aspects of a law practice that are relevant to compliance with the rule can or will be prescribed in the law practice's formal policy documents. That said, policies designed to prevent and protect persons engaged or employed by the law practice should cover:

- A clear statement that bullying, discrimination, and harassment (and any of the prohibited forms of conduct) is not accepted by the practice at any level and that all persons engaged or employed by the practice can expect to be treated with respect.
- An expectation that senior lawyers and managers actively support the policy, including modelling respectful behaviour themselves.
- A clear and simple reporting process (consultation with employees on this aspect will help to make an effective policy for your practice).
- Avenues of support for complainants.
- General procedures for the investigation of complaints.
- Confidentiality and privacy (noting that these cannot operate to exclude mandatory reporting requirements to the Law Society).

Relevant systems include risk assessment processes to set controls designed to eliminate or mitigate the risk of prohibited behaviour in the workplace and ensuring that there are appropriate training opportunities for workers and managers. Training should be directed at awareness of what constitutes bullying and harassment and other prohibited behaviours, the available options to address the behaviour, and the importance of raising and addressing issues before they escalate.

While not expressly referred to in r 11.2, as set out above the RCCC now expressly prohibits the victimisation of a person who make a complaint or report. A law practice's policies and systems should operate to prevent behaviour that may amount to victimisation.

### Designated lawyer

The amendments to the RCCC have introduced the concept of a "designated lawyer". This creates a role within a law practice for a person designated as responsible for discharging the law practice's reporting and certification obligations established by rr 11.4 and 11.5.

> *11.3 A lawyer practising on their own account must ensure that at all times the lawyer's law practice has a lawyer who is designated for meeting the requirements specified in rules 11.4 and 11.5. A lawyer designated for this purpose must be practising on their own account.*

There are no specific requirements for who may be named as the designated lawyer in a law practice other than that the designated lawyer must be practising on their account. Larger law firms typically have a senior partner or director in a management role as

[44] Helpful policy templates can be found online. For example, see https://www.worksafe.govt.nz/topic-and-industry/sexual-harassment/sexual-harassment-example-policy/. Care must be taken not to simply adopt a template policy form unthinkingly but to ensure it is tailored to meet the particular features and needs of the law practice.

managing partner or chair of the firm's board and this may be the obvious person to be designated by the firm under r 11.3.

### Reporting and certification

Rule 11.4 and its sub-rules contain important new requirements that a lawyer designated under r 11.3 must comply with.

*11.4 A lawyer designated under rule 11.3 must notify the Law Society, within 14 days, if any person is issued a written warning or dismissed by the law practice for conduct that amounts to 1 or more of the following:*

*(a) bullying:*

*(b) discrimination:*

*(c) harassment:*

*(d) racial harassment:*

*(e) sexual harassment:*

*(f) theft:*

*(g) violence.*

*11.4.1 A lawyer designated under rule 11.3 must notify the Law Society, within 14 days, if—*

*(a) any person leaves the law practice; and*

*(b) within the 12 months before the person's leaving, the law practice had advised that person that it was dissatisfied with, or intended to investigate, their conduct in relation to any of the types of conduct referred to in rule 11.4.*

*11.4.2 Rule 11.4.1 does not apply to circumstances where the investigation has been concluded and there were no grounds to report the matter under rule 2.8 or 11.4.*

*11.4.3 A report submitted under rules 11.4 and 11.4.1 must—*

*(a) be in written form; and*

*(b) identify—*

*(i) the person making the report; and*

*(ii) the person or persons to whom the report relates; and*

*(c) specify details of the alleged conduct; and*

*(d) be supported by any appropriate documentation held by or available to the person making the report.*

*11.4.4 A lawyer designated under rule 11.3 must certify to the Law Society annually, by a date prescribed by the Law Society, whether—*

*(a) the law practice has complied with all of the mandatory reporting obligations imposed under the Lawyers and Conveyancers Act 2006; and*

*(b) the law practice has policies and systems in place as set out in rule 11.2 and is complying with its obligations under the Health and Safety at Work Act 2015; and*

*(c) the designated lawyer has complied with rule 11.4.*

*11.4.5 For the purposes of this rule, **person** includes any lawyer or any other person who ceases to perform legal or non-legal services for the law practice, including after the termination or expiry of a fixed-term contract, resignation, or otherwise.*

*Reporting*

Rule 11.4 requires notification to the Law Society, within 14 days, if any person is given a written warning or is dismissed by the law practice for conduct that amounts to one or more of the following:

- bullying;
- discrimination;
- harassment;
- racial harassment;
- sexual harassment;
- theft;
- violence.

Rule 11.4.1 requires notification, within 14 days, if any person leaves the law practice having been advised within the previous 12 months by the practice that it was dissatisfied with, or intended to investigate, their conduct in relation to the types of behaviour listed above. For example:

> Tom is a lawyer who works at a law practice and is accused of sexually harassing a staff member. The law practice advises Tom that it intends to investigate the allegation that has been made. Tom leaves the law practice on a date that is within 12 months of this occurring. The law practice's designated lawyer must notify the Law Society within 14 days of Tom leaving the law practice. It is not relevant to the reporting obligation whether Tom's decision to leave was unconnected to the allegation or investigation.

These new reporting requirements expressly exclude circumstances where the investigation into the alleged behaviour has concluded and there are no grounds to report the matter under rr 2.8 or 11.4. That is, a report by the designated lawyer is not required if, at the conclusion of the investigation:

- reasonable grounds do not exist to suspect the lawyer may have engaged in misconduct; and
- neither a written warning nor dismissal occurred as a result of the investigation.

Using the same example as above:

> The law practice concludes its investigation and finds that the allegation against Tom is unsubstantiated, or alternatively, that it does not rise to the level of suspected misconduct or justify a written warning or dismissal. Tom leaves the law practice after the investigation has concluded and within 12 months of the law practice initially advising him that it intended to investigate the allegation. No reporting obligation is engaged.

> A report made by the designated lawyer must be made in writing, identify the person making the report and the person or persons to whom the report relates, and specify details of the alleged conduct. The report must also be supported by any appropriate documentation held by or available to the designated lawyer.

The purpose of the rule is clear – to impose mandatory reporting requirements not just on individual lawyers under r 2.8, but also on law practices through their designated lawyer – as a response to the concerns identified by the Working Group about misconduct being kept hidden from regulatory scrutiny with the wrongdoing lawyer simply moving on to their next role.

*Certification*

The designated lawyer must annually certify the law practice's compliance with:

- the mandatory reporting obligations imposed under the LCA;
- the requirement in r 11.2 that the law practice has policies and systems in place to prevent and protect persons engaged or employed by the law practice from unacceptable conduct and to comply with its obligations under the Health and Safety at Work Act 2015.

The designated lawyer must also annually certify their own compliance with the r 11.4 reporting obligations.

**Client complaints mechanisms**

> *11.5 A lawyer practising on their own account must ensure that the lawyer's law practice establishes and maintains appropriate procedures for handling complaints by clients with a view to ensuring that each complaint is dealt with promptly and fairly by the law practice.*
>
> *11.5.1 When a lawyer owns a sole law practice, the complaints procedure may include the reference of complaints to an independent lawyer for consideration.*
>
> *11.5.2 This rule does not bind a lawyer whose status in a law practice is solely that of an employee.*

This change shifts existing r 3.8 to Chapter 11 of the RCCC, given that the requirements of the rule form part of professional practice obligations by a law practice and dovetails with the need to have policies and systems in relation to the proper handling of complaints internally by the law practice (and subject of course to the reporting requirements under rr 2.8 and 11.4).

There is also some minor redrafting to reflect the new definition of "law practice" included in the amendments to the RCCC. This presents a good opportunity for law practices to review their client complaints mechanisms. Law practices are well advised to put time and effort into having client complaints mechanisms that are fit for purpose. It is self-evidently in the interests of consumers of legal services that lawyers are responsive to complaints about their work and conduct, and it is in the interests of lawyers to deal with and resolve such complaints themselves rather than matters escalating to the point where a complaint is made to the Law Society. Of course, just as with reports and complaints made by persons engaged or employed by the law practice, client complaints cannot be dealt with in a way

that purports to exclude the right of the client to complain to the Law Society and there must be compliance with mandatory reporting obligations.

### In-house lawyers

The Working Group noted that in-house lawyers make up 23% of the legal profession in New Zealand. However, it could not identify a satisfactory way of extending professional practice obligations of the kind addressed in this chapter to in-house legal services.

The definition of "law practice" in r 1.2, which is a cornerstone definition for the purpose of these RCCC Chapter 11 requirements, does not include an in-house legal services team. This does not mean that in-house lawyers have no protections. All lawyers, including lawyers who are managers of in-house legal teams, are bound by the new conduct rules in Chapter 10 of the RCCC and any misconduct must be reported under r 2.8. In addition, the protections of the general law apply under the Employment Relations Act, the Health and Safety at Work Act, and the Human Rights Act.

# 7. GOOD CAUSE TO TERMINATE A RETAINER

## Unacceptable behaviour by a client

### Rule 4.2

It is now beyond doubt that a lawyer may terminate a retainer if their client engages in behaviour that amounts to bullying, discrimination, harassment, racial or sexual harassment, threatening behaviour, or violence towards that lawyer or a person associated with the law practice.

Rule 4.2 permits a lawyer to terminate a retainer for "good cause" and a new para (f) has been added to the RCCC to expressly record the types of behaviour that are good cause to terminate a retainer:

> *(f) conduct by the client directed towards the lawyer or a person associated with the law practice that amounts to 1 or more of the following:*
>
> *(a) bullying:*
>
> *(b) discrimination:*
>
> *(c) harassment:*
>
> *(d) racial harassment:*
>
> *(e) sexual harassment:*
>
> *(f) threatening behaviour:*
>
> *(g) violence.*

### Starting point – the "cab rank rule"

One of the most fundamental duties of a lawyer is the duty to accept instructions from members of the public that are within the lawyer's areas of practice. This is referred to as the "cab rank rule". The rule recognises that lawyers have an essential role in facilitating access to justice. Lawyers are not free to turn away persons who seek their assistance, or to terminate an existing retainer, without good cause.

The articulation of the cab rank rule is found in r 4 of the RCCC which provides that:

> A lawyer as a professional person must be available to the public and must not, without good cause, refuse to accept instructions from any client or prospective client for services within the reserved areas of work that are within the lawyer's fields of practice.

There are exceptions to the cab rank rule: "good cause" to refuse to accept instructions or to terminate a retainer.

Good cause to refuse to accept instructions include a lack of available time, the instructions falling outside the lawyer's normal fields of practice, instructions that could require a lawyer to breach any professional obligation or the unwillingness or inability of the prospective client to pay the lawyer's normal fee. A lawyer must be able to show that genuine grounds exist for the lawyer to rely on these exceptions to the cab rank rule.

The same requirement applies to the question of whether a lawyer has good cause to terminate a retainer: a lawyer must be able to show that genuine grounds exist to do so. The

various grounds which may constitute good cause to terminate a retainer can be found at r 4.2 of the RCCC.

A lawyer who refuses to accept instructions or terminates a retainer, without being able to show that genuine grounds exist which amount to "good cause" under the RCCC, may have breached rr 4, 4.1, or 4.2 of the RCCC and may have engaged in unsatisfactory conduct or misconduct as a result.

### Termination of a retainer due to client behaviour

Conduct by a client directed towards the lawyer or a person associated with the law practice that amounts to one or more of the behaviours set out at r 4.2.1(f) is good cause to terminate a retainer.

A "person associated with the law practice" includes a barrister instructed by the law practice and a person engaged or employed by the law practice. There may be good cause to terminate a retainer if, for example, a client engages in bullying or discriminatory behaviour towards support staff employed by the law practice. It is not necessary that the client's unacceptable behaviour be directed at a lawyer in the law practice for there to be good cause to terminate a retainer.

Rule 4.2.1(f) of the RCCC is consistent with existing employer obligations under the Health and Safety at Work Act 2015, the Employment Relations Act 2000, and the Human Rights Act 1993. Law practices must make sure they are acting to protect persons employed or engaged by the law practice from harm, including terminating a retainer if necessary, where a client is engaging in unacceptable behaviour towards a person employed or engaged by the law practice.

Just as with other grounds that provide good cause to terminate a retainer, there must be a genuine basis for a lawyer to conclude that good cause exists to terminate the retainer due to the client's behaviour towards them or a person employed or engaged by the law practice. A lawyer's personal opinion of their client or the goals their client is pursuing may be unfavourable, but this is not good cause to terminate a retainer. The facilitation of access to justice reflected by the cab rank rule requires lawyers to provide their services without letting moral judgements interfere with them doing so in their clients' best interests. This includes, for example, representing persons who may have committed serious crimes.

It may be possible for a lawyer to take steps to protect a person associated with the law practice from unacceptable behaviour by a client without terminating the retainer. Lawyers should consider protective steps that may be reasonably available before terminating a retainer on this ground. However, available protective steps do not include steps that breach the lawyer's (or the law practice's) wider legal obligations, for example, by unjustifiably disadvantaging a person in their employment or otherwise discriminating against persons engaged in or employed by the law practice.

> ABC Limited is the major client of the law practice Mahi Law. The legal work that Mahi Law does for ABC provides excellent commercial law experience and opportunities for advancement for the junior and intermediate lawyers employed by Mahi Law.
>
> Jack Smith is a manager at ABC and is the sole point of contact between ABC and the lawyers who work at Mahi Law. Jack Smith has engaged in behaviour that amounts to sexual harassment of two female lawyers at Mahi Law. ABC does not

consider that Jack Smith's conduct is a problem and refuses to allow Mahi Law to take its instructions from anyone else at ABC.

*Does Mahi Law need to act?*

Yes, Mahi Law has employment obligations to make sure its employees are safe. It must therefore take practicable steps to stop a repeat of Jack Smith's conduct. Good cause plainly exists for Mahi Law to terminate the retainer. Are there protective steps available to Mahi Law to avoid the need to terminate?

*What protective steps could Mahi Law take?*

Potential options that Mahi Law could explore are diverting phone calls from Mr Smith to the supervising partner and ensuring that the supervising partner also attends client meetings with Mr Smith.

*Can Mahi Law remove the female lawyers who are presently working on ABC matters, and only use male lawyers on ABC matters in the future?*

No, Mahi Law would be discriminating against and unjustifiably disadvantaging its female lawyers relative to their male colleagues if it removed the female lawyers.

*Is there good cause to terminate the retainer?*

Yes, under r 4.2.1(f). Further, if there are no steps reasonably available to protect its staff, Mahi Law's wider employment obligations might require the retainer to be terminated.

# 8. CONTINUING PROFESSIONAL DEVELOPMENT

Changes to the Lawyers and Conveyancers Act (Lawyers: Ongoing Legal Education—Continuing Professional Development) Rules 2013 allow for the Law Society to impose a mandatory component to lawyers continuing professional development requirements. Amendments have been made to rr 3, 4 and 6.

> *3.1(b)* ***activities*** *means learning that—*
>
> - *includes any mandatory component required by the New Zealand Law Society.*

The definition of activities in r 3.1(b) has been extended to include any mandatory component required by the Law Society.

Rule 4, which outlines lawyers continuing professional development requirements, will now include at 4.1(b) that lawyers undertake the required hours of CPD activities specified in r 6, including any mandatory component required by the Law Society.

Any mandatory component the Law Society requires will be included as part of a lawyer's 10-hour minimum requirement.

# 9. HELP AND SUPPORT

The health and wellbeing of all lawyers is important to the Law Society. To this end the Law Society provides access to a variety of different support and guidance services which are available to support lawyers through the disciplinary process. Details of those services are provided below.

## National Friends Panel

The National Friends Panel is a New Zealand Law Society service. The Panel is made up of lawyers willing to be contacted on a confidential basis by other lawyers with questions or concerns relating to practice issues. It can be helpful to discuss things with someone who understands the pressures of life as a lawyer. Some of your experienced colleagues have put themselves on this panel and offered to provide assistance and support to lawyers who are dealing with bullying and harassment in the workplace. Care should be taken at the beginning to establish the relationship – a lawyer/client relationship (on a pro-bono) basis will ensure that the matter is privileged so that issues relating to reporting do not arise for the "friend" or colleague. [45]

If you would like to discuss utilising this service or would like assistance with selecting a "friend" you can contact the Law Care free phone on 0800 0800 28.

## Legal community counselling service

The Law Society has engaged Vitae[46] to provide short-term, solution-focused counselling by trained and accredited clinicians (counsellors, psychologists or psychotherapists).

This is available to anyone in a legal workplace – lawyers and non-lawyers, who can contact Vitae if they want to access the Legal Community Counselling Service.

The service is individual and confidential.

The service is available every day of the year and every hour of the day. There are three ways you can access this service:

- Free call Vitae on 0508 664 981;
- Fill out the online referral form;
- Download the Vitae NZ app from the App store or Google Play.

When contacting Vitae please mention that you are accessing the Legal Community Counselling Service.

Anyone using the Legal Community Counselling Service will be able to have up to three free confidential sessions with an appropriate counselling professional of their choice. The first two sessions are on a self-referral basis. Vitae is able to recommend on an anonymous basis that the Law Society funds a third session if this is needed. No individual information will be provided by Vitae to Law Society when seeking approval for a third session.

45 Rule 2.8.4(a) of the Amendment Rules.
46 http://www.vitae.co.nz/

All contact will be between the person seeking assistance and Vitae. No personal details will be provided to the Law Society. As this is a trial and we need to see how the service is being used and by whom, statistical information will be collected by Vitae and passed onto the Law Society in an anonymous, aggregated form.

## Law Care: 0800 0800 28

The Law Society has a dedicated 0800 phone line (0800 0800 28) where members of the legal community can discuss sensitive matters with a Law Society staff member.

Law Care is a confidential point of contact for lawyers and law firm employees who have experienced, witnessed, or been affected by sexual assault, sexual harassment, or other unacceptable behaviour.

The Law Society staff who operate the phone line can offer callers a range of options and support services to assist in dealing with their concerns. They have received training focused on the needs of those who may use this service.

## Other support

- Larger organisations often have confidential support schemes (such as Employee Assistance Programmes) which you may be able to access.
- WorkSafe also provides information on what you can expect from your employer once you bring your concerns to their attention.
- The Humans Rights Commission[47] has a specific guide on dealing with sexual harassment. The Commission also offers a free, confidential service for anyone enquiring or complaining about discrimination, racial or sexual harassment – 0800 496 7877.

There are also other resources and organisations that can assist in relation to sexual harassment and assault:

- Safe to Talk: Send a text to 4334 and they will text you back;
- Police: 111;
- HELP: 09 623 1700;
- Counselling Services Centre: 09 277 9324;
- National rape crisis: 0800 883 300;
- ACC (for assistance with funding support): ACC Sensitive Claims 0800 735 566;
- Lifeline: 0800 543 354 (0800 LIFELINE);
- Sexual assault support centres near you: www.sexualabuse.org.nz.

You may also have access to free confidential services or support schemes through your employer, such as an Employee Assistance Programme (EAP).

[47] https://www.hrc.co.nz/enquiries-and-complaints/what-you-can-complain-about/