NEW RULES, SAME CULTURE?
Commentary on the changes to the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008

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I INTRODUCTION

From 1 July 2021, amendments to the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 and the Lawyers and Conveyances Act (Lawyers: Ongoing Legal Education – Continuing Professional Development) Rules 2013 came into effect (collectively, the Rules). These amendments came about due to a changing social context that brought well overdue revelations regarding the legal profession into the public eye. The changes signal there should be no tolerance for unlawful behaviour between members of the profession.

The global #MeToo social movement stimulated a national debate in Aotearoa about sexual abuse and sexual harassment. In mid-February 2018, allegations began to surface of sexual harassment and assault at one of the country's biggest law firms, Russell McVeagh. The complainants were summer clerks at the time, who all alleged a former partner of the firm indecently assaulted them at the Wellington firm's Christmas functions in 2015. It soon became clear these allegations were not isolated to one individual, nor to one firm, but rather formed part of a larger systemic cultural issue that required serious and urgent change.

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As part of its response to the revelations, the New Zealand Law Society (NZLS) circulated a consultation document about proposed changes to the Rules in early June 2020 and a draft of the changes was prepared. It is important to note there was no wider political will from the Government to change the Lawyers and Conveyancers Act 2006 (the Act). Therefore, NZLS was required to do what it could to update the Rules, without making changes to the Act. Feedback was given by many groups, such as women's legal associations, the Aotearoa Legal Workers' Union and the In-House Lawyers Association (ILANZ). The final version of the Rules became available on 1 April 2021.

The amended Rules include definitions of bullying, discrimination, harassment, including racial and sexual harassment, and other unacceptable behaviour within the legal profession. New mandatory reporting requirements have also been introduced for firms, requiring notification to the NZLS of this type of conduct to ensure there is an appropriate response (and accountability) from the legal profession. There are express references to firms' compliance with their health and safety obligations being reported to the NZLS.

Whilst it should always have been obvious such conduct was manifestly unprofessional and potentially amounted to misconduct, the fact that this was not expressly articulated in the Rules allowed for ambiguity in interpretation (whether genuine or feigned). Recognition of the scale of the problem of unlawful conduct within the profession, making a strong statement that it is not to be tolerated, and addressing it, are long overdue. However, in our view, questions arise as to whether these new Rules go far enough and what the impact of the changes will be.

Although the definitions and ambit of the Rules have been improved by amendments following the consultation period, the restricted scope, novel definitions, and finer detail of the reporting regime may create some concern. The effect of the Rules and the new mandatory reporting regime is yet to be seen. It is possible we may see both an overreaction and underreaction under these new Rules, as the profession takes time to better understand their function, application and purpose.

II SOCIAL CONTEXT TO THE CHANGES OF THE RULES

The allegations of sexual misconduct in law firms, most notably at Russell McVeagh, signified the starting point for a long overdue public discussion about inappropriate conduct within the legal profession. Forming part of the larger "#MeToo" movement against sexual abuse and harassment that swept across the globe, the legal profession (in Aotearoa and in other jurisdictions) was forced to acknowledge and reflect on revelations about bullying and sexual harassment in the profession. It emerged from the ensuing surveys and public discourse that many people had experienced a range of inappropriate conduct in the legal profession.[1] However, the public debate also showed many people did not regard sexual harassment, bullying, racism and other forms of unlawful and harmful behaviour towards colleagues as warranting disciplinary action.[2]

It is difficult to believe that abusive behaviour within the legal profession, as experienced by the five young women at Russell McVeagh,[3] was not already formally expressed as capable of being held to be professional misconduct. The fact such conduct was unacceptable was made abundantly clear by the New Zealand Lawyers and Conveyancers Disciplinary Tribunal in the James Gardner-Hopkins case, stating:[4]

> This decision affirms what has always been the case, namely that indecent, unconsented or unwelcome touch by a lawyer on another, breaches the standards of conduct expected of a member of the profession. Intimate non-consensual touch connected with the workplace, on someone that the lawyer has power over, has always been unacceptable.

As publicity spread, there was an outpouring of stories and discussion about sexual harassment, bullying, violence and discrimination experienced by individuals within the legal profession.[5]

The NZLS Legal Workplace Environment Survey (the Survey) of 3516 lawyers found that nearly one third of female lawyers have been sexually

1 Colmar Brunton *Legal Workplace Environment Survey 2018* (New Zealand Law Society, 28 May 2018).

2 *Report of the New Zealand Law Society Working Group* (NZLS Report) (New Zealand Law Society, December 2018) at 36.

3 *National Standards Committee No.1 v James Desmond Gardner-Hopkins* [2021] NZLCDT 21.

4 At 172.

5 For example the stories posted on Zoë Lawton's #Metoo Blog: Zoë Lawton "#Metoo blog" (2018) <zoelawton.com>.

harassed during their working life.[6] Such experiences are not recent developments; widespread discrimination and sexual harassment of women in the profession has been reported since the first nationwide survey of lawyers in 1992.[7] In addition, the Survey showed that bullying, racism and other forms of discrimination were widespread, with 52 per cent of lawyers reporting bullying at some point in their career.[8] The Survey showed that race and culture plays a role in bullying, with Māori, Pasifika, and Asian lawyers reportedly experiencing bullying more frequently than Pākehā lawyers.[9] At the same time, 40 per cent of lawyers under the age of 30 believed major changes were needed to improve the culture of their workplace.[10] The Survey indicated there are entrenched cultural, structural and historical issues which have continued to create barriers to achieving equality and diversity within the legal profession. A comprehensive review of the regulatory framework was clearly necessary to address these barriers, which had become woven into the fabric of the profession.

In response NZLS commissioned an enquiry undertaken by a Working Group chaired, by Dame Silvia Cartwright. The report completed by the Working Group (the Report) stressed the importance of not being complacent in the wake of the Gardner-Hopkins case. The Report emphasised the importance of rebuilding public trust in the NZLS after a previous lack of oversight, and increased revelations of bullying, sexual violence, harassment and discrimination.[11]

III CHANGING THE RULES – NO POLITICAL WILL TO CHANGE THE ACT

One important thing to note is that the statutory definition of 'misconduct' has not been amended. The Report recommended changes to both the Act and the Rules. However, only the Rules have been amended. Although the NZLS said it was in close communication with the Government, and the prospect of changes to the Act was initially considered, ultimately the advice from the Government was this was not possible at this time.[12] As a result, the changes to

6 Colmar Brunton, above n 1, at 21.
7 NZLS Report, above n 2, at 22.
8 Colmar Brunton, above n 1, at 6.
9 At 7.
10 At 13.
11 NZLS Report, above n 2, at 8.
12 New Zealand Law Society "Key proposals for change to the Conduct and Client Care Rules" (2020)

the Rules include the addition of the statement below in order to clarify the purpose and nature of the principal rules:[13]

> 1.5.1 These rules set the minimum standards of professional conduct and client care that all lawyers are required to observe in order to maintain the reputation and integrity of the profession so as to ensure public confidence in the provision of legal services. The rules provide a reference point for discipline.
>
> 1.5.2 The preservation of the integrity and reputation of the legal profession is the responsibility of every lawyer.

Further rules have been introduced to signpost to the profession what is unacceptable behaviour. The expressly prohibited behaviour is defined as bullying, harassment, discrimination, sexual harassment or violence (which includes all forms of physical, psychological and sexual abuse or assault).[14] The definition of sexual harassment is broadly similar to the legal definitions under the Employment Relations Act 2000 and Human Rights Act 1993.

By way of context, in 2019 the Lawyers Standards Committee (the Committee) made a finding of unsatisfactory conduct against a lawyer who sexually harassed two law firm employees at work social functions.[15] The Committee was prepared to broaden the ambit of the definition of regulated services to social occasions connected to the lawyer's workplace.[16] The Committee unanimously determined the lawyer's conduct amounted to unsatisfactory conduct.[17] However, the Committee decided that a charge of misconduct was not justified due to the following mitigating factors: the lawyer had acknowledged the behaviour, taken responsibility for his actions, shown remorse and resigned from his job.[18] Additionally, the two employees concerned had indicated they were happy with the way the firm had dealt with the matter.[19]

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941 LawTalk at 8.

13 Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (LCCC Rules), r 1.5.

14 Rule 1.2.

15 *Re Mr X* (Concerning Part 7 of the Lawyers and Conveyancers Act 2006) National Standards Committee ZTUVK, 16 March 2018.

16 At [32].

17 At [52].

18 At [61]

19 At [61].

It is interesting to consider whether a similar finding would be made under the Rules if such a case were to come before the Committee today, given the amendments that have been made. Hopefully, under the new Rules, this behaviour would clearly be identified as misconduct, regardless of the mitigating factors, and that any mitigating factors would be considered in terms of outcomes, rather than assessing whether the threshold for misconduct has been met.

Unfortunately, the complaints process is still governed by the Act, not the Rules. Despite the Working Group concluding in the Report that the process under the Act is not fit for the purpose of dealing with complaints about harassment, sexual harassment, discrimination, bullying or violence, no changes to the Act have been made.[20] This is a major failing of the reforms. In our experience, many people who make formal complaints of sexual harassment and assault report the legalistic, lengthy, opaque and often adversarial complaints process they endured caused them as much harm, or more, than the original conduct.[21] This is supported by the Citizen's Advice Bureau who report that from their experience, people who experience harassment and bullying at work are more likely to move to a different job, rather than going through the process of raising a complaint.[22]

The NZLS has since stated that changes to the Act were not possible at the time, and substantive changes could follow an "independent review of the structure and function of the Law Society which was announced in October 2019".[23] This review is ongoing. Changes have been introduced into the make-up of Standards Committees and internal Law Society processes to try to improve the experience of complainants in sensitive cases.

The ambiguities of new definitions and responsibilities, and the failure to amend the Act in addition to the Rules, raises the possibility the Courts will read the Rules down in any legal challenge about the application of the changed Rules. If a challenge were to be taken to the High Court, the risk

20 NZLS Report, above n 2, at 12.

21 Steph Dyhrberg, Debbie Francis and Alison Mau *"Eliminating Sexual Harassment in the Workplace: Time for a Fresh Approach"* (papers presented to the 2020 CLE Conference Employment Law – Justice at Work?, 22 October 2020).

22 Ministry of Business, Innovation and Employment *Issues Paper: Bullying and Harassment at Work* (2020)at [39].

23 New Zealand Law Society "Key proposals for change to the Conduct and Client Care Rules", above n 12, at 8.

remains that the Court could take a different interpretation approach than intended by the NZLS in enacting the changes.

IV DEALING WITH CLIENTS

An important protective measure for the staff of law firms has been added to the Rules. The grounds for terminating a client retainer now include situations where a client is subjecting any employee or associated person (for example, a contractor or barrister) to any risk of violence, harassment, sexual harassment, bullying, discrimination or threatening behaviour.[24] Previously, there were limited and ambiguous grounds for terminating a retainer, such as inappropriate client behaviour towards staff and colleagues.

Firms are often reluctant to terminate a retainer due to financial constraints. However, together with the health and safety obligations on a Person Conducting a Business or Undertaking (a PCBU), the Rules will now form a basis for holding firms to account in relation to how they address inappropriate client behaviour. Firms should make it clear to clients and staff that harassment and other inappropriate behaviour towards employees and others in the workplace by clients will not be tolerated and may result in termination of the retainer. However, we imagine many firms will be reluctant to do this and people may feel pressure not to raise these issues where it could result in terminated retainers and a loss of fees. There should be safe and accessible processes for dealing with any issues if and when they arise. It would be helpful to include what behaviour is expected, and other health and safety requirements (for example, around Covid-19), in initial engagement terms for new client retainers.

V MANDATORY REPORTING REGIME

The other key change to the Rules is the new reporting and compliance obligations imposed on legal partnerships, incorporated firms and entities offering regulated services to the public. Each firm must have a designated person who is a lawyer qualified to practise on their own account, such as a partner.[25] This person is responsible for notifying the NZLS within 14 days if any lawyer is issued with a written warning or dismissed for any of the following conduct:[26]

24 LCCC Rules, above n 13 , r 4.2.1(f).
25 Rule 11.3.
26 Rule 11.4.

i) Harassment

ii) Sexual harassment

iii) Discrimination

iv) Bullying

v) Violence

vi) Theft

The designated partner will also need to give an annual undertaking of compliance with the Rules.[27] If these requirements are breached, there could be disciplinary consequences for the designated person, and any other lawyer who knew about the behaviour and failed to report it. Firms must certify every year that they have complied with these obligations, including having the policies and systems in place and meeting health and safety obligations.[28] The designated partner must also advise the NZLS if a lawyer or other staff member leaves and, within the previous 12 months, the firm had raised issues with that person regarding their conduct,[29] or intended to investigate allegations of that conduct. This includes situations where there is an end of a contract, fixed term engagement or on resignation. It would therefore be unwise to give an unqualified positive reference for a departing employee when such issues have been raised. Notably, this requirement extends to non-legal staff. This raises a question as to why non-lawyer employees of a law firm should be reported to a body which does not have any regulatory power over them.

We consider it a significant shortcoming that, whilst the Rules governing conduct apply to all lawyers holding a current practising certificate, the mandatory reporting obligations do not apply to barristers' chambers and in-house legal teams. The NZLS adopted an entity reporting approach. In a 2020 survey of 14,981 New Zealand practising certificate holders, 1,702 identified themselves as barristers and a further 3,598 classed themselves as in-house lawyers.[30] The mandatory reporting scheme therefore excludes a significant proportion of practising lawyers.

ILANZ commented on this in its feedback to the NZLS on the proposed

27 Rule 11.4.4(c).
28 Rule 11.4.4(a)–(b).
29 Rule 11.4.1.
30 Compiled by Geoff Adlam "Snapshot of the Profession 2020" (2020) 940 LawTalk 28.

changes, noting that beyond the universal requirements for all lawyers to uphold the rules and the individual reporting obligation of Rule 2.8, the changes focused largely on those who are working in a legal practice as opposed to as barristers or in-house.[31] Although ILANZ acknowledged the nature of the in-house employment relationship means there are inherent difficulties in terms of the reach of the NZLS as a regulator, it emphasised that not applying the same standards across the profession is a significant omission and lost opportunity.[32]

ILANZ welcomed an opportunity to work with the regulatory team to produce best practice guidelines that would work towards the same outcome for all lawyers and groups of lawyers.[33] This would provide in-house lawyers and barristers with clear guidelines, and an opportunity to review and enhance their current ethical guidance to ensure consistency as far as possible with the changes to the Rules.[34] To date there has been no notable work in progress.

In addition, the reporting requirements do not apply to lawyers without practising certificates. This was raised by the Report, which ultimately decided that those without practising certificates should not be subject to the reporting requirement.[35] Instead, the Report recommended that clear information should be given to people in the legal community who are not lawyers, about the standards expected, complaints process and available assistance.[36] Although there were concerns from the Working Group this would create a disproportionate burden and unintended negative impacts, arguably, without a clear approach across the legal community, it may be difficult to create the necessary structural change.

The NZLS has recently clarified that it will engage a Screening Panel process via the Legal Complaints Review Officer to assess whether information provided under the mandatory reporting regime should be referred to a Standards Committee.[37] A Standards Committee can decide to open an own-motion investigation. Further guidance provided by the NZLS recently also

31 Feedback from the ILANZ Committee (ILANZ, 3 August 2020) at 1.
32 At 1.
33 At 1.
34 At 2.
35 NZLS Report, above n 2, at 40.
36 At 40.
37 Katie Rusbatch "Rules of Conduct and Client Care" (paper presented at Wellington Women Lawyers' Association workshop – New Rules Governing Lawyers' Behaviour, 5 November 2021).

sets out the process that must be followed when making a report or a complaint and provides the resources to do so.[38]

Ultimately, the NZLS needs to spell out how this information is intended to be used, how the Screening Panel system will work (and who is on this Panel) and ensure the privacy principles around collection, storage, accuracy, access and correction are complied with in accordance with the Privacy Act 2020.

VI OVERREACTING AND UNDERREACTING?

As is often observed in other regulatory contexts, imposing mandatory reporting may have significant unintended consequences. Ironically, the consequences of the amendments to the Rules may actually increase the power imbalance between law firm partners and their more junior staff. There is a lack of clarity and guidance for practitioners about the types of incidents or behaviours, other than where a warning or dismissal results, that must be reported. It is not clear what the threshold is for reporting behaviour. There is a disconnect between the reporting obligations, particularly for unsubstantiated allegations or concerns, the threshold for issues that are likely to be considered by a Standards Committee to warrant disciplinary action, and the serious impact such issues could have on the employment prospects of law firm employees.

Sexual harassment, discrimination and bullying cover a multitude of sins that exist along a spectrum. It is suggested to nip low level behaviour (noting the difficulty in determining what is "low-level") in the bud to prevent worse and more damaging behaviour from occurring. However, with mandatory reporting, there is a risk of hypersensitivity and over-reporting, with serious consequences. The designated partner, or the firm, may decide they would rather report everything, regardless of seriousness, to avoid risking censure for not reporting. Although reporting is an important tool to assist employees who are experiencing sexual harassment, discrimination and/or bullying, misusing the mandatory reporting tool could have implications for employees' careers. Allegations may be genuinely trivial, or may be false or raised for the purpose of "encouraging" an employee to resign, yet may trigger mandatory reporting.

The ambiguity of the level of seriousness required for reporting has a flow on effect for firms making decisions about raising and investigating alleged

38 New Zealand Law Society *Guidance on professional standards and reporting obligations* (November 2021).

misconduct. Interpersonal disputes that could readily be resolved through low level meetings, coaching or facilitation may be escalated into investigations. Even raising the issue or investigating it may have consequences in terms of annual reporting, and whatever is going to be done with that information.

In our work we have already witnessed investigations of conduct that, in our view, were clearly not at the level of seriousness requiring reporting. Yet we have also seen young lawyers who are too scared or intimidated to report bad behaviour as they are being warned that reporting an incident may "go on their permanent record". Conversely, people experiencing or witnessing unacceptable behaviour may be even more reluctant to report it because they are worried about the potential dire consequences for the other lawyer involved. Often, people experiencing sexual harm say they do not want to destroy the perpetrator's career.

Equally, law firms may not raise issues or investigate them because then they have to report them which could cause reputational damage, among other consequences, for the firm. Even with the amended Rules, a confidential conversation or a mediated settlement could still be used to slide people out the door without triggering reporting. Confidentiality agreements and non-disclosure agreements cannot override the Rules. All firms must ensure they have the proper systems in place and comply with them.

Under-reporting and backlash from the profession and alleged perpetrators remain very real concerns. The legal profession has enabled a culture that has long allowed unacceptable behaviour to flourish behind closed doors. The people who own, manage and work in legal practices should not tolerate the sort of behaviour that sadly is commonplace in many legal workplaces. Yet senior lawyers are often the ones demonstrating inappropriate behaviour. It is concerning that there are still issues with workplace behaviour, which can have a severe impact on the individual, particularly when the complaints and reporting processes are unsafe. Lawyers already have a mandatory obligation to report professional misconduct but often do not. All lawyers need to take note of the new required standards of behaviour and hold ourselves and our colleagues to account.[39] It will be interesting to see whether the new Rule

39 Note under the Rule changes, mandatory reporting will be subject to exceptions where the information has been received in the course of providing confidential advice, support or guidance to another lawyer, including as a member of the Friends' Panel, unless necessary to prevent fraud or any crime or to prevent a serious risk to the health and safety of any person. The victim of misconduct has no obligation to report misconduct.

prohibiting victimisation makes lawyers feel they can more safely report misconduct. [40]

VII CONCLUSION

Changing the Rules is a major step forward. These changes set a new tone and send a strong signal to the profession that treating other people unlawfully and disrespectfully is career threatening. This is a welcome change to the social landscape where survivors felt that speaking up was career threatening.

The current ambiguities in definitions and thresholds should be resolved by clear guidance, rather than awaiting litigation. Although the recent guidance released by the NZLS provides some assistance, more work is needed in this area. The profession needs to fully understand what will be done with information reported to the NZLS and the potential implications of both unacceptable conduct and the obligation to report it.

Excluding barristers' chambers and inhouse legal teams from the mandatory reporting regime should be re-evaluated in the wider structural review.

Although the new Rules are a step in the right direction, they alone will not affect the fundamental culture shift the legal profession needs. We need broader and deeper conversations, education and commitment to understanding the obligations on lawyers and firms. Through these types of actions, hopefully ingrained attitudes and behaviour will start to change. We all have a role to play in creating a safer workplace, but there needs to be better guidance about how to deal with the serious issues that have to be reported to the NZLS by lawyers generally and the designated person in each firm.

Much more education is required, including as a mandatory component of the Legal Professional Studies course and Stepping Up programme. The NZLS needs to use its new discretion to introduce a mandatory bullying, harassment and racism prevention component of continuing professional development (CPD). The complaints and disciplinary processes need to be changed to make them more humane. People involved in complaints processes, particularly complainants, need far more support. Safe processes must be put in place for all involved. Some firms are starting to recognise this, for example by engaging independent investigators, consulting on terms of reference and paying for independent representation.

40 LCCC Rules, r 2.10.1.

Regardless of any Rule changes, if we keep doing the same things the same way, nothing will change. Every single person involved in the profession has to do the mahi. Particularly the NZLS, senior lawyers, managers and HR should look closely at workplace behaviours, structures and practices. On an individual level, we need to have the honesty and integrity to acknowledge we need to change many aspects of the legal profession. There still needs to be major structural change to disrupt the power imbalances within legal practice that allow inappropriate conduct to flourish, and that silence the victims of bullying, discrimination and harassment.