

Law & disorder

Long after sexual misconduct by a partner at one of New Zealand’s top legal firms, the profession is still grappling with the fallout, writes **Sasha Borissenko**

Supporting mustard-coloured shoes, a tailored coat and a composed attitude, James Gardner-Hopkins entered the five-day Lawyers & Conveyancers Disciplinary Tribunal hearing in May. It wasn't a criminal case, but as one of the country's top environmental barristers, and with his career and reputation on the line, the stakes were high.

It had been five-and-a-half years since alleged sexual misconduct against five summer clerks – all of them law students at the time – at two Christmas functions held by giant law firm Russell McVeagh, and three years since the story made headlines. The disciplinary hearing could be a first – potentially setting a precedent against abuse of power among professional organisations. It's no surprise that suppression orders were plentiful.

Day one set the scene. Sitting behind a makeshift screen, the women recalled many examples of harassment and objectification – whether that was being grabbed around the waist, buttocks or breasts, or being told they were indistinguishable from the other clerks.

One complainant said she truly didn't think Gardner-Hopkins would know what she looked like then, or now. Another said, "I am sure that James would not have known my name when he assaulted me at the Christmas party".

Nine witnesses and three days later, Gardner-Hopkins took the stand and broke into tears recounting his marriage troubles, family hardship, and describing his time at Russell McVeagh as some of the best years of his life.

Despite numerous unreserved apologies over the five days – days which Dale La Hood, representing the Law Society's national standards committee, pointed out were reserved because Gardner-Hopkins had not pleaded guilty from the outset – the tribunal found the former president of the Resource Management Law Association guilty of six misconduct charges.

Only after the hearing could his name be reported, though many in the law field already knew about the allegations against him.

In its concluding observations, the tribunal noted that of the group affected by Gardner-Hopkins' actions, two had left the country – one specifically as a result of the events.

"At least one has left the profession; another changed her area of practice so as to avoid contact with Mr Gardner-Hopkins especially after he was elected president of the Resource Management Lawyers Association; another felt her career had been adversely affected."

Compelling evidence

Julian Long, representing Gardner-Hopkins, prefaced his cross-examination of the complainants with an unreserved apology.

"A, can I give you my personal apologies for your experiences? My client will do what he needs to do when he gives evidence, but I know he's also apologetic for the experiences that you have had. This is a difficult cross-examination for me as well as [you]," he said.

"I was a young lawyer myself and I'm a man, unfortunately, or fortunately as

the case may be. I started at Russell McVeagh and I [had] a good time there."

As the hearing progressed, Long appeared troubled by a comment that was suppressed to the public. "We haven't read it out and I'm not going to [but it is] utterly incomprehensible to me and totally and utterly unacceptable, and I don't know the lawyer named and if a standards committee's looking at this and not doing something about it, then I don't know what that standards committee is thinking. [That] is not the Law Society that I want to be a member of."

In the end, the comment did not appear to affect the tribunal's view of the women's evidence. "We found [the complainants'] evidence compelling. Each gave evidence honestly. All accepted the difficulties in recalling the detail of events after the passage of over five years since they occurred. Leaving such detail to one side, the complainants all had a clear recollection of the acts that they alleged Mr Gardner-Hopkins engaged that night.

"The [women] had the moral compass to know what had happened was wrong and the courage to speak out. In doing so, in no small part they have initiated long overdue and necessary steps to ensure this conduct is not repeated on others."

Steph Dyhrberg, one of the lawyers who assisted the witnesses, says: "The complainants are satisfied with the findings and it's been fantastic for the tribunal to acknowledge their courage and resilience. It was important to get a solid denigration of the conduct. It was important to see a decision that clearly stated this wasn't and isn't acceptable conduct.

"The judgment drew a line in the sand, saying you can have warm collegial relationships but you cannot touch people without their consent and use a huge power imbalance for your own personal gratification.

"Throughout the complaints process, the women were able to document their memories within two years of the events. I don't think the case would have got to the hearing without the personal commitment from the women and their support networks – be it family, friends, counselling and legal representation. A lot of people don't have access to that support.

"The context enabled the women to get sufficient support to see it through the distance. It's a gruelling process."

Why did it take so long?

We know that the Law Society was first informed of the conduct in October 2016, after one of the complainants went to the regulator. It's understood that the woman was told a formal complaint was required for an investigation, despite there being a mechanism allowing standards committees to conduct an "own motion" to investigate.

In October 2017, Gardner-Hopkins was appointed president of the Resource Management Law Association – an association endorsed by the Law Society.

When there is a complaint against a lawyer, the Law Society receives it and decides whether to refer it to one of the 22 standards committees throughout the country. Made up of expert volunteer lawyers and lay people, those committees typically meet monthly and decide whether to refer complaints on to the NZ Lawyers & Conveyancers Disciplinary Tribunal.

As well, in 2019 the Law Society set up a specialist standards committee to deal with sexual assault and bullying claims. In 2019-20 the society received 42 complaints of bullying and 35 of harassment, including sexual harassment.

Law Society chief executive Helen Morgan-Banda says inquiries undertaken by that bullying/harassment committee go through a thorough process that ensures there is natural justice for both complainants and the lawyers being investigated.

The Law Society is legally restricted from revealing facts about the complaints process, thanks to the

tive Jo Avenell says the firm has acknowledged that the events of 2015-16 were unacceptable.

"The firm's board was deeply disappointed in the partner's conduct, including at the events that took place in 2015-16, and misleading the firm's leadership regarding relevant details of these, and moved decisively such that the partner left the firm in early 2016."

Russell McVeagh had co-operated with the Law Society's investigation and has "since focused on making changes, including commissioning and making a wide-scale review of the firm's culture, policies and practices, and provided subsequent updates".

Hard to get in, harder getting out

While he was under investigation, Gardner-Hopkins also attended the Law Society and Wellington Branch 150th anniversary commemorative dinner at Te Papa in 2019. In the bathrooms were posters providing

information on available support, if anything inappropriate occurred. Which begs the question, how could he practise for all that time?

In theory, the standards committee could suspend a lawyer under the Lawyers and Conveyancers Act if that lawyer was seen to be a risk to the public and the charge was capable of being proven.

In order to pass the bar, you first have to obtain a character certificate establishing that you're a fit and proper person to practise.

Dyhrberg says that in the pursuit of obtaining that character certificate, minor misdemeanours may be queried, whether that's plagiarism at univers-

ity, personal mental health issues, or intentional damage, for example.

"It's seen as a reasonably high bar to gain admission, yet once you're in, the threshold to losing that character certificate seems remarkably high. Unless you mismanage client funds. It's an interesting dichotomy. To be a fit and proper person to practise means you've got a positive duty to be of good character."

But every person is entitled to due process, Dyhrberg says.

Issues revealed

The tribunal hearing also faced some procedural issues. Unlike family or criminal jurisdictions, the room wasn't designed to accommodate the number of media or the complainants; it is believed that the women and witnesses at times crossed paths with the former Russell McVeagh partner in the lift, the shared bathrooms, or in the line to get through security. While the tribunal was a mix of women and men, the lawyers representing the standards committee and Gardner-Hopkins were all men.

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Lawyer Steph Dyhrberg

in a formal setting. And they have done so voluntarily.

"Reliving the experience and knowing you're in close quarters with those responsible will always be very challenging for survivors of sexual assault. It has been more than five years of uncertainty for these young women."

Ministry of Justice operations and service delivery group manager Bruce Findlay says providing safe spaces, specifically designed for vulnerable witnesses and victims, is an important aspect of improving trust and confidence in the justice system.

"The ministry has undertaken, and continues to make, operational changes to improve the experience for victims when at court. Changes include developing an 'alternative entry' policy for vulnerable victims. This aims to make victims feel more secure when entering a court building.

"The ministry also has work underway to improve facilities for vulnerable witnesses and their whānau, when at court to give evidence."

However, the ministry is unable to comment on a matter before the tribunal, Findlay says. "This is because the tribunal is a judicial body that operates independently of the Ministry of Justice. It is up to the tribunal to determine how a matter is heard."

On the issue of cross-examination, Otago University psychology professor

Where now?

The tribunal's decision said Gardner-Hopkins may have been unfit to practise at the time, but whether that's the case now is yet to be decided.

In the meantime, changes to the current conduct rules for lawyers came into force from the start of this month, clarifying the threshold for reporting to the Law Society.

The new rules also require firms to notify the society about any warnings or dismissals for dubious conduct, or instances when a lawyer leaves a practice during the course of an investigation.

As for Russell McVeagh, Avenell says the firm is currently ensuring its policies and procedures are aligned to the Law Society's new rules governing lawyers' behaviour.

"As the case remains before the tribunal for the purpose of penalty, the firm will not be commenting further at this time."

Sasha Borissenko is former editor of *New Zealand Lawyer* and one of the journalists who broke the story of inappropriate sexual conduct at Russell McVeagh.



James Gardner-Hopkins at work in 2019, representing Cromwell residents in a town-planning case. Photo / ODT

Dr Rachel Zajac says the justice process is stressful for anyone who has to go through it.

"But imagine having to recount intensely personal details about a terrible chapter of your life, and then having a lawyer call that account – and often your character – into question during cross-examination. It's little wonder complainants describe cross-examination as the worst part of the whole process.

"But cross-examination isn't going anywhere. We have to test the evidence – that's a cornerstone of the legal process. Otherwise we may as well just convict or acquit based on what we read in the newspaper," she says.

"The bigger question is how we test the evidence. We need to create conditions under which complainants of sexual violence can give their most complete and accurate testimony, and much of that hinges on reducing the stress and uncertainty they face across the trial process."

The tactics lawyers use to cast doubt on sexual violence complainants and their evidence haven't changed much in several decades, she says.

Defence lawyers are simply employing strategies that will create doubt in jurors' (or tribunal members') minds, she says. "If society didn't subscribe to those beliefs – at least to some extent – there would be little point in using them. So let's take a good look at ourselves before we pillory defence lawyers."