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To Impose or Not Impose Penalty Conditions Following Professional Misconduct: What Factors Are Cited by Three Professional Disciplinary Tribunals in New Zealand?

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Abstract: Profession-related disciplinary tribunals consider a range of factors when determining penalties following findings of professional misconduct. Penalties that impose conditions on practice hold the potential to facilitate practitioners' rehabilitation back to safe practice. This study explores the use of penalty conditions by three disciplinary tribunals in New Zealand (the Lawyers and Conveyancers Tribunal [LCDT]; the Health Practitioners Disciplinary Tribunal [HPDT]; and the Teachers Disciplinary Tribunal [TDT]). Disciplinary decisions published between 2018 and 2022 (N = 538) were analysed, coding the explicit reasons cited for imposing or not imposing conditions and if rehabilitation was cited as a penalty principle. Conditions were imposed in 58.6% of the cases, though tribunals varied. All of the tribunals commonly referred to the concepts of remorse/insight, or lack of it, as reasons for ordering or not ordering conditions, and they often considered the seriousness of the misconduct. Reasons for not ordering conditions were more varied between tribunals, as was citing rehabilitation as a penalty principle. The findings suggest that tribunals give substantial consideration to the decision of imposing conditions, drawing on both objective (e.g., past misconduct) and subjective (e.g., cognitive and psychological) phenomena. The reasons did align with concepts found in broad sentencing guidelines from some other jurisdictions (e.g., criminal justice response), though future research on defining and measuring these concepts may help understand their predictive and protective utility.

Keywords: professional misconduct; penalty conditions; rehabilitation; disciplinary tribunals

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1. Introduction

Following the findings of professional misconduct, disciplinary tribunals (tribunals) typically consider a range of penalties. Penalty options vary according to the legislation and jurisdiction under which disciplinary bodies and tribunals operate, though there are some similar options across many occupations and jurisdictions. For example, tribunals have the option of removing regulated practitioners from the profession (sometimes referred to as 'erasure', 'deregistration' or 'being struck off') or suspending a person from practice for a period. Alternatives to deregistration and suspension often involve the imposition of penalty conditions. Examples include a requirement to practice under supervision for a period of time; undergo mentoring; or obtain treatment for underlying health issues. These are referred to as 'conditions' in this article. This analysis focuses on the use of conditions by three tribunals in New Zealand, namely the Health Practitioners Disciplinary Tribunal (HPDT), the Lawyers and Conveyancers Disciplinary Tribunal (LCDT), and the Teachers

Disciplinary Tribunal (TDT). These tribunals are part of a hierarchy of legal institutions. Their structures and processes have been described elsewhere (Gibbons and Duggal 2020), including specific details on each (LCDT, Hodge 2020; HPDT, Diesfeld and Surgenor 2020; TDT, McCook-Weir 2020). All professions have codes of ethics, and breaches of these may lead to disciplinary charges.

We acknowledge that there is a large body of literature on the factors influencing sentencing in the criminal justice context (e.g., the Sentencing Act 2002[1] in New Zealand) and misconduct in the wider commercial and employment sector[2]. However, the current paper is concerned with the narrower context of professional misconduct penalties, such as conditions, and how profession-related disciplinary tribunals discuss and apply these. These three particular tribunals consider a range of factors in determining penalties, and in some jurisdictions, detailed guidance has been developed for those decisions. For example, in the United Kingdom, the General Medical Council (GMC) has published guidance for disciplinary bodies regarding how to determine sanctions. It lists aggravating factors, such as lack of insight or the extent of negative impact on clients. Also, mitigating factors are listed, such as the presence of insight, expression of regret and remorse, and production of an apology. Other relevant factors include accepting responsibility, rectification activity, and an unblemished disciplinary history[3]. Some jurisdictions also provide similar guidance for sub-tribunal disciplinary bodies. One example is the New Zealand Law Society Penalty Guidelines for Lawyers Standards Committees[4].

In this paper, we focus on the specific use of penalty conditions by three New Zealand disciplinary tribunals. We document the reasons cited for imposing or not imposing penalty conditions, discussing these in the context of sentencing guidelines and links with citing rehabilitation.

Penalty Conditions

Removal from the profession or a period of suspension occurs in a sizeable minority of cases after findings of misconduct, according to research in Australia and New Zealand regarding health practitioners (Elkin et al. 2011; Surgenor et al. 2021). However, another common outcome is specified conditions that can allow practitioners to continue to practice. For example, the Health Practitioners Competence Assurance Act (2003)[5] describes this as "practise his or her profession only in accordance with any conditions as to employment, supervision, or otherwise that are specified in the order" (s. 101(1)(c)). These often appear to have public safety as their rationale, as they include activities such as a limitation on practice for a period, for example by restricting the category of people or services that the practitioner can provide. Also, the imposition of conditions may be viewed as rehabilitative, with the aim of promoting the person's competence or sustaining their ability to safely practice. That is, while conditions are clearly ordered as a 'penalty', their philosophical approach is different from punishment (Surgenor et al. 2023). In New Zealand, the HPDT the orders conditions in a majority of cases after findings of misconduct. Similar practices occur in other countries. For example, a study of Australian and New Zealand doctors found that, after findings of professional misconduct, restrictions on practice (i.e., conditions such as education, supervision and counselling) were imposed in 37% of cases (Elkin et al. 2012).

Rehabilitation has been explicitly cited as a penalty sentencing principle in some professional disciplinary tribunals, including the HPDT. In New Zealand, Roberts v Professional Conduct Committee[6] specifically identified the rehabilitation of the health practitioner as

[1] https://legislation.govt.nz/act/public/2002/0009/latest/DLM135342.html, accessed on 1 July 2024.
[2] See, e.g., https://www.fairtrading.nsw.gov.au/about-fair-trading/our-compliance-role/guidelines-to-determine-a-disciplinary-action-outcome, accessed on 1 July 2024.
[3] https://www.gmc-uk.org/-/media/documents/DC4198_Sanctions_Guidance_Feb_2018_23008260.pdf, accessed on 1 July 2024.
[4] https://www.lawsociety.org.nz/assets/Professional-Standards/Penalty-Guidelines-23-6-22.pdf, accessed on 1 July 2024.
[5] https://www.legislation.govt.nz/act/public/2003/0048/latest/DLM203312.html, accessed on 5 July 2024.
[6] https://www.hpdt.org.nz/portals/0/459Nur12202P.pdf, accessed on 6 July 2024.

one of eight factors that are relevant to creating an appropriate penalty. That principle explicitly was adopted by similar tribunals, including the New Zealand's Social Workers Complaint and Disciplinary Tribunal (SWCDT)[7] and the TDT[8]. At least with respect to the HPDT, it could be concluded that protection of the public may be the overriding principle since public protection is the "principal purpose" of the Health Practitioners Competence Assurance Act 2003 (s. 3(1)), and that statute establishes the HPDT. This is less clear for the TDT and LCDT since the legislation establishing these tribunals (Education and Training Act 2020[9]; Lawyers and Conveyancers Act 2006[10]) does not make the same 'principal purpose' statement. This difference might lead to different weighting when applying even the same penalty principles.

Even in the most egregious forms of professional misconduct (e.g., sexual boundary violations), some decisions note that rehabilitative approaches may be relevant (e.g., see discussion by O'Connor et al. 2024) and have been applied. For example, following findings of sexual misconduct by a general practitioner with a patient (amongst other things), the HPDT ordered supervision, the presence of a chaperone, and that a sexual misconduct assessment be passed following his period of suspension[11]. Some authors have opined that there should be prerequisites for rehabilitative conditions. For example, the transgressor must acknowledge the misconduct and the harm and have made serious efforts to repair the harm (Stemwedel 2014).

In summary, the decision by a tribunal to apply conditions is informed by sanction guidance, where these exist. If sanction guidance is not available, then tribunals may follow principles created elsewhere, including by courts. We are not aware of any study that has empirically analysed how tribunal decisions for teachers, lawyers, and health practitioners have applied such guidance or principles, including with specific reference to rehabilitation. Thus, this study explored tribunals' reasons for imposing (or not imposing) conditions, as expressed in their written decisions. As the imposition of conditions most often allows practitioners to continue to practice, it also examined the extent to which rehabilitation was cited at any stage in the tribunals' written decision regarding penalties, hypothesising that reference to rehabilitation may increase the likelihood of conditions.

We analysed the conditions imposed by three New Zealand disciplinary tribunals that have a similar structure and function, including in some instances, overlapping members. This illuminates some factors that influence tribunals' decision-making regarding penalties. It explores tribunals' assumptions regarding the protection of the public and rehabilitation back to practice. The study helps understand whether tribunals require guidelines, apply existing guidelines, or would benefit from revised guidelines.

2. Methods

The HPDT, TDT, and LCDT were chosen because they share the following common factors. All were established under national legislation as the single disciplinary tribunal for each type of profession (the HPDT covered 21 health practitioner professions at the time of the period of the decisions studied). All have a mix of legal (Chair) and professional members, though the TDT is the exception in not having at least one lay member. The professions serve people in potential positions of dependence and vulnerability. The tribunal decisions have been published for a sufficient time to generate adequate case numbers for research.

Data were extracted from the published decisions over a five-year period from January 2018 to December 2022. This cut-off date was chosen because publication of decisions

[7] See, e.g., https://swrb.govt.nz/wp-content/uploads/2024/06/SWCDT-T22-20P-Decision-Final-00C-Redacted.pdf, accessed on 9 July 2024.

[8] See, e.g., https://teachingcouncil.nz/assets/Files/PRDecisions/CAC-v-Pearce-Decision-2021-68.pdf?vid=3, accessed on 10 July 2024.

[9] https://www.legislation.govt.nz/act/public/2020/0038/latest/lms170676.html, accessed on 21 August 2024.

[10] https://www.legislation.govt.nz/act/public/2006/0001/latest/DLM364939.html, accessed on 15 July 2024.

[11] https://www.hpdt.org.nz/Charge-Details?file=Med22/559P, accessed on 15 July 2024.

can be delayed by appeals or other reasons for deferment (e.g., the time period studied included the global pandemic, causing delays in proceedings). After removing 'withdrawn' and 'no penalty' decisions (N = 27), N = 538 decisions were included in the analysis. While the cohort of TDT cases straddled the Education and Training Act 2020[12] and the repealed Education Amendment Act 2015[13], the penalties available to the TDT were unchanged.

Ahead of data extraction, a coding protocol (available on request) was developed by the authors, based on the knowledge accumulated from our prior experience analysing decisions from these disciplinary tribunals (Diesfeld 2010; Rychert and Diesfeld 2019; Surgenor et al. 2021) and a review of the existing literature on professional misconduct penalty considerations (including sanction guidelines where these existed). Codes were refined through four rounds of pilot testing. The five coders independently coded the same four decisions (outside the date range of the included cases). The protocol was clarified as needed based on any differences in interpretation during the pilot coding. A similarly sized cohort of cases was then assigned to each coder (all authors), with the opportunity to bring forward any ambiguous coding decisions for a consensus discussion between the coders.

2.1. Measures

In reading the decisions, in the penalty discussion section of the decision, we coded for any explicit reasons (multiple choices available) directly linked with ordering or not ordering conditions. References to reasons not linked to the tribunals' penalty discussion (e.g., practitioner's own submissions regarding their low risk or other mitigating circumstances) were not included, as the study focused on the tribunal's own consideration of these issues. Coding also included recording the length of conditions (months), types of conditions, and if rehabilitation was referred to as a sentencing principle in the penalty discussion at any point. The coding protocol also included a 'free text' field to record any other reasons, leaving open the possibility for a new subcategory to be formed if this unexpected reason appeared frequently.

2.2. Statistical Analysis

Descriptive summary statistics (counts and percentages, rank orders) were calculated for all data and summarised for each tribunal. Univariate comparisons (Chi-square, Fisher's exact test where indicated; Spearman's rank order correlation) between tribunals were then calculated where sample sizes allowed.

3. Findings

Overall, 58.6% of the decisions included a penalty condition. The TDT ordered the highest frequency of conditions (68.1%), followed closely by the HPDT (64.7%) and LCDT (16.0%). Overall, there was a significant difference between tribunals ($\chi^2 = 86.90$, df = 2, $p < 0.001$), with a post hoc analysis indicating that the LCDT ordered significantly fewer conditions than either the HPDT ($\chi^2 = 50.86$, $p < 0.001$) or TDT ($\chi^2 = 83.74$, $p < 0.001$), though the latter two were not significantly different from each other ($\chi^2 = 0.75$, $p = 0.422$).

Where the length of these conditions was specified (80% of cases with conditions, $n = 251$), we used the longest period of conditions if multiple conditions were imposed (as the conditions can run concurrently). Overall, conditions were imposed for an average of 22.3 months (SD = 9.2), ranging from 1–60 months. The length of conditions significantly differed between tribunals ($\chi^2 = 41.\ 34$, $p < 0.001$). Sample sizes precluded a comparison with the LCDT, but the HPDT applied significantly longer condition durations (M = 23.9 months; SD = 10.6) than the TDT (M = 21.9 months; SD = 8.52) ($\chi^2 = 32.53$, $p < 0.001$).

Tables 1 and 2 describe the reasons for ordering and not ordering conditions by each tribunal. The four most frequently cited reasons for ordering conditions (Table 1) were the same across the three tribunals. Namely, the presence or prospect of insight/remorse featured in a sizeable number of decisions, as did comments that the practitioner had

[12] See note 9.
[13] See note 9.

already initiated their own steps to directly address the misconduct (e.g., engaged in extra supervision/course work/counselling). The next most frequent ones were the seriousness of the misconduct and good character. The HPDT and LCTD especially linked the need for conditions with the seriousness of the misconduct (66.2% and 46.7%), though less so by the TDT (16.6%). Rank ordering of the top four reasons between pairs of tribunals found no significant difference between the HPDT and TDT ($r_s = 0.02$, $p = 0.8$), the TDT and LCDT ($r_s = 0.31$, $p = 0.06$), and the HPDT and LCDT ($r_s = 0.31$, $p = 0.68$).

Table 1. Reasons cited by tribunals for imposing conditions [1].

Reason Cited	All Tribunals	HPDT	TDT	LCDT
	N = 315 (%)	*n* = 77 (% within HPDT)	*n* = 223 (% within TDT)	*n* = 15 (% within LCDT)
Insight/remorse or prospect of these	141 (44.8)	24 (31.2)	111 (49.8)	6 (40.0)
Already initiated own steps	119 (37.8)	27 (35.1)	86 (26.5)	6 (40.0)
Misconduct seriousness impels need for conditions	95 (30.2)	51 (66.2)	37 (16.6)	7 (46.7)
Good character	52 (16.5)	16 (20.8)	34 (15.2)	4 (26.7)
Lacks insight/remorse or prospect of these	46 (14.6)	14 (18.2)	30 (13.5)	2 (13.3)
Low risk of future misconduct	34 (10.8)	21 (27.3)	16 (7.2)	2 (13.3)
Mental health condition implicated in misconduct amendable to rehabilitation	28 (8.9)	8 (10.4)	19 (8.5)	1 (0.67)
Substance abuse/dependence implicated in misconduct amenable to rehabilitation	27 (8.6)	7 (9.1)	19 (8.5)	1 (0.67)
Workplace factors beyond the practitioner's control	8 (2.5)	1 (1.3)	7 (3.1)	0 (0.0)
Conditions imposed by other agents (e.g., regulatory authority/employer) underway	3 (0.09)	1 (1.3)	2 (0.08)	0 (0.0)
Workforce shortages	2 (0.06)	0 (0.0)	2 (0.08)	0 (0.0)
Physical health condition implicated in misconduct amendable to rehabilitation	2 (0.06)	0 (0.0)	2 (0.08)	0 (0.0)
Nothing to suggest incapable of safe practice	13 (0.04)	4 (5.2)	0 (0.0)	0 (0.0)
Other addiction implicated in misconduct amendable to rehabilitation	1 (0.03)	0 (0.0)	1 (0.04)	0 (0.0)
Other—multiple unique text comments	50 (15.9)	10 (13.0)	36 (16.1)	4 (26.7)

[1] Multiple reasons can apply.

The pattern was less uniform for reasons for not ordering conditions (Table 2). Namely, "seriousness of misconduct" and "lack of insight/remorse" featured among the four most frequent reasons across all tribunals, but specific factors potentially related to the unique characteristics of each profession were also relevant. For example, the LCDT comments about past disciplinary findings featured highly (27.8%) as a reason that the LCDT did not impose conditions, though this rarely occurred for the TDT (9.8%) or HPDT (2.4%). By way of contrast, the practitioner's intent to no longer practice in the profession featured in the top four for the TDT (14.7%) but rarely for the LCDT (3.8%).

Tribunals also significantly differed on how frequently they specifically referenced rehabilitation as a penalty principle ($\chi^2 = 106.7$, df = 2, $p < 0.001$), with the HPDT referring to this 95.0% of the time, followed by the TDT (74.2%) and LCDT (30.8%). A post hoc analysis indicated that each tribunal was significantly different from each other ($p < 0.001$). However, reference to rehabilitation was not significantly associated with the use of conditions by the HPDT ($p = 0.18$) or TDT ($p = 0.34$), though this was on the cusp of significance for the LCDT ($p = 0.07$).

Table 2. Reasons cited by tribunals for not imposing conditions [1].

Reason Cited	All Tribunals	HPDT	TDT	LCDT
	N = 223	*n* = 42 (% within HPDT)	*n* = 102 (% within TDT)	*n* = 79 (% within LCDT)
Seriousness of misconduct	103 (46.2)	19 (45.2)	43 (42.2)	41 (51.9)
Lack insight/remorse or prospect of these	54 (24.2)	8 (19.0)	34 (33.3)	12 (12.6)
Low risk	39 (17.5)	18 (42.9)	6 (5.9)	15 (19.0)
Disciplined before	33 (14.8)	1 (2.4)	10 (9.8)	22 (27.8)
Public safety risk too high	25 (11.2)	9 (21.4)	14 (13.7)	2 (2.5)
No intent to practice	22 (9.9)	4 (9.5)	15 (14.7)	3 (3.8)
No evidence of meaningful reflection	20 (9.0)	3 (7.1)	13 (12.7)	4 (5.1)
Not taken adequate efforts to address conduct	17 (7.7)	1 (2.4)	11 (10.8)	5 (6.3)
Has insight or remorse, so no conditions	17 (7.6)	5 (11.9)	4 (3.9)	8 (10.1)
Conditions already formally underway	14 (6.3)	1 (2.4)	8 (6.7)	5 (6.3)
Lack of engagement with tribunal process	13 (5.8)	2 (4.8)	9 (8.8)	2 (2.5)
Lacks meaningful prospect for rehabilitation	11 (4.9)	0 (0.0)	11 (10.8)	0 (0.0)
Ingrained problems not amenable to rehabilitation	9 (4.0)	2 (4.8)	6 (5.9)	1 (1.3)
"Unfit" for rehabilitation	8 (3.6)	1 (2.4)	5 (4.9)	2 (2.5)
Had previous conditions/rehabilitation opportunities or failure	8 (3.6)	1 (2.4)	7 (6.9)	0 (0.0)
Difficult to determine what suitable rehabilitation would be	4 (1.8)	3 (7.1)	1 (0.99)	0 (0.0)
Physical health implicated, not amendable to rehabilitation	1 (0.04)	0 (0.0)	0 (0.0)	1 (1.3)
Other addiction not amendable to rehabilitation	1 (0.04)	0 (0.0)	1 (0.99)	0 (0.0)
Mental health implicated, not amendable to rehabilitation	0 (0.0)	0 (0.0)	0 (0.0)	0 (0.0)
Substance abuse/dependence, not amenable to rehabilitation	0 (0.0)	0 (0.0)	0 (0.0)	0 (0.0)
Other—multiple unique text comments	16 (7.2)	1 (2.4)	4 (3.9)	11 (13.9)

[1] Multiple reasons can apply.

Tables 1 and 2 also describe the sizeable presence of unique reasons for (or not for) ordering conditions (15.9% and 7.2%, respectively). Examples of each included "historical convictions" and "deception".

4. Discussion

As expected, professional disciplinary tribunals in New Zealand regularly utilise conditions as part of professional misconduct penalties, although this was seen much less in the LCDT than in the HPDT or TDT. Such conditions are imposed for substantial periods of time, sometimes years. Even though these conditions most often allowed for the practitioners to continue to work, the conditions and their length may have financial impacts. Examples include the cost of paying for prolonged supervision and the loss of income due to restricted practice conditions such as not working in sole practice. These may be in addition to fines, and it is known that costs are awarded in a majority of disciplinary cases (Surgenor et al. 2021). Balanced against this, tribunals clearly use conditions as a supportive means by which to continue or return practitioners back to safe practice and protect the public.

The LCDT is a clear outlier because it rarely applied conditions (Surgenor et al. 2024). There may be many reasons for this. For example, the LCDT may impose higher sanctions, such as suspensions or cancelled registration (collectively 54%, compared with 48.7% for HPDT and 28% for TDT in this study). Possibly related to this, the LCDT cases included a high rate of practitioners who had prior disciplinary findings (50%) compared with the HPDT (6.7%) or TDT (5.6%). This may have arisen from a different progression to their disciplinary tribunal for lawyers, rather than recidivism in this profession itself being an outlier. But as a general point, repeated misconduct may sway a disciplinary tribunal to view conditions as futile or an insufficient penalty, choosing instead other penalties such as suspension or deregistration. How professional disciplinary tribunals grapple with penalising repeated professional misconduct is likely complex but an important area for future research. Other reasons may relate to the type of misconduct most commonly occurring in that profession and the perceived ongoing risk to the public.

Variation in practices across tribunals is not necessarily concerning, but comparative research has a role in helping reveal how tribunals reach decisions. The differing member composition of the tribunals may play a part in explaining differences as well.

4.1. Reasons for Conditions

This study found that these tribunals give substantial consideration to the decision of imposing or not imposing conditions. The 'tools at hand' include judgements about both objective (e.g., prior misconduct) and subjective (e.g., cognitive and psychological) phenomena, all of which are concepts broadly aligned with sanction guidelines where these exist. The most common reasons found in this study are discussed below.

4.1.1. Remorse and Insight

The prominent place of remorse/insight in determining both the need for and against conditions is congruent with sanctions guidelines (e.g., GMC), where these factors are described as mitigating (e.g., in the presence of insight/remorse) and aggravating (in the absence of) factors.

The prominence of remorse nonetheless raises some questions. This includes the lack of standard agreement about what remorse means in terms of both the defining of the attributes and its utility for predicting future behaviour (Bandes 2016; Proeve 2023). Even if well-defined, disciplinary tribunals need to be able to reliably recognise remorse and agree on when it is best considered (Hall and Rossmanith 2022). For example, should this be remorse expressed during the hearing or remorseful actions over an extended period of time? The disciplinary process itself may facilitate practitioners' journey to remorse and insight, though it is not clear if tribunals consider the progression they may observe during the process.

Remorse and insight are dynamic, not static, phenomena. As a further example of the complexities, there is not a straightforward relationship between plea and remorse (Proeve 2023). Thus, understanding and utilising remorse in disciplinary tribunals is complex. While frequently viewed as an important mitigating and aggravating factor, tribunals may be applying various approaches to assessing remorse (e.g., greater or lesser focus on displays of various emotional or behavioural characteristics) and making different attributions about its role and meaning (e.g., lowering risk). As with the justice system overall (Proeve 2023), remorse is likely to persist as a dominant construct in penalty deliberations, awaiting further theoretical and empirical advances to resolve some of the described complexities.

4.1.2. Practitioner-Initiated Remediation

Disciplinary tribunals in this study also commonly guide their decisions about conditions based on whether the practitioner has already attempted to remediate the problem. This might include making apologies to those affected and/or active attempts to remediate the matter ahead of the tribunal hearing (e.g., refunding misappropriated funds or complet-

ing courses or treatments directly related to the type of misconduct). Again, this concept features in the sanction guidelines of multiple professions.

Some have argued that apologies can directly achieve the goals of discipline if they also meet the needs of victims, thereby "reduce(ing) the need to exact punishment" (Levin and Robbennolt 2021, p. 518). But in some settings or professions, there may be a greater reluctance to apologise due to a professional culture that discourages apologising or possibly greater legal risks when apologising (Robbennolt 2003). Moving to specific *requirements* to apologise after misconduct as part of a penalty condition and using an apology as *evidence* of rehabilitation) is problematic. Apology laws introduced in many United States jurisdictions have been controversial and have not been shown to reduce physician malpractice rates (Ross and Newman 2021).

Concepts such as remorse, insight, and apologies do not function in isolation from each other. For example, declining to apologise may indicate a lack of remorse. Also, some apologies may be interpreted by tribunals as inadequate, insincere, or lacking remorse if, for example, they are provided at the last minute. This has prompted commentary on the elements of effective apologies (e.g., Robbennolt 2009), including in the New Zealand legal context (Diesfeld 2012). Likewise, the notion of insight is not straightforward, as has been illustrated in other tribunal contexts (Diesfeld and Sjöström 2007).

4.1.3. Seriousness of Misconduct and Risk

Other prominent reasons linked with penalty conditions included the seriousness of the misconduct and the risk to the public. Conditions might be imposed to directly manage risk. In the case of not applying conditions, the risk may be negligible. Alternatively, the risk to the public may be sufficiently high that alternative penalties (e.g., suspension, deregistration) are needed. Further, we note that all three tribunals often linked discussion of imposing conditions with the good character of the practitioner. This mitigating factor also features in the sanction guidelines earlier referred to. It is not clear how good character is assessed, though possibly through character references in combination with the absence of previous misconduct and procedural processes, such as cooperating with the tribunal and admission of wrongdoing. We noted referral to all such factors at the same point (para 52) in a tribunal's discussion of penalty, where a doctor received extensive conditions to undergo assessments and treatment on recommencing practice[14].

4.1.4. Health Conditions

Conditions directly designed to address health-related problems (e.g., mental health or substance use and addiction) linked with the misconduct are rarely featured. At first glance, this may appear surprising given the broader understanding of tribunal penalty conditions as being rehabilitative and other research implicating health impairments with professional misconduct (Austin et al. 2021; Wang et al. 2024). However, it could reflect that some regulatory bodies have strong health assessment pathways, including mandated ones. Where so, tribunals may consider that management of health issues through conditions, even when directly linked with the misconduct, is best left to the regulatory body. Diverting to a health pathway instead of, or as well as, a tribunal hearing is supportive of impaired practitioners, as disciplinary charges are themselves impactful on wellbeing (Rychert and Diesfeld 2019; Verhoef et al. 2015). This is also reflected in the practice of some tribunals to refer the details of conditions directed at managing health issues to the management and oversight of the relevant body. The relative absence of a health pathway at a level below the LCDT is in marked contrast to that of health practitioners in New Zealand (Moore et al. 2015; Diesfeld et al. 2024).

4.2. Links with Rehabilitation as Penalty Principle

We hypothesised that reference to rehabilitation as a penalty principle would be linked with imposing conditions. Although our analysis did not confirm this as a significant

[14] https://www.hpdt.org.nz/portals/0/1031Med19434P.pdf, accessed on 1 August 2024.

association, this should be further explored. For example, our study relied on the explicit mention of rehabilitation, and not mentioning it is not the same as concluding that a tribunal did not consider it. This refers to one of the limitations of the study. In coding tribunals' references to rehabilitation in the written decisions, we took a conservative approach of relying on the presence of key words. Further, cases are nuanced even when consistency is often sought within a single tribunal (e.g., when referring to the same penalty principles) for the same type of misconduct. Another possibility is that tribunals use deregistration/suspension as a 'time for rehabilitation' without being explicit in stipulating what may be needed (conditions) to achieve practitioners' return to safe practice.

4.3. Limitations and Future Research

Limitations of this study included the use of multiple coders, though the sheer number of cases required this. Problems of reliability and validity were somewhat mitigated by pilot-testing the protocol, and all coders had experience coding written disciplinary decisions for quantitative research. However, predicting all possible reasons for conditions was difficult, meaning that there were a number of sufficiently unique reasons that had to be coded as "other". Future research may be better able to address this by modifying and adding to the codes described in this study.

Translating legal decisions into statistics is a limitation acknowledged by others in this field (e.g., Millbank 2020), and the use of other methods may help mitigate this risk. For example, qualitative methods could explore tribunals' decision-making and reasoning when ordering penalties, including the underlying assumptions about practitioner rehabilitation back to safe practice. We have previously argued that developing an explicit theory for disciplinary contexts would help explicate such assumptions and respond to the call for evidence-based regulation (Surgenor et al. 2023) and international best practice. Part of this includes understanding how practitioners themselves experience the conditions as helpful or otherwise.

A further limitation is that the decisions analysed covered multiple professions, both within and between tribunals, with some professions having a more therapeutic purpose (e.g., health practitioners) than others (e.g., lawyers and teachers). A profession's focus or unique workforce challenges may also declare itself when the tribunal considers penalties, noting that each tribunal includes two experienced professional members.

We note that there are several points in the regulatory and disciplinary process for practitioners to have conditions imposed. That is, many of these same conditions can be imposed by some regulators of the profession for matters that may not reach the threshold for disciplinary hearings or arise from different pathways. For example, in the United Kingdom, the GMC refers to 'undertakings' that are restrictions agreed to between the doctor and the GMC. Similarly, health regulatory authorities in New Zealand can impose some of the same conditions as the HPDT, though these routes relate to competence and fitness concerns. The factors drawn upon in determining these conditions may reveal different and overlapping reasons to those used in a disciplinary context, but the revelation of these reasons equally may add knowledge and is, therefore, another area for research.

Finally, research could also explore what forms of professional misconduct are 'beyond the realm' of practitioner rehabilitation and why. We noted some cases where the tribunal ordered conditions to be activated at the point of seeking re-registration or recommencing practice after suspension. Relevant to this, legislative reviews of New Zealand's Health Practitioners Competence Assurance Amendment Act (2019)[15] (s. 29) newly allowed the HPDT to specify a date before which a person may not apply for registration again and allowed for the imposition of conditions ("preconditions"[16]) that the practitioner must satisfy before or at the point of applying for reregistration. Having an understanding of the factors

[15] https://www.legislation.govt.nz/act/public/2019/0011/latest/LMS11957.html#LMS11952, accessed on 5 July 2024.

[16] See, e.g., https://www.hpdt.org.nz/portals/0/1332Med22560P.pdf, accessed on 13 August 2024.

determining the length of stand-down periods and how these specific "preconditions" are framed will be important once sufficient cases have accumulated.

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