

BEFORE THE SOCIAL WORKERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

SWCDT

24/24P

UNDER

the Social Workers Registration Act 2003 (“the Act”)

IN THE MATTER

of a disciplinary charge laid against a social worker under Part 4 of the Act.

BETWEEN

A PROFESSIONAL CONDUCT COMMITTEE

appointed under the Act

Applicant

AND

TE KORINGA o te AO CAPPER of Rotorua,
registered social worker

Respondent

DECISION ON LIABILITY, PENALTY AND NON-PUBLICATION

Tribunal: Catherine Garvey (Chairperson), Dr Sonya Hunt, Ms Sue Jarvis, Ms Andrea McKenzie, Mr Iani Nemani (Members)

Ms Deepika Latchman (Executive Officer)

Appearances: Ms Ellie Wilson, Govett Quilliam and Mr Lucas Davis (Counsel for the Professional Conduct Committee)

Mr David Sparks (Advocate, Community Law Centre, for Mr Capper)

Hearing: 13 November 2024, in Rotorua

Decision: 10 February 2025 (Reissued 7 March 2025)ⁱ

INTRODUCTION

1. Te Kōringa o te Ao Capper (the respondent) faces a disciplinary charge in relation to allegations arising from contact with a 13 year old client and her whānau in 2021. Mr Capper registered with the Social Workers Registration Board (the Board) in 2018. He was employed for over 10 years at [REDACTED], a community based provider of social services (from here on referred to as “the organisation”) until his dismissal for the conduct outlined in the charge.
2. [REDACTED] [Ms T] is the Regional Manager of the organisation and made a mandatory report to the Board dated 16 June 2021. Mr Capper self-reported his dismissal on 17 June 2021, and the Board imposed an interim suspension order on 7 July 2021. The matter was referred to a Professional Conduct Committee (PCC) in December 2021; for reasons that are not apparent to the Tribunal, the notice of charge was not laid until 1 February 2024 and an initial pre-hearing conference held shortly after.
3. This matter was originally to be a defended hearing. The PCC sought time to ascertain the availability of [REDACTED], the young person referred to in the charge [Miss A] and a joint memorandum was then filed on 26 July 2024 seeking directions for [REDACTED] [Miss A’s] evidence to be given in accordance with s80 of the Act¹. A defended hearing was scheduled for November in accordance with timetabling for the exchange of evidence.
4. In October 2024, however, the parties filed an Agreed Summary of Facts and advised the Tribunal that there was no dispute as to liability (the Tribunal must still be satisfied that the charge is proved). In reliance on the agreed summary, the PCC elected to rely on evidence from [REDACTED] [Ms T]. Mr Capper indicated his intention to be heard in person on matters relevant to penalty. Accordingly, an abridged hearing was held on 13 November 2024, and Mr Capper attended the hearing where he was supported by representatives of his current employer [REDACTED].
5. At the conclusion of the evidence and submissions the Tribunal gave an oral indication of its findings on liability – that the charge of professional misconduct was proved - and of the penalty to be imposed. Further time was allowed for Mr Capper to prepare evidence in support of an oral application for permanent non-publication of his name, and to respond to the Tribunal’s request for evidence of his financial position to assist in the determination of costs. This material was received on 5 December and a reply received from the PCC on 16 December. The Tribunal reconvened by audio visual link to deliberate on 17 December 2024.

THE NOTICE OF DISCIPLINARY CHARGE

6. The PCC referred Mr Capper to the Tribunal pursuant to s71(1)(c) of the Act which provides:
 - (1) As soon as reasonably practicable after a complaint or notice of conviction is referred to a professional conduct committee, it must determine whether –
 - a. ...

¹¹ Section 80 of the Social Workers Registration Act 2003 provides for special protection for certain witnesses, including a witness aged under 18 years, including to give evidence in private and with appropriate directions made by the Tribunal as to who may be present. Publication is constrained in accordance with s80(6).

- b. ...
 - c. The committee should submit the complaint or conviction to the Tribunal;
- 7. An Amended Notice of Charge was filed dated 1 November 2024, reflecting the Agreed Summary of Facts. The Tribunal granted leave to file the amended charge at the commencement of the hearing.
- 8. The charge pleads in the alternative, professional misconduct under s82(1)(a), or conduct unbecoming that reflects adversely on the respondent's fitness to practise as a social worker, under s82(1)(b). The particulars of the charge read as follows:
 - 1. Between, on or about, April 2021 and May 2021, while practicing as a registered social worker, Mr Capper conducted himself in an inappropriate and/or unprofessional manner by failing to maintain professional boundaries and/or entered into an inappropriate relationship with [REDACTED] [Miss A] (then aged 13 years) and with the family of [REDACTED] [Miss A], who was then a prior client of Mr Capper, by:
 - a. Contacting [REDACTED] [Ms X] from his personal cellphone, expressing his wish to maintain contact with his previous client, [REDACTED] [Miss A];
 - b. Sending text messages from his personal cell phone number to [REDACTED] [Miss A]:
 - i. Referring to [REDACTED] [Miss A] as "bubba" and/or "my bubba" and/or "my darling";
 - ii. Offering to watch [REDACTED] [Miss A] at her rugby games;
 - iii. Asking if [REDACTED] [Miss A] wanted to get her nails done.
 - c. On or around 27 April 2021:
 - i. Taking [REDACTED] [Miss A] out for dinner;
 - ii. Entered [REDACTED] [Miss A's] home, to talk to her family;
 - iii. Offered to take [REDACTED] [Miss A] to have her nails done;
 - iv. Offered to take [REDACTED] [Miss A] to the "Poly Pools".
 - 2. That between, on or about April 2021 and May 2021, while practicing as a registered social worker, Mr Capper failed to maintain any records of the services/interactions with [REDACTED] [Miss A] or the members of her family.

THE EVIDENCE

- 9. At the commencement of the hearing the parties produced an Amended Agreed Summary of Facts (summary of facts) which formed the basis of the Tribunal's consideration of liability. Relevant contextual evidence was contained in [REDACTED] [Ms T's] affidavit, outlining Mr Capper's employment with the organisation, relevant organisational policies, and the organisation's investigation into Mr Capper's conduct. At the Tribunal's request [REDACTED] [Ms T] attended the hearing to answer questions.

10. As noted, Mr Capper is currently employed at [REDACTED] (a large multi-disciplinary provider of community-based and residential social services). The Chief Executive Officer [REDACTED] [Mr H] and Mr Capper's Team Lead [REDACTED] [Ms M] also gave evidence with respect to penalty.
11. The following summary relies on the summary of facts, [REDACTED] [Ms T's] affidavit and oral evidence, and uncontested oral evidence given by Mr Capper.
12. Mr Capper began working at the organisation as a student. Once qualified he was employed as a social worker predominantly in a residential service, and was promoted to Team Leader of the youth residential programme in May 2019. [REDACTED]
[REDACTED] While the young people are in residence, social work services are provided by the residential team and they are transferred back to the community social work team on returning home.
13. [REDACTED] [Miss A] attended the residential programme when she was aged 10 years and met Mr Capper at this time. [REDACTED] [Miss A's] younger sister [REDACTED] [Child B] became a client of the residential service in 2021. On or about 15 April 2021 [REDACTED] [Miss A] attended her sister's graduation ceremony for the programme, together with their caregiver [REDACTED] [Ms X]. [REDACTED] [Miss A] was aged 13 years at this time.
14. The summary of facts records the relevant events as follows:

7. Following the ceremony, Mr Capper discussed [REDACTED] [Child B] and [REDACTED] [Miss A] and how they were doing with [REDACTED] [Ms X]. He advised [REDACTED] [Ms X] that he would like to stay in touch with the whānau and offer ongoing support. Mr Capper and [REDACTED] [Ms T] began exchanging messages and phone calls from Mr Capper's personal cell phone number. This communication centred on [REDACTED] [Miss A] and [REDACTED] [Child B], with [REDACTED] [Ms X] voicing her concerns about their behaviour and potential self-harm. [REDACTED] [Ms X] discussed potential options for interventions, although no specific referrals were made.
8. In or around April 2021, Mr Capper was in contact with [REDACTED] [Ms X] by text message. The contact was regarding taking [REDACTED] [Miss A] to dinner, so that [REDACTED] [Ms T] could have some time with [REDACTED] [Child B]. [REDACTED] [Ms X] did not have any credit on her phone, and so was not able to respond to Mr Capper, and so asked [REDACTED] [Miss A] to reply to Mr Capper from her phone.
9. As a result, in or around April 2021, [REDACTED] [Miss A] and Mr Capper entered into the following text exchange:

[Miss A]: *Hi matua tk it's [REDACTED] [Miss A] this is my number Aunty has no credit I'm doing good not up to much how are you.*

Mr Capper: *Morena my bubba. I'm good thank you, just working. The usual...lol, What's your plans for the school holidays? Great to hear from you 😊*

[Miss A]: *I'm not doing much for the holidays*

Mr Capper: *I heard you are playing rugby now...how is that going for you What about school, you enjoying school?*

[Miss A]: *Yeah I'm doing rugby and I'm doing really good at school my reading has gotten better.*

Mr Capper: *When are your rugby games? I might come watch you play if that's okay. I'm proud that your doing well at school. You will be great to whatever you choose to do. You have my number now so if you need anything, to talk you can get hold of me. I'm so proud of how well you are doing Bubba 😊*

[Miss A]: *I don't know when my rugby games are but I would like you to come to them but I will let you know when they are*

Mr Capper: *Yup let me know when your games are and I will be there to support you. How is Aunty doing? Don't forget to tell her you are texting me. I'm really super proud of you Bubba. I hope I get to catch up with you soon.*

...

Mr Capper: *Can you tell Aunty I will call her later this afternoon.*

[Miss A]: *ok.*

Mr Capper: *And when I call her later I will talk to you too?*

[Child A]: *Yeah*

Mr Capper: *Alright my darling I better get ready for work but I will talk to you later today okay. I look forward to it. Talk soon 😊*

[Miss A]: *Ok bye*

Mr Capper: *Hi Bubba I didn't gwt [sic] to talk to you yesterday 😞 I spoke with Aunty for a while.*

[Miss A]: *[illegible]*

Mr Capper: *Are you coming with Aunty to pick [redacted] [Child B] up tomorrow?*

[Miss A]: [illegible]

Mr Capper: *Oh all good. Enjoy your time with your cousin. You okay?*

[Miss A] [illegible]

...

Mr Capper: *Hi my bubba. Are you home? Imma ring aunty soon.*

[Miss A]: *Yup*

Mr Capper: *What we having for dinner bubba?*

[Miss A] *idk*

Mr Capper: *You pick for us*

[Miss A]: *Yep*

Mr Capper: *I'm looking forward to catching up with 😊*

[Miss A]: *Yeah*

15. On or about 27 April 2021 Mr Capper and [REDACTED] [Miss A] went for a kebab dinner arranged with [REDACTED] [Ms X's] consent, and then took dessert home for the whānau. Mr Capper entered the home and stayed for approximately 30 minutes. While there he encouraged [REDACTED] [Miss A] to ask permission to go on further outings with him that they had discussed including to get her nails done and have breakfast. [REDACTED] [Miss A] was given permission, however when Mr Capper sent further brief texts over the following days she did not respond. The summary of facts goes on:
 16. On or around 30 April 2021, [REDACTED] [Ms X] contacted Mr Capper to state that she did not wish to continue contact with Mr Capper. Mr Capper has had no contact with [REDACTED] [Miss A] or [REDACTED] [Ms X] since.
 17. Mr Capper made no notes, nor kept any record of his interactions with [REDACTED] [Miss A], [REDACTED] [Child B], or [REDACTED] [Ms X]. He further did not advise his team leader, his formal supervisor, or any other management at [REDACTED] [the organisation] that he was engaging with [REDACTED] [Miss A] and her family.
16. The community social worker assigned to the whānau was advised of the contact with Mr Capper. She raised her concerns with [REDACTED] [Ms T] who in turn contacted [REDACTED] [Ms X] by phone and then met with her and [REDACTED] [Miss A] in person. [REDACTED] [Ms T] was shown the text messages and obtained permission to photograph these, copies of which were annexed to her affidavit. When she read the messages she said that she "felt sick".
17. Mr Capper was notified of the complaint and of the organisations intention to investigate. No in-person meeting was held, which both [REDACTED] [Ms T] and Mr Capper attributed to

advice Mr Capper received to only communicate with his employer in writing. Mr Capper acknowledged that his conduct was serious and apologised to his employer and to [REDACTED] [Miss A] and her whānau. He identified personal issues that were impacting him at the time. Mr Capper sought a final warning but was summarily dismissed. [REDACTED] [Ms T] explained that her primary concern was “the secrecy” surrounding Mr Capper’s actions, and that this impacted on trust and the reputation of the organisation. In her experience Mr Capper had previously been open and had “always sought support in the past”.

18. [REDACTED] [Ms T] also considered that it was inappropriate for Mr Capper to provide his personal phone number to a client, and was concerned about the failure to notify concerns about self-harm that Mr Capper said were raised in relation to one of the girls. She advised that disclosures of potential self-harm, self-harm and suicidal ideation are required to be immediately recorded, and escalated as appropriate, noting in her affidavit:

8. Where any Staff Member has a concern about a child, then the usual process would be to have a Child Centred Discussion. This will typically be a meeting with staff, including a Team Leader, to discuss possible solutions and plans to any issues arising. The issues can be as minor as a homesick child while in the village, through to a more serious disclosure. Any decisions will include the Community Social Work team, who would then be expected to make whatever necessary referrals were required. Referrals are not made by the TCE Team.²

19. [REDACTED] [Ms T] confirmed that no notes were made of Mr Capper’s interactions with [REDACTED] [Miss A] and [REDACTED] [Ms X] in April 2021. She explained that records kept in the residential service were typically in the nature of pre and post shift records so that incoming staff had relevant information. Community social workers use an electronic record-keeping system and are expected to make notes of each interaction and visit, ideally on the same day or the day following. [REDACTED] [Ms T] was not aware of any issues with Mr Capper’s record-keeping prior to his undocumented contact in this case.

20. The organisation has a policy entitled ‘Keeping Staff Safe from Allegations’ which sets out the responsibilities of the organisation’s staff to clients, and the need to follow acceptable standards of professional and personal conduct. Two versions of this were in use during Mr Capper’s employment, containing the same advice and guidance on interactions with children and their families. The policy includes the following instructions:

- Be professional and maintain the highest standards of personal behaviour at all times.
- Be aware of situations which can be misconstrued or manipulated by others. For example if a staff member is alone with a child in the house, bathrooms, clinic or similar place...
- Be vigilant and aware of how actions can be misconstrued. For example children (especially adolescents) can have strong emotional feelings towards staff. Whilst these should not be dismissed and the child or young person hurt as a result, neither should they be encouraged in any way.
- Ensure that as far as possible you are not alone when working with children on an individual basis...

21. [REDACTED] [Ms T] advised that Mr Capper had supervision from an external supervisor as well as internal supervision available within the organisation. [REDACTED] [Ms T] expressed

² Mr Capper came under the auspices of this team.

an understanding that potentially “*lines get blurred*” working closely with clients but that on those occasions it is important to seek supervision, which Mr Capper did not.

22. As stated, Mr Capper’s evidence was given in support of penalty (seeking to preserve his registration and renew his practising certificate). His explanation for his conduct was not challenged by the PCC. Mr Capper accepted that he gave his personal phone number to [REDACTED] [Ms X], that he had text communications with [REDACTED] [Miss A] as outlined, and he acknowledged that this was unprofessional. He offered by way of explanation that [REDACTED] [Ms X] sought support in relation to concerns about Child B (self harm, suicidal ideation), and that his judgment was impacted because of his personal experience with a family member when he was younger. The summary of facts states that Mr Capper said he wanted to stay in touch with the whānau; he expanded on this in response to questions from the Tribunal saying that Ms X “*reached out*” to him at the graduation ceremony and he said:

She had a lot of questions and-but they had to go so I just said, “listen, if you ring me, let me know what you need” because they were going to be transitioned out of the service and she felt that they needed just a little bit more support.”³

23. Mr Capper explained that his intention was:

...to support her through the issue she was facing at the time...there was a reflection in the same case so the stuff around triggering past trauma...So my intention was to, yeah, support and awahi her through that.⁴

24. Mr Capper accepted that stepping back he appreciates his actions were “*misguided*”⁵ and that he should have had open lines of communication with his line manager and supervisor at least. When questioned why he did not follow established procedures, Mr Capper explained that his desire to help and to not seek support was because⁶:

I was stuck thinking that I needed to solve the problem but it, actually, wasn’t my problem to solve, and that revolves around ego and being not-and the ability to separate one’s self from the issue.

25. Mr Capper acknowledged that the language he used in his text messages and his contact with the whānau reflected becoming overly familiar due to close relationships built as a member of the residential service. He reflected that as a professional social workers cannot allow themselves to become too comfortable with clients, saying⁷:

So we can’t allow ourselves to become too comfortable because, actually, at the end of the day, like I said this-and I hate to be brutal but what I’ve learned is they are actually not my friends and they’re not my family and they are not mine to solve their problems, so I have to separate that out. At the end of the day, they’re my clients.

³ Transcript of Evidence at p62 and 63.

⁴ Above n 3 at 49.

⁵ Above n3 at 62.

⁶ Above n3 at 57.

⁷ Above n3 at 69.

26. [REDACTED] [Mr H] described Mr Capper's current role and spoke positively of his work and capacity to connect with service users, and described training and safeguards in place that he considers provide reassurance that a similar event will not occur. [REDACTED] [Mr H] acknowledged that while Mr Capper can be employed in his current capacity without a practising certificate, to retain his ability to practise as a registered social worker will enable Mr Capper to grow his professional practice and benefit the organisation through the work he will then be able to undertake.
27. [REDACTED] [Ms M] attested to Mr Capper disclosing the reasons for the suspension of his practising certificate when he applied for his position. She also spoke highly of his work with his current employer, and his respect for colleagues and clients.

LIABILITY - PRINCIPLES

28. The burden of proof rests with the PCC, and the standard of proof is the balance of probability. When determining whether the allegations are proved the Tribunal must have regard to the seriousness of those allegations and the consequences of the facts to be proved⁸.
29. The Tribunal may make an order under s83 of the Act (as to the nature of the penalty to be imposed) if it is satisfied that one of the grounds under s82 is established. Section 82(1)(a) refers to professional misconduct, which is defined in s82(2)(a) to include a breach of the code of conduct. The Social Workers Registration Board Code of Conduct (the Code) is issued pursuant to s105 of the Act⁹ as a guide to the minimum standards of professional and personal conduct required of social workers. In determining whether to make an adverse finding, the Tribunal adopts a two-step approach:
- a. an objective analysis of whether the acts and omissions can reasonably be regarded as constituting a breach of the Code; and
 - b. whether the Tribunal is satisfied that the acts or omissions reach the threshold to warrant a disciplinary sanction for the purposes of protecting the safety of the public or maintaining professional standards.
30. Several provisions of the Code are relevant to the present case. Principle 1 expects that social workers will act with integrity and honesty; this is not limited to interactions with current clients. Of particular note are the expectations that a social worker will:
- a. Principle 1.1 – act honestly and ethically in all personal and professional behaviour.
 - b. Principle 1.2 – comply with all legal, professional and ethical obligations and any other relevant standards, including those in the Act.
 - c. Principle 1.5 – communicate in an appropriate, open accurate and straightforward way.

⁸ *Z v Dental Complaints Assessment Committee* SC 22/2007; [2008] NZSC 55 at [103]-[105].

⁹ Social Workers Registration Board Code of Conduct, 14 March 2016.

31. Principle 4 of the Code outlines the expectation that social workers are competent and responsible for their own professional development, and includes working in a safe way (4.3) and actively participating in supervision and critical reflection (4.10).

32. Principle 5 requires a social worker to protect the rights and promote the interests of clients, particularised in Principle 5.8 as the need to maintain personal and professional boundaries and not form inappropriate relationships with clients or those close to them. The Code gives guidance on these principles, including:

...Within the professional relationship there is almost always an imbalance of power due to your authority, specialised knowledge, ability to access privileged information, and influence as a social worker. You may also have a professional relationship with the client's family/whānau and others close to the client that may increase their vulnerability.

The power imbalance is increased when the client's knowledge is limited or they are particularly vulnerable because of age, character trait(s), of a particular set of circumstances. Take care to ensure that your own personal, sexual, or financial needs are not influencing interactions between yourself and the client. Also recognise that clients may read more into the professional relationship with the social worker and try to have their personal or sexual needs met. When this happens you have to maintain the professional boundary.

33. Principle 9 requires social workers to conduct themselves in a way that maintains public trust and confidence in the profession. Principle 9.1 states:

maintain a high standard of professional and personal behaviour-avoid activities, work, or non-work, that may in any way bring the social work profession into disrepute; the same standards of conduct are expected when using social media and electronic forms of communication.

34. Finally, Principle 10 of the Code addresses the expectation that social workers will keep clear, accurate and contemporaneous records of interactions with clients.

35. With regard to the alternative pleading of conduct unbecoming that reflects adversely on a social worker's fitness to practice, this likewise involves a two-step approach:

- a. an objective analysis of whether the social worker's acts or omissions can reasonably be regarded as conduct unbecoming of a social worker; and
- b. if the Tribunal can be satisfied that the acts or omissions reflect adversely on the social worker's fitness to practise and therefore require a disciplinary sanction.

36. To be 'unbecoming' the conduct will need to be inconsistent with the standards expected of a registered social worker, and may include conduct within the personal sphere. The test does not require a finding that the social worker is in fact unfit to practice.

LIABILITY – DISCUSSION

37. The Tribunal finds that Mr Capper's conduct as outlined in the amended notice of charge reaches the threshold for professional misconduct, by virtue of a breach of several provisions of the Code. These breaches were a departure from conduct that, viewed objectively, the profession and the public would expect of a reasonable and experienced social worker, and warrants a disciplinary sanction.
38. It is important to preface the Tribunal's reasoning by recording that the PCC did not make any allegation of grooming or other bad intent against Mr Capper. Any such allegation would be viewed extremely seriously and require sufficiently compelling evidence to meet the allegation. Our findings reflect the Tribunal's cautious acceptance of Mr Capper's explanation for his conduct.
39. The Tribunal finds that Mr Capper's in-person contact and text communications with [redacted] [Miss A] show a failure to maintain appropriate professional boundaries. Mr Capper's professional interactions with the whānau ought to have ended when [redacted] [Child B] left the residential service, and responsibility was transferred to the community social work team. It was inappropriate for Mr Capper to offer to continue to provide professional support outside of his role, and to have continued contact. He also ought to have discussed his contact with [redacted] [Ms X] with his line manager, supervisor or others and facilitated support from the correct source.
40. The Tribunal also finds that the nature of the conduct is likely to impact the trust and confidence with which the social work profession may be viewed by the public. Whether conduct may bring the profession into disrepute requires an objective assessment of whether a member of the public, armed with the relevant facts and circumstances, would view the standing or reputation of the profession as being lowered by that conduct¹⁰. In this regard the Tribunal finds the following conduct relevant:
- a. the content of Mr Capper's text messages – an adult man to a 13 year old girl known to him by virtue of his role as a social worker – is inappropriate and carried a high risk of being misconstrued.
 - b. taking a young client alone in his car to dinner and planning further solo outings was more than simply "*misguided*", it was highly unprofessional and in clear breach of the Code's expectations for maintaining professional boundaries.
41. The absence of any formal records of Mr Capper's interactions is also in breach of the Code and the Tribunal has no doubt any employer would expect records to be made in the same circumstances. Mr Capper did not argue that he was acting in a personal capacity, and his offer of assistance was only agreed to because of his position within the organisation. The lack of records also meant Mr Capper left himself vulnerable regarding the motivation that might be ascribed to his actions.
42. The Tribunal has previously considered an inappropriate relationship between a social worker and young person on several occasions, finding professional misconduct. Two relevant

¹⁰ In reliance on *Collie v Nursing Council* [2001] NZAR 74 at [28].

examples are *PCC v Harrison*¹¹ and *PCC v Moeke*¹². In *Harrison* the respondent was an experienced social worker employed by Oranga Tamariki and seconded to work for a Trust providing various courses and resources for rangatahi. A teenaged girl who was involved in a Waka Wananga run by the Trust and met Mr Harrison in his work capacity (although they established that they had a whakapapa connection) contacted Mr Harrison on social media regarding bullying and concerns for her mental health. He met with her and arranged for her to do work experience in a business he was associated with. He gave the young person gifts of perfume and a mobile phone, drove her alone in his car, and paid for lunches. The language Mr Harrison used in the text messages was inappropriate (“*I love you oi*” and “*I miss you oi*”). Mr Harrison denied any inappropriate intentions but accepted the conduct blurred professional boundaries. He also omitted to make records or seek supervision. The PCC did not allege grooming or a sexual relationship (Mr Harrison was acquitted of criminal charges in relation to his contact with the young person). The Tribunal imposed censure and conditions involving professional supervision and professional development for a period of two years. The Tribunal’s condition requiring professional development in cultural competence and communication was a direct reflection that the language used - despite Mr Harrison’s assertion it reflected the culture he worked in - was not acceptable.

43. In *Moeke* the social worker sent inappropriate messages on social media to a 14-year-old girl who was enrolled in a programme run by his employer. The messages included the use of language to refer to the young person as “*bub*”, “*babe*”, “*cheeky bum*” and “*hun*”, and attempts to meet outside of the professional relationship including going to the movies. Mr Moeke wrote a message saying he wished the young person was older so that he could date her. The Tribunal found the relationship was clearly inappropriate and was professional misconduct by virtue of a breach of Principles 1, 5, 7, 9 and 10 of the Code. The Tribunal held:¹³

[34] ... It was Mr Moeke’s responsibility to maintain clear and appropriate personal and professional boundaries in his online communications with YG and by his conduct, he failed to discharge that responsibility over a two-month period. The Tribunal was concerned about what Mr Moeke considers is acceptable and safe practice and has little difficulty concluding the conduct was a serious departure from what is acceptable conduct in the social work profession.

[35] The Tribunal considers that given the implicit power imbalance in a social-worker client relationship, and the breach of trust that is involved where there is a breach of professional boundaries, this will likely adversely impact the client involved. Maintaining appropriate boundaries is a fundamental skill, obligation, and professional discipline for all social workers. The Tribunal considers that social workers who lack the ability to maintain appropriate professional boundaries step onto a slippery slope of complicated relationships with clients which are likely to be damaging to the client, will be confusing, and may result in

¹¹ *Professional Conduct Committee v Harrison* RSW3/D1/SWDT/2019, 12 March 2020.

¹² *Professional Conduct Committee v Jubert Moeke* RSW11/D3/SWDT/2020, April 2021.

¹³ Above n6 at [34] and [35].

even more serious misconduct. There is the potential for mutual emotional dependency to arise. In the worst cases sexual relationships can develop. Social workers like Mr Moeke who are involved in delivering courses or providing professional services to vulnerable clients, particularly youth, cannot be ‘friends’ with those clients.

44. Mr Capper’s evidence quoted at [25] above shows he has reflected and reached a similar view.
45. The Tribunal also notes the stance taken by the Teachers Disciplinary Tribunal in cases involving a breach of professional boundaries between a teacher and a young person. That Tribunal has emphasised the importance of the teacher – as the adult and professional – setting and maintaining professional boundaries and avoiding acting out of self-interest, such as being motivated by their own emotional or other needs. The potential for harm to a young person exists when professional boundaries are crossed even when no inappropriate motive is established. As a professional, a teacher is expected to exercise good judgment, self-control and avoid situations that can cause distress, emotional confusion or confusion about the nature of their relationships with students.¹⁴ In the Tribunal’s view, the same expectations apply to social workers and their clients.
46. For the reasons outlined, we have no hesitation in finding that Mr Capper’s conduct can be categorised as a failure to maintain professional boundaries and was an inappropriate relationship with [REDACTED] [Miss A]. It was fortunate that [REDACTED] [Ms X] brought a swift end to the contact. The further plans that Mr Capper discussed show a lack of judgment, and had they gone ahead, would have placed him at serious risk and warranted closer scrutiny of his motives. The organisation’s policy on staff conduct with young clients could not be any clearer as to the potential for such conduct to be misconstrued or cause harm. Even with good intentions there was a risk of harm to [REDACTED] [Miss A], such as Mr Capper’s attention being confusing and causing discomfort.
47. The failure to advise any colleagues, seek supervision, or share the concerns about [REDACTED] [Child B] was also unprofessional. We agree with [REDACTED] [Ms T’s] evidence that this placed the child, Mr Capper and the organisation at risk. Social work inherently gives rise to challenging situations and decision-making and this is why supervision is viewed within the profession as part and parcel of good professional practice. Contemporaneous and accurate record keeping is also important for these and other reasons.
48. With respect to the alternative pleading of conduct unbecoming, given the findings set out above in relation to professional misconduct, it was not necessary for the Tribunal to consider this further.

PENALTY - PRINCIPLES

49. Having found the charge proved the Tribunal may make orders under s83 of the Act. The principles relevant to the imposition of penalty in disciplinary proceedings are well-established and are to protect the public, and to maintain professional standards and public

¹⁴ For example, *Complaints Assessment Committee v Duffy* [2015] NZTDT 2, 19 May 2015; *Complaints Assessment Committee v Teacher V* [2020] NZTDT 22; *Complaints Assessment Committee v Teacher* [2013] NZTDT 3.

confidence in the profession. Section 83 sets out a range of penalties and the Tribunal should impose the least restrictive penalty appropriate in the circumstances of the case and one that is fair, reasonable and proportionate and comparable to those imposed in similar cases. Rehabilitation is a relevant consideration, and penalties may be imposed with a rehabilitative purpose.¹⁵

50. The most serious penalties of cancellation or suspension¹⁶ of registration are reserved for the most serious cases and where it is necessary for the protection of the public to remove a social worker who is unfit to practise. Cancellation will only be appropriate where the social worker's conduct is such that it is the only appropriate response to reflect the seriousness of the conduct and its impact on fitness and the reputation of the profession. Cancellation or suspension may not be required notwithstanding the misconduct is serious, where the social worker has demonstrated insight and taken rehabilitative steps which provide reassurance that the purposes of discipline can be met with a lesser penalty.
51. The PCC referred to several cases for comparison including *Harrison*, discussed above. The other cases are noted but not directly comparable to the present.¹⁷ The PCC submits that the aggravating features in this case are as follows¹⁸:
- a. Mr Capper is an experienced social worker who held a leadership role. He had been inducted into the risks associated with close contact with minors.
 - b. [Miss A] was a child, aged 13 at the time. She was vulnerable, and her family situation was known to Mr Capper.
 - c. the pattern of conduct spanned a number of weeks, and appeared to be escalating in nature. There was a clear lack of insight into the ongoing boundary breaches.
52. The PCC also acknowledges the presence of mitigating factors, namely Mr Capper's cooperation with the disciplinary process including the agreed summary of facts, and his previously unblemished disciplinary history. The Tribunal would add to this the mental health factors which Mr Capper identified and the steps that he has taken to address these as explained to the Tribunal in his oral evidence, discussed below.
53. The PCC submits that the appropriate starting point for penalty is suspension of Mr Capper's practising certificate for a period of 6 months. The PCC acknowledges that given the suspension imposed by the Board and subsequent lapse of Mr Capper's practising certificate, he has served a "default suspension" such that an alternative penalty may be appropriate entailing:
- a. censure.

¹⁵ In reliance on *Roberts v Professional Conduct Committee of the Nursing Council of New Zealand* High Court Wellington CIV 2012-404-003916, 12 December 2012, Collins J.

¹⁶ s83(1)(a)(i); suspension may be imposed for a period of not more than 3 years.

¹⁷ *Professional Conduct Committee v Surowiez-Lepper* RSW3/D3/SWDT/2015 and *Professional Conduct Committee v RSW Y RSW2/D2/SWDT/2015*; *Complaints Assessment Committee v Austin* RSW2/D2/SWDT 2016.

¹⁸ Submissions of Professional Conduct Committee as to Penalty dated 12 November 2024 at [15].

b. conditions:

- i. a course of education or training imposed prior to the issue of a new practising certificate, covering professional boundaries, cultural competence and communication.
- ii. upon resumption of practice Mr Capper be required to practice under external supervision with a Board approved supervisor.

54. Mr Capper accepts conditions being placed on his practising certificate. His primary submission was that a penalty involving further suspension or cancellation of his registration is not warranted. Mr Capper has been in his current employment for over two and a half years, he disclosed his suspension and reasons for this to his current employer when recruited; he does not work directly with young people on a daily basis, but instead works mainly with tane. The ability for Mr Capper to regain a practising certificate is seen to be desirable for his mana and his professional development, and as having benefit to his employer.

55. Sensitive health information



Sensitive health information



56. Supporting Mr Capper's reflections on his conduct and work done  [Mr H] opined that he does not think that the conduct "*reflects him as he is* [now]". It is clear that Mr Capper has support within his current employment and is seen as capable of expanding his practice and providing benefit to his employer's clients for whom a real need for support and advocacy from skilled and relatable practitioners exists.

57. In response to a question from the Tribunal, Mr Capper also expressed sadness for the harm that his actions could have caused to  [Miss A].²⁰

58. On behalf of Mr Capper, Mr Sparks urged the Tribunal to take a rehabilitative and forward-looking approach to penalty, avoiding cancellation or suspension.²¹ Mr Sparks submitted that Mr Capper acted with "*genuine intent and no untoward motives*" and the absence of Police involvement was noted. No particular submissions were made with regard to censure or appropriate conditions, however the Tribunal understood from Mr Capper's evidence and that of his employer that he will be supported with any required professional development.

¹⁹ Transcript of evidence at 49/27.

²⁰ Transcript of evidence 68/1 and 6.

²¹ Mr Capper referred to relevant examples of rehabilitative penalties imposed in *Leary v Law Practitioners Disciplinary Tribunal* [2008] NZAR 57 (HC) and *Iosefa v New Zealand Lawyers and Conveyancers Disciplinary Tribunal* [2024] NZLCDT 26.

PENALTY-DISCUSSION

59. We do not repeat our liability findings other than to note that the conduct caused the Tribunal serious concern for its lack of insight, and that the plans for one-on-one outings outside of working hours with [REDACTED] [Miss A], aged 13 years, were reckless and unprofessional conduct. The reaction of Mr Capper's colleagues on learning of his actions was one of immediate concern. [REDACTED] [Ms T's] evidence that she "*felt sick*" highlights how inappropriate it was perceived to be. We also observe that Mr Capper's reflections on the impact of his actions on the young person were only given in response to questions from the Tribunal.
60. The Tribunal considered the imposition of cancellation and suspension but is satisfied in the circumstances that the purposes of the Act can be met with a penalty short of these most serious penalties. We are also mindful that Mr Capper has had a lengthy period without a practising certificate. Taking the evidence of Mr Capper, and the support of his employer who provided assurance as to supports available to him in the workplace, we consider that suitable conditions can be imposed. Indeed there is some benefit in Mr Capper holding a practising certificate in terms of the oversight this provides by having the Board monitor the implementation of appropriate conditions.
61. The Tribunal considers the following penalty is appropriate and consistent with comparable cases:
- a. censure
 - b. conditions:
 - i. that Mr Capper receives supervision from an external supervisor, being a senior registered social worker, on a monthly basis for a minimum of 6 months with a focus on the Code of Conduct and professional boundaries.
 - ii. Mr Capper's supervisor is to report to the Board at 6 months and on completion of supervision (if ongoing after 6 months).
 - iii. Mr Capper to disclose the Tribunal's decision to his supervisor, current employer and any prospective employer for a period of two years.

COSTS

62. With regard to costs, the Tribunal may make an order pursuant to s83(1)(e) to require that the social worker pay part or all of the costs and expenses of and incidental to the PCC's inquiry²², the prosecution of the charge²³, and the hearing²⁴. The disciplinary process has a necessary and important function in meeting the purposes of the Act, and it is funded by the profession through the disciplinary levy. The power of the Tribunal to make an order for costs

²² s83(1)(e)(ii).

²³ s83(1)(e)(iii).

²⁴ s83(1)(e)(iv).

reflects the principle that the entire costs of the proceedings should not be borne by the profession and those who face a disciplinary charge and who are found guilty are expected to contribute to the costs of this.

63. Costs are discretionary. The usual starting point for a contribution towards costs in favour of the prosecuting party is 50% of the actual and reasonable costs incurred. This figure may be adjusted taking the particular circumstances of the case into account. Costs are not intended to constitute part of the penalty, and therefore the principles that govern penalty are not applied in the same way to an order for costs. What may be determinative of an increase or decrease from the 50% starting point are any matters that indicate the costs sought are unreasonable and/or the financial circumstances of the party facing a costs order.
64. The schedule of costs filed by the PCC total \$49,675.86. This includes the costs of the PCC investigation (\$17,390.66) and the costs of the prosecution (\$32,285.20 including disbursements). The costs of the Tribunal are \$21,318.40²⁵. In brief reply submissions on costs dated 16 December 2024, the PCC proposed to reduce the quantum of its hearing/prosecution costs based on which a contribution may be sought by one third, meaning a total of costs for the PCC of \$39,021.74²⁶. This concession fairly reflects that elements of the charge were withdrawn and counsel attended witnesses whose evidence was not called. It is not clear why the PCC investigation costs are at the level they are, and on the face of it a sum exceeding \$17,000 appears high.
65. The Tribunal agrees that it is appropriate in the circumstances to reduce the starting point from which Mr Capper's contribution is calculated. We consider it is also appropriate to reduce the contribution to be paid by Mr Capper below 50%, although it is not without concern that we do so given the total amount that will be borne by the profession. The reasons for this approach are:
- a. Matters that go to the actual and reasonable costs incurred to be used as a starting point:
 - i. there have been substantial delays in this matter which we cannot attribute to Mr Capper, and attendances that were outside of his control including the several months required to determine the availability of witnesses.
 - ii. the substantive amendment of the charge.
 - b. Matters that go to the level of contribution that we will order. But for sufficient evidence of impecuniosity we would have ordered a greater contribution:
 - i. that Mr Capper has had a default suspension (as the PCC described it) since 2021. This inevitably has impacted on his ability to be remunerated at the level of a social worker holding a practising certificate.

²⁵ Costs incurred by the Tribunal include travel and expenses for the hearing (accommodation, hearing venue, food), the costs of the Tribunal Co-ordinator and stenographer and administrative costs, preparatory work and sitting time for the members, and preparation of the Tribunal's reasoned decision. The fees of the Tribunal members are paid in accordance with the Cabinet Fees Framework.

²⁶ This reflects a reduction of one third from the \$32,285.20 sum.

- ii. Mr Capper has filed evidence of very limited financial means, including that he does not own a home and does not have savings, and his outgoings are greater than his current income. These matters go to the percentage contribution that the Tribunal will order.

66. The Tribunal orders that Mr Capper is to pay a contribution of 20% of the costs of the Tribunal and prosecution of the charge. While not within the scope of the Tribunal's powers to determine how payment is addressed, Mr Capper is encouraged to liaise with the Board to make suitable arrangements.

NON-PUBLICATION

67. The Tribunal is required to hold hearings in public in line with the principles of open justice and transparency of proceedings. However, the Tribunal may make orders for non-publication under s79 of the Act if it is satisfied that it is desirable to do so, having regard to the interests of any person (who might be affected by the order) and the public interest. The public interest includes knowing what matters come before the Tribunal, the circumstances that are considered to amount to professional misconduct or to otherwise justify a disciplinary finding, and how the Tribunal responds to this. There is also generally a public interest in knowing the identity of those who are found guilty of a disciplinary charge.

68. The threshold for the Tribunal to make an order does not require exceptional circumstances, and is a lower threshold than in criminal proceedings. It is akin to the test under the Health Practitioners Competence Assurance Act 2003 (also that the tribunal be 'satisfied that it is desirable' to make an order) and the test in the teaching arena, which is also that the tribunal is of the opinion it is 'proper' to make an order. The Tribunal will consider whether any adverse impact that an applicant asserts will arise from publication is 'likely' to follow. This needs to be something more than the ordinary consequences that are expected to arise from publicity of an adverse finding, such as embarrassment or concern for reputational harm.

69. The Tribunal is satisfied that it is desirable to make orders in favour of [redacted] [Ms X], [redacted] [Miss A] and [redacted] [Child B]. There is no public interest in their identity being known and to the contrary, there is a strong interest in protecting the privacy of the young people, which is recognised in s80 of the Act.

70. An application for permanent non-publication was made by Mr Capper, supported by [redacted] [Mr H] who also seeks an order on behalf of [redacted] (although neither filed an affidavit). The PCC seeks an order in favour of [redacted] [the organisation] and, because she will identify the organisation, [redacted] [Ms T].

71. Mr Capper's application is made on the following grounds, in summary:

- a. Potential for stigma due to the nature of the charge, which he states may give rise to him "*being labelled or judged*" without members of the broader community understanding the full context.

- b. Sensitive health information
- c. Concern for those close to Mr Capper, and the impact of publication on them and his own relationships with them if they feel “shame” or “disillusionment” because of his actions. *“Family members, particularly children or elderly relatives could suffer emotional distress or even be targeted in their own personal or professional lives due to the association.”*
- d. Potential discriminatory harm of a various types to Mr Capper’s future opportunities (not related to work), such as renting, bank loans, schooling.
- e. A risk that negative publicity “could severely undermine my credibility and reputation in the workplace”, impacting professional relationships and future job prospects as well as altering dynamics in his current workplace and indeed risking his current job.
- f. A potential loss of credibility as an advocate and community leader “in future advocacy efforts”.
- g. A “chilling effect” on others who may feel intimidated or unwilling to stand up for what they believe in. *“If I were publicly named, I would become an example of the dangers faced by those who seek to make their voices heard...ultimately stifling meaningful social change”.*

72. The Tribunal’s assessment is that Mr Capper’s submission was articulate but spoke to every perceived potential consequence of adverse publicity, including some remote and some expressly countered by the evidence. What the Tribunal expects in support is evidence that establishes a personal interest that supports an order. This might have included specific evidence of Mr Capper’s domestic situation, his current health status and the likely adverse outcomes of publicity on him or named others. Sensitive health information

The Tribunal was not told whether Mr Capper’s family and close friends are aware of the proceedings, or any details that would support a finding that they are likely to suffer harm as a consequence of publication. We were given no evidence about a partner or children.

73. Further, Mr Capper’s concerns regarding his current employment are countered by the evidence of his CEO and Team Leader who confirmed their support for Mr Capper as a valued employee, in full knowledge of the disciplinary charge. That knowledge has currently been confined to management level staff, and wider dissemination may be inevitable if this decision gains publicity. That is a matter Mr Capper and his employer can address as they see fit.

74. We turn to the organisations. With regard to the identify of Mr Capper’s current employer, the application is based on the fact that this charge relates to matters now several years old and which occurred while Mr Capper was employed elsewhere and in circumstances dissimilar to his current role.

75. The PCC’s application on behalf of [redacted] [the organisation] and [redacted] [Ms T] is based on the submission:

10. There are no private interests advanced by the PCC, either in support or in opposition to non-publication orders. It is accepted that the publication of the name and location of [REDACTED] may lead to the identification of the minors named in the charge. It is envisioned that this is unlikely however given the lapse in years since the conduct in question, and the number of clients [REDACTED] has.
 11. What is more concerning is the potential for reputational harm associated with publication. The Clientele of [REDACTED] is inherently vulnerable. They provide a residential service which requires a high level of trust. There is no doubt that [REDACTED] took appropriate steps when managing this matter. However, any suggestion of impropriety within a residential setting does have the clear potential to impact on the reputation and mana of [REDACTED]. This is not warranted and not in the public interest.
76. The PCC acknowledges that publication of Mr Capper's name may identify the organisation to some but that this is less (potentially) damaging than simply publishing the organisation's name.
77. We are persuaded that any public interest in the identity of [REDACTED], [REDACTED] (and therefore [REDACTED] [Ms T]) is outweighed by the interests of those parties, and in relation to the latter, by the interests of [REDACTED] [Ms X] and her whānau. This was not a case involving systemic failures at the organisation and we accept that there is a risk of harm for current clientele. We also accept that there is no need to publish the name of Mr Capper's current employer who is as closely aware of the circumstances of the case as possible, and given the time elapsed. The disclosure requirement however provides some assurance in the event Mr Capper changes his employment.

ORDERS

78. The Tribunal finds that the charge is met, and that the particulars separately and cumulatively amount to professional misconduct under s82(1)(a) of the Act. Pursuant to s83 the Tribunal makes the following orders:
- a. Mr Capper is censured.
 - b. The following conditions are to be placed on Mr Capper's practising certificate when issued:
 - i. that Mr Capper receives supervision from an external supervisor, being a senior registered social worker, on a monthly basis for a minimum of 6 months with a focus on the Code of Conduct and professional boundaries.
 - ii. Mr Capper's supervisor is to report to the Board at 6 months and on completion of supervision (if ongoing after 6 months).
 - iii. Mr Capper to disclose the Tribunal's decision to his supervisor, current employer and any prospective employer for a period of two years.

iv. Mr Capper does not engage in social work with tamariki/rangatahi until satisfactory report from his external supervisor to the Board.²⁷

c. Mr Capper is to pay costs to the PCC in the sum of \$7804.35.

d. Mr Capper is to pay costs to the Tribunal in the sum of \$4263.68.

79. Pursuant to s79 of the Act the Tribunal makes the following permanent orders for non-publication:

- a. The name and identifying particulars of [REDACTED] [Miss A], [REDACTED] [Child B] and [REDACTED] [Ms X].
- b. The name of the organisation [REDACTED] and of [REDACTED] [Ms T].
- c. The name and identifying particulars of [REDACTED] including the names of [REDACTED] [Mr H] and [REDACTED] [Ms M].
- d. Sensitive information regarding Mr Capper's wellbeing.

80. The interim order for non-publication of Mr Capper's name is to remain in place for the statutory appeal period.

81. This decision will be published on the Board's website.

82. Pursuant to s83 (i)(a)(ii) that:

- a. Mr Capper does not engage in social work with tamariki/rangatahi until satisfactory report from his external supervisor to the Board.

Dated: 10 February 2025

Signed:



Catherine Garvey
Chairperson

ⁱ This decision was issued on 10 February 2025 and omitted a condition determined by the Tribunal and advised to the parties by Minute dated 14 November 2024. The omission was noted by counsel for the Complaints Assessment Committee and the decision amended with the insertion of paragraph 78(b)(iv) above, and reissued accordingly.

²⁷ This condition was outlined to the parties in a post-hearing Minute dated 14 November 2024 setting out the Tribunal's indication of its findings and was then omitted in error from the decision distributed to the parties dated 10 February 2025.