IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 41/2019
[2020] NZSC 83

BETWEEN	NEW ZEALAND LAW SOCIETY Appellant
AND	JOHN LLEWELLYN STANLEY Respondent

Hearing:	23 April 2020
Court:	Winkelmann CJ, William Young, Glazebrook, O'Regan and Ellen France JJ
Counsel:	P N Collins for Appellant J C Gwilliam and H Joubert for Respondent
Judgment:	17 August 2020

JUDGMENT OF THE COURT

A The appeal is dismissed.

B Costs are reserved.

REASONS

WILLIAM YOUNG, O'REGAN AND ELLEN FRANCE JJ
(Given by Ellen France J)

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Introduction

[1] Mr Stanley, the respondent, completed the necessary academic and professional qualifications for admission as a barrister and solicitor of the High Court as a mature student. (He is now 67 years of age.) The New Zealand Law Society (the Law Society), the appellant, refused to give him a certificate of character essentially because of concerns about his character. Those concerns relate to his history of criminal offending, which includes four convictions for driving with excess breath/blood alcohol, and his attitude towards that offending. Without a certificate of character from the Law Society, Mr Stanley could not be admitted in the usual way. Instead, the matter proceeded to a contested hearing in the High Court. Subsequently, Clark J concluded that Mr Stanley was not a fit and proper person to be admitted in terms of the Lawyers and Conveyancers Act 2006 (the Act) and refused his application.[1]

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1 *Stanley v New Zealand Law Society* [2018] NZHC 1154, [2018] NZAR 1210 [HC judgment].

[2] Mr Stanley appealed successfully from this decision to the Court of Appeal.[2] The Court of Appeal concluded that, subject to Mr Stanley taking the statutory oath, he was entitled to an order admitting him as a barrister and solicitor of the High Court. The Law Society unsuccessfully sought a stay of the Court of Appeal judgment.[3] Mr Stanley has now been admitted as a barrister and solicitor and has been issued with a practising certificate.[4]

[3] The Law Society appeals with the leave of this Court from the decision of the Court of Appeal determining that Mr Stanley was a fit and proper person.[5] The appeal raises questions about the approach to be taken to s 55 of the Act. Section 55 provides that for the purpose of determining whether or not an applicant for admission is a "fit and proper person" to be admitted, the High Court or the Law Society "may take into account any matters it considers relevant and, in particular, may take into account" any of the matters listed in s 55(1). Those factors relevantly include the following:

> (a) whether the person is of good character:
>
> …
>
> (c) whether the person has been convicted of an offence in New Zealand or a foreign country; and, if so,—
>
> (i) the nature of the offence; and
>
> (ii) the time that has elapsed since the offence was committed; and
>
> (iii) the person's age when the offence was committed:
>
> …

[4] To determine the appeal it is necessary to consider three questions. The first question is the approach to be taken to the fit and proper person standard in s 55(1) where the applicant for admission has previous convictions. That will require consideration of the statutory scheme and the way in which it has been interpreted to

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2 *Stanley v New Zealand Law Society* [2019] NZCA 119, [2019] NZAR 1001 (French, Dobson and Brewer JJ) [CA judgment].

3 *Stanley v New Zealand Law Society* [2019] NZCA 354 (Kós P, Gilbert and Wild JJ) [Stay judgment].

4 We understand that the practising certificate was issued subject to voluntary undertakings from Mr Stanley requiring him, amongst other matters, to obtain the approval of the Law Society before accepting employment as an in-house lawyer.

5 *New Zealand Law Society v Stanley* [2019] NZSC 125.

date. The second question is how the principles apply to Mr Stanley. The remaining question is whether (and, if so, how) Mr Stanley's name could be removed from the roll of barristers and solicitors should the appeal be allowed.[6]

The statutory scheme

[5] The legislative history of the discipline of the legal profession, the establishment of the Law Society and the Society's role in professional discipline is discussed in some detail by McGrath J in *Auckland District Law Society v B*.[7] For present purposes it is sufficient to note that two aspects common to professional discipline generally, that is, controls on those who wish to enter the profession and on the conduct of those within the profession, have been reflected in New Zealand law governing the legal profession since the Supreme Court Ordinances of 1841 and 1844.[8]

[6] A wide range of professions have good character and competence requirements for entry.[9] The content of those requirements may vary according to the profession.[10] In terms of lawyers in New Zealand, the content of the fit and proper person and good character requirements needs to be considered in light of the statutory scheme. The purposes of the Act provide the starting point. The relevant purposes are set out in s 3(1) as follows:[11]

> (a) to maintain public confidence in the provision of legal services … :

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6 At [2].

7 *Auckland District Law Society v B* [2002] 1 NZLR 721 (CA) at [72]–[84].

8 Robin Cooke (ed) *Portrait of a Profession* (AH & AW Reed, Wellington, 1969) at 142–143, citing Supreme Court Ordinance 1841 5 Vict 1, cl 13; and Supreme Court Ordinance 1844 7 Vict 1, cl 16. See also WR Flaus "Discipline within the New Zealand Legal Profession" (1971–1973) 6 VUWLR 337 at 340–341.

9 *Layne v Attorney General of Grenada* [2019] UKPC 11, [2019] 3 LRC 459 at [36]. In New Zealand see, for example, Health Practitioners Competence Assurance Act 2003, s 15(1) (registered health practitioners); Education Act 1989, s 353 (registered teachers); Real Estate Agents Act 2008, s 36 (licensed real estate agents, branch managers and salespersons); Social Workers Registration Act 2003, s 6(1) (registered social workers); and Plumbers, Gasfitters, and Drainlayers Act 2006, s 36 (registered plumbers, gasfitters and drainlayers).

10 *Layne*, above n 9, at [37] per Lady Arden. The history of the requirement of good character is discussed by Lord Sumption in the same judgment at [56]–[57]. Deborah L Rhode discusses the "extended historical lineage" of "moral character" as a professional requirement in "Moral Character as a Professional Credential" (1985) 94 Yale LJ 491 at 493–502. See also Carol M Langford "Barbarians at the Bar: Regulation of the Legal Profession through the Admissions Process" (2008) 36 Hofstra L Rev 1193 at 1196–1198.

11 These purposes also apply to registered conveyancers for whom the Lawyers and Conveyancers Act 2006 makes provision.

(b) to protect the consumers of legal services … :

(c) to recognise the status of the legal profession … .

[7] Section 3(2) provides that in order to attain those purposes, the Act, amongst other things, reformed the law relating to lawyers and provided for a "more responsive regulatory regime" for lawyers.[12] To achieve the purposes, the Act also prescribes the "fundamental obligations with which, in the public interest, all lawyers … must comply in providing regulated services".[13] These fundamental obligations are set out in s 4 and include the following:

(a) the obligation to uphold the rule of law and to facilitate the administration of justice in New Zealand:

…

(c) the obligation to act in accordance with all fiduciary duties and duties of care owed by lawyers to their clients:

(d) the obligation to protect, subject to his or her overriding duties as an officer of the High Court and to his or her duties under any enactment, the interests of his or her clients.

[8] The requirements for the admission and enrolment of barristers and solicitors in New Zealand are set out in Part 3 of the Act. Under s 48(1), every person admitted by the High Court under the Act "must be admitted as a barrister and solicitor". Once admitted, every person so admitted is generally entitled "while his or her qualification continues, to practise in or before any court or tribunal".[14]

[9] Section 49 sets out the qualifications for admission as a barrister and solicitor. Section 49(1) provides that a person qualifies for admission if the person is in at least one of the categories in the section. Relevantly, s 49(2) provides that the first category comprises those persons who:

(a) have all the qualifications for admission prescribed or required by the New Zealand Council of Legal Education; and

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12 Section 3(2)(a) and (b).

13 Section 3(2)(d).

14 Section 48(2). Under s 39(1), the Law Society, on application by any person whose name is on the roll, must issue that person with a practising certificate. This is subject to a number of qualifications including the ability to refuse to issue a practising certificate under s 41(1) on the ground that the person is not a fit and proper person: see s 39(4)(b)(ii).

(b) are fit and proper persons to be admitted as barristers and solicitors of the High Court; and

(c) meet the criteria prescribed by rules made under section 54.[15]

[10] A certificate of character from the Law Society is evidence the applicant is a fit and proper person. Section 51 provides that:

> A certificate purporting to be signed by the executive director of the New Zealand Law Society, or a person authorised for the purpose, … by the Council of the New Zealand Law Society, and certifying that [an applicant] is both a fit and proper person to be admitted as a barrister and solicitor of the High Court and a person who meets the criteria prescribed by rules made under section 54 is, in the absence of proof to the contrary, sufficient evidence of those facts.

[11] If a person wishes to be admitted on the grounds that he or she is qualified under the first category described in s 49(2), the applicant must apply to the High Court in accordance with the Act and any rules made under the Act.[16] Section 52(2) provides that the High Court must make an order admitting the person as a barrister and solicitor if:

(a) the High Court is satisfied that the [applicant] is qualified for admission under section 49(2) …; and

(b) the [applicant] has taken the [oath in the prescribed form].

[12] In this case the key section is s 55 which is headed "Fit and proper person". Section 55(1) provides that:

> For the purpose of determining whether or not a person is a fit and proper person to be admitted as a barrister and solicitor of the High Court, the High Court or the New Zealand Law Society may take into account any matters it considers relevant and, in particular, may take into account any of the following matters:
>
> (a) whether the person is of good character:
>
> (b) whether the person has, at any time, been declared bankrupt or been a director of a company that has been put into receivership or liquidation:

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15 Section 49(3) and (4) set out the second and third categories which respectively comprise persons admitted in other countries and those issued with a certificate having given notice under the Trans-Tasman Mutual Recognition Act 1997.

16 Section 52(1).

(c) whether the person has been convicted of an offence in New Zealand or a foreign country; and, if so—

(i) the nature of the offence; and

(ii) the time that has elapsed since the offence was committed; and

(iii) the person's age when the offence was committed:

(d) whether the person has engaged in legal practice in New Zealand when not admitted under this Act or a corresponding law, or not holding an appropriate New Zealand practising certificate, as required by law:

(e) whether the person has practised law in a foreign country—

(i) when not permitted by or under the law of that country to do so; or

(ii) if permitted to do so, in contravention of a condition of the permission:

(f) whether the person is subject to—

(i) an unresolved complaint under a corresponding foreign law; or

(ii) a current investigation, charge, or order by a regulatory or disciplinary body for persons engaging in legal practice under a corresponding foreign law:

(g) whether the person—

(i) is a subject of current disciplinary action in another profession or occupation in New Zealand or a foreign country; or

(ii) has been the subject of disciplinary action of that kind that has involved a finding of guilty, however expressed:

(h) whether the person's name has been removed from a foreign roll, and that person's name has not been restored:

(i) whether the person's right of practice as a lawyer has been cancelled or suspended in a foreign country:

(j) whether the person has contravened, in New Zealand or a foreign country, a law about trust money or a trust account:

(k) whether the person is subject to an order under this Act or a corresponding law disqualifying the person from being employed by, or a partner of, a lawyer or an incorporated law firm:

(l) whether, because of a mental or physical condition, the person is unable to perform the functions required for the practice of the law.

[13] Under the previous legislative regime, the Law Practitioners Act 1982 and the Rules made under that Act, every applicant for admission was required to show evidence of good character "and" evidence that the applicant was a fit and proper person.[17] Those requirements were treated as "discrete and conjunctive requirements for admission".[18] Under the current Act, good character is a subset of the fit and proper person standard.[19] As Wylie J said in *Brown v New Zealand Law Society*, "it is possible that a person could be of good character but not fit and proper for unrelated reasons".[20]

[14] Section 55(2) makes it clear that either the Court or the Law Society may decide that a person is fit and proper even though that person falls within any of the categories mentioned in any of the paragraphs in s 55(1) or does not meet all of the criteria prescribed by rules made under s 54. Finally, s 55(3) also expressly provides that s 55(1) does not limit the grounds on which it may be "determined that [an applicant] is not a fit and proper person" or the criteria that may be prescribed by rules made under s 54. The inquiry is not constrained in the sense that factors other than the listed matters may be considered.[21] The section is a guide.[22]

[15] Under s 56 of the Act, the Registrar must maintain a roll of barristers and solicitors. Once the High Court makes an order admitting any person as a barrister and solicitor, and on payment of the relevant admission fee, the Registrar "must place that person's name on the roll".[23]

[16] The Law Society's functions include controlling and regulating the practice in New Zealand by barristers and solicitors of the profession of law and upholding the fundamental obligations imposed on lawyers who provide regulated services in New Zealand.[24] The functions also include assisting and promoting, "for the purpose

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17 Law Practitioners Act 1982, s 46(2)(a)(ii); and Law Practitioners Admission Rules 1987, r 6(1).
18 *Singh v Auckland District Law Society* [2002] 3 NZLR 392 (HC) at [26(a)].
19 It is not apparent from the legislative history why this change was made. It does not appear to have been seen as significant.
20 *Brown v New Zealand Law Society* [2018] NZHC 1263, [2018] NZAR 1192 at [35]. See also Duncan Webb, Kathryn Dalziel and Kerry Cook *Ethics, Professional Responsibility and the Lawyer* (3rd ed, LexisNexis, Wellington, 2016) at 143.
21 *Brown*, above n 20, at [34].
22 At [34].
23 Lawyers and Conveyancers Act, s 57.
24 Section 65(a) and (b).

of upholding the rule of law and facilitating the administration of justice in New Zealand, the reform of the law".[25] Under s 67(2)(d) the Law Society is expressly given the power to "oppose any application made for admission as a barrister and solicitor, or any other application made under [the] Act".

[17] Section 94 requires the Law Society to have practice rules providing for specified matters which include "(a) the criteria for eligibility for a practising certificate", "(e) standards of professional conduct and client care", and "(o) the kinds of conduct, including criminal offences, for which a practitioner or former practitioner may be disciplined".[26] The Law Society must, in exercising the powers under s 94(e), have rules for a code of professional conduct and client care as a "reference point for discipline".[27]

[18] Finally, reference should be made to the Lawyers and Conveyancers Act (Lawyers: Admission) Rules 2008 which are made pursuant to s 54. Section 54(1) provides for rules to be made as to the evidence of the qualifications, character, and fitness of applicants, and "generally in respect of any matter relating to the admission of [applicants] as barristers and solicitors". Section 54(2) states that the rules may prescribe "non-educational criteria" which "may preclude the admission of a person who has, at any time, been convicted of an offence of a kind or class specified in rules made under this section or who has, at any time, been declared bankrupt". The present Rules do not prescribe any such criteria.

[19] Under r 5(1) of these Rules, a person in Mr Stanley's position is required to apply to the New Zealand Council of Legal Education for a certificate of completion and to the Law Society for a certificate of character. These documents are then exhibited to the affidavit in support of the application for admission required to be filed by r 5(2). We interpolate here that in this case the Society delegated the decision as to whether or not to issue a certificate of character to its Practice Approval

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25 Section 65(e).

26 In terms of s 94(o), r 1.4(d) of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 provides that the kinds of conduct for which a lawyer or former lawyer may be disciplined include a "conviction of an offence punishable by imprisonment where the conviction reflects on the lawyer's fitness to practise, or tends to bring the legal profession into disrepute".

27 Section 95.

Committee. This Committee has delegated authority from the Board of the Law Society to deal with non-standard practice approval matters.

[20] Rule 6 addresses the situation in which Mr Stanley found himself when the Law Society declined to provide a certificate of character. In that situation, the applicant for admission must serve a copy of their application on the Law Society within two days of filing it in the High Court.[28] Under r 6(4)(a), the Law Society must, within 21 days of receipt, serve on the applicant a notice of opposition setting out the grounds on which the application is opposed together with any affidavits in support. Rule 6(4)(b) provides that the applicant's application "must be determined at a hearing" at which the Law Society must be represented.

[21] Rule 8(1) provides for every application for admission to be determined by a High Court judge.

The position in comparable jurisdictions

[22] In England and Wales, Australia and Canada there are similar "fit and proper person" and/or "good character" requirements for entry to the legal profession.

England and Wales

[23] In England and Wales, a certificate of "character and suitability" is a prerequisite to becoming a solicitor.[29] Character and suitability is assessed by the Solicitors Regulation Authority (SRA), which is the approved regulator for solicitors under the Legal Services Act 2007 (UK). The phrase "character and suitability" replaced the previous requirement of "moral fitness";[30] an example of more modern language.

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28 Lawyers and Conveyancers Act (Lawyers: Admission) Rules 2008, r 6(3).
29 Solicitors Act 1974 (UK), s 3(1)(b).
30 Keith Davies "Administrative Law" [2004] All ER Rev 1 at [1.24].

[24] In assessing character and suitability, the SRA takes into account:[31]

(a) the "overriding need" to "protect the public and the public interest" and "maintain public trust and confidence in the solicitors' profession and in legal services provided by authorised persons"; and

(b) the nature of the individual's role and individual circumstances on a case by case basis.

[25] The SRA Assessment of Character and Suitability Rules also provide that the SRA will consider criminal conduct when assessing character and suitability.[32] This is subject to legislation equating to New Zealand's Criminal Records (Clean Slate) Act 2004 (the Clean Slate legislation),[33] although convictions and cautions which are "spent" in the terms of the equivalent legislation must, with some exceptions, be disclosed to the SRA.[34] The SRA also bears in mind "the public interest in supporting the rehabilitation of offenders".[35] Criminal conduct is assessed in accordance with a table in the Rules which sets out a non-exhaustive list of types of offending categorised as "most serious", which is "likely to result in refusal", and "serious", which "may result in refusal".[36] Finally, the Rules set out a non-exhaustive list of aggravating and mitigating factors informing the character and suitability assessment.[37] For example, the absence of evidence of successful rehabilitation is an aggravating factor, while the converse, evidence of successful rehabilitation, is a mitigating factor.[38]

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31 SRA Assessment of Character and Suitability Rules, r 2.1.

32 Rules 2.2. and 3.1

33 The equivalent legislation is the Rehabilitation of Offenders Act 1974 (UK) and The Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (UK).

34 The Rehabilitation of Offenders Act 1974 (Exceptions) Order (UK), art 3(a)(i) and pt 1 of sch 1. See also Solicitors Regulation Authority "Guidance: Admission as a solicitor" (July 2020) <www.sra.org.uk>. Under the Rehabilitation of Offenders Act (UK), after a specified period of time, cautions and convictions (except those resulting in prison terms of over 48 months) are regarded as "spent": ss 1, 4 and 5.

35 SRA Assessment of Character and Suitability Rules, r 3.1.

36 Rule 3, table 1.

37 Rule 5, table 3.

38 The SRA's enforcement strategy applicable to the regulation of solicitors once admitted records drink driving as a type of conviction that the SRA will "take more seriously": Solicitors Regulation Authority "SRA enforcement strategy" (25 November 2019) <www.sra.org.uk> at [2.2].

[26] Similarly, those who wish to become barristers must pass a "fit and proper person" check.[39] The test for determining fitness and propriety is whether the applicant is "capable of upholding the Core Duties which underpin the behaviour expected of barristers".[40] The purpose of the inquiry is to ensure public confidence in, and maintain the reputation of, the profession.[41] Applicants are required to disclose, amongst other things, "any spent or unspent convictions, cautions, or final warnings … save those which are 'protected' by law [or 'filtered' by the Disclosure and Barring Service]".[42] Such disclosure will not automatically result in an application being refused. Rather, the type of offence, the sentence imposed and the length of time since the sentence ended must be considered.[43] Other factors that may be considered include the applicant's age at the time of offending, whether there is a pattern of offending, whether the offending was linked to professional practice, whether the use of drugs or alcohol was a factor, the applicant's attitude towards the events, and evidence of rehabilitation.[44]

Australia

[27] In Australia, one of the requirements for admission is that the person is a fit

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39 "Memorandum of Understanding between The Bar Standards Board and The Council of the Inns of Court and The Honourable Society of The Inner Temple and The Honourable Society of The Middle Temple and The Honourable Society of Gray's Inn and The Honourable Society of Lincoln's Inn" (March 2019) [Bar Standards Board and Inns of Court "Memorandum of Understanding"], sch 1 at [7]. Under the Legal Services Act 2007 (UK), the General Council of the Bar (Bar Council) is the approved regulator of barristers in England and Wales. The Bar Council delegates responsibility for all regulatory functions to the Bar Standards Board.

40 Bar Standards Board and Inns of Court "Memorandum of Understanding", above n 39, sch 1 at [9]. See also sch 1 annex 1 at [1].

41 Schedule 1 at [10]. See also Bar Standards Board "Information for students on the fit and proper person checks" (3 March 2020) <www.barstandardsboard.org.uk>.

42 See the prescribed "Admission Declaration" and "Call Declaration" forms available on the Bar Standards Board website, above n 41. As with the Solicitors Regulation Authority, the Bar Standards Board is empowered by The Rehabilitation of Offenders Act 1974 (Exceptions) Order (UK) (as amended by the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (Amendment) (England and Wales) Order 2013 (UK)) to require applicants to disclose criminal offences except for certain protected or filtered convictions.

43 Bar Standards Board and Inns of Court "Memorandum of Understanding", above n 39, sch 1 annex 2 at [4]. The decision maker is provided with detailed guidelines on how to evaluate these factors. This includes the categorisation of offences into different classes of seriousness and an assessment grid for evaluating the time since the sentence ended: see sch 1 annex 2 at [6]–[25].

44 Schedule 1 annex 2 at [3]–[5]. A range of aggravating and mitigating factors are set out at [26]. See also Bar Standards Board, above n 41.

and proper person to be admitted to the legal profession.[45] Apart from South Australia, legislation or rules in the other Australian jurisdictions list "suitability matters" for the decision maker to consider in determining whether the person is a fit and proper person.[46] The suitability matters are similar to the considerations in s 55(1) of the New Zealand Act, including the consideration of "good fame and character", whether there have been past convictions and, in the event there have been past convictions, the nature of the offending, the time that has lapsed since the offending and the applicant's age when the offence was committed.[47]

Canada

[28] In Canada, law societies must ensure that applicants for admission are of good character and reputation.[48] The terminology commonly used is "good character and reputation" or "good moral character". There is also some reference to the "fit and proper person" standard. In Saskatchewan, "suitability to practise" is defined as "honesty, governability, financial responsibility and respect for the rule of law and the administration of justice".[49]

The authorities

[29] The principles applicable to deciding whether an applicant is a fit and proper person or similar standards have been considered in numerous cases in New Zealand and in comparable jurisdictions. There is no controversy as to those principles and so no need to undertake an historic review of those cases. Relevant principles emerging from the cases will be canvassed in the course of the discussion which follows and it suffices at this point simply to briefly summarise the approach taken.

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45 Legal Profession Act 2006 (ACT), s 26(2)(b); Legal Profession Act 2006 (NT), s 25(2)(b); Legal Profession Uniform Law Application Act 2014 (NSW), s 4 (confirming the application of ss 16(1)(a) and 17(1)(c) of the Legal Profession Uniform Law in New South Wales); Legal Profession Act 2007 (Qld), s 31(1); Legal Practitioners Act 1981 (SA), s 15(1)(a); Legal Profession Act 2007 (Tas), s 31(6)(b); Legal Profession Uniform Law Application Act 2014 (Vic), s 4 (confirming the application of ss 16(1)(a) and 17(1)(c) of the Legal Profession Uniform Law in Victoria); and Legal Profession Act 2008 (WA), s 26(1)(a)(ii).

46 *Halsbury's Laws of Australia* (reissue, 2018) vol 16 Legal Practitioners at [250-10].

47 See Legal Profession Act (ACT), s 11(1); Legal Profession Act (NT), s 11(1); Legal Profession Uniform Admission Rules 2015 (NSW), r 10(1) (these rules also apply in Victoria: see r 4 definition of "Board"); Legal Profession Act (Qld), s 9(1); Legal Profession Act (Tas), s 9(1); and Legal Profession Act (WA), s 8(1).

48 *Halsbury's Laws of Canada* (reissue, 2017, online ed) Legal Profession at [HLP-16].

49 Rules of The Law Society of Saskatchewan (Sask), r 149.

New Zealand

[30] *Lincoln v New Zealand Law Society* provides a recent illustration of the approach taken to the assessment of the fit and proper person standard in the New Zealand authorities.[50] The Court of Appeal in that case summarised the approach in this way:[51]

> (a) The Court should not lightly prevent [an applicant] being admitted when they have achieved the qualifications prescribed by the New Zealand Council for Legal Education.
>
> (b) [An applicant] for admission is not to be punished for past wrongdoing.
>
> (c) An assessment of the [applicant's] fitness to be admitted as a barrister and solicitor must focus on protecting the public and the profession.[52]
>
> (d) The assessment must be prospective. It requires an evaluation of the [applicant] at the time of their application and the risks, if any, they pose in the future to society and the profession's reputation.
>
> (e) The concept of a fit and proper person incorporates standards of integrity, and "moral rectitude of character".
>
> (f) Where [an applicant] has been involved in some past indiscretion the Court must be satisfied that the "frailty or defect of character" indicated by the earlier behaviour can be safely regarded as "spent".
>
> (g) The Court is required to make an objective judgement based on all relevant evidence when assessing the ability of the [applicant] to comply with the fundamental obligations imposed upon all lawyers.[53]
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> (footnotes omitted)

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50 *Lincoln v New Zealand Law Society* [2019] NZCA 442.

51 At [34].

52 Wylie J in *Brown*, above n 20, at [39(c)] referred to the need to be satisfied the applicant "is a person of integrity and moral rectitude of character, such that he or she can be safely accredited by the Court to the public as being a person who can properly and responsibly discharge his or her duties".

53 In *Brown*, above n 20, at [39(f)] the High Court expressed this principle in terms of the need to look at the facts "in the round" without trying "to pay undue regard to the earlier wrongdoing".

Comparable jurisdictions

[31] The approach taken in the authorities for England and Wales is illustrated by *Jideofo v The Law Society*,[54] which in turn derived the relevant principles from the leading authority in the context of post-admission conduct of *Bolton v Law Society*:[55]

> (i) … the test of character and suitability is a necessarily high test;
>
> (ii) … the character and suitability test is not concerned with 'punishment', 'reward' or 'redemption', but with whether there is a risk to the public or a risk that there may be damage to the reputation of the profession; and
>
> (iii) … no one has the right to be admitted as a solicitor and it is for the applicant to discharge the burden of satisfying the test of character and suitability.

[32] As in New Zealand, the two regulatory objectives are of protecting the public and maintaining the reputation of the profession in order to maintain public confidence in the profession.[56]

[33] There is also no significant difference in approach in either Australia or Canada. Relevantly, there is much the same focus on the particular requirements of the legal profession[57] and a concern as to whether the applicant has the necessary "[q]ualities of honesty and integrity and a preparedness to comply with the law".[58]

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54 *Jideofo v The Law Society* [2007] EW Misc 3 (EWLS) at [16]–[17].

55 *Bolton v Law Society* [1994] 1 WLR 512 (CA). While there are some differences in the assessment of fitness and propriety in admission applications compared to applications for strike off or restoration to the roll (see Webb, Dalziel and Cook, above n 20, at 142), the underlying principles assist in all contexts (see *Jideofo*, above n 54, at [14]). Cases dealing with strike-off and restoration are accordingly referred to where relevant.

56 *Mulla v Solicitors Regulation Authority* [2010] EWHC 3077 (Admin) at [17]. See also *Jideofo*, above n 54, at [10]; and *Shuttari v The Law Society* [2007] EWHC 1484 (Admin) at [18].

57 For Australian examples see *Ziems v The Prothonotary of the Supreme Court of New South Wales* (1957) 97 CLR 279 at 298 per Kitto J; *New South Wales Bar Association v Cummins* [2001] NSWCA 284, (2001) 52 NSWLR 279 at [20]; and *Re Application by Gadd* [2013] NTSC 13 at [11]–[13]. For Canadian examples see *Law Society of British Columbia v Applicant 3* 2010 LSBC 23, [2010] LSDD No 124, citing the principles affirmed in *McOuat v Law Society of British Columbia* (1993) 78 BCLR (2d) 106 (BCCA).

58 *Prothonotary of the Supreme Court of New South Wales v Montenegro* [2015] NSWCA 409 at [66]. For other Australian examples see the summaries of the relevant propositions in *Jarvis v Legal Practice Board* [2012] WASAT 28 at [61]–[62]; and *Prothonotary of the Supreme Court of NSW v P* [2003] NSWCA 320 at [17]. For a Canadian example see *Applicant 3*, above n 57, at [14]–[19], citing the principles affirmed in *McOuat*, above n 57.

[34] We turn now to the approach to be taken to the fit and proper person standard with particular reference to issues arising from past convictions. This discussion draws on the existing body of cases. Those cases include a number of the earlier authorities which, despite the passage of time and legislative changes, remain relevant, although some of the language can helpfully be modernised.

The approach to be taken to the fit and proper person standard

[35] The first point to note is the obvious one. That is, the fit and proper person standard has to be interpreted in light of the purposes of the Act.[59] Those purposes broadly reflect two aspects. The first aspect is the need to protect the public, in particular by ensuring that those whose admission is approved can be entrusted with their clients' business and fulfil the fundamental obligations in s 4 of the Act.[60] The second aspect is a reputational aspect reflecting the need to maintain the public confidence in the profession at the present time and in the future. This second aspect also encompasses relationships between practising lawyers and between lawyers and the court.

[36] While some of the language is outdated, the essence of the first aspect is reflected in the judgment of Skerrett CJ in *Re Lundon*:[61]

> The relations between a solicitor and his client are so close and confidential, and the influence acquired over the client is so great, and so open to abuse, that the Court ought to be satisfied that the person applying for admission is possessed of such integrity and moral rectitude of character that he may be safely accredited by the Court to the public to be entrusted with their business and private affairs.

[37] The observations of Kitto J in *Ziems v The Prothonotary of the Supreme Court of New South Wales* to similar effect also remain pertinent today.[62] With reference to

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59 See Lawyers and Conveyancers Act, s 3(1).

60 As we note above at [7], these obligations include the obligation to uphold the rule of law and to facilitate the administration of justice.

61 *Re Lundon* [1926] NZLR 656 (CA) at 658.

62 *Ziems*, above n 57, at 298.

Ziems, Spigelman CJ in a more recent judgment of the New South Wales Court of Appeal described "four interrelated interests" as follows:[63]

> Clients must feel secure in confiding their secrets and entrusting their most personal affairs to lawyers. Fellow practitioners must be able to depend implicitly on the word and the behaviour of their colleagues. The judiciary must have confidence in those who appear before the courts. The public must have confidence in the legal profession by reason of the central role the profession plays in the administration of justice. Many aspects of the administration of justice depend on the trust by the judiciary and/or the public in the performance of professional obligations by professional people.

[38] The second point is that the fit and proper person evaluation is a forward looking exercise.[64] That is because the Court or the Law Society, as the decision maker, is required to make a judgement at the time of undertaking the evaluation as to the risks either to the public or of damage to the reputation of the profession if the applicant is admitted.[65] Those risks have to be construed in light of the fundamental obligations on lawyers discussed above.[66] Of particular relevance here are the obligations to uphold the rule of law[67] and to protect the interests of the client subject to duties as an officer of the Court or under any other enactment.[68]

[39] The evaluation is often described as objective.[69] By this, the authorities simply mean that it is necessary to focus on the relevance of the past conduct vis-à-vis the professional standards, rather than being influenced by sympathy for the position of the applicant.[70] Dixon J in *Re Davis* put it in this way:[71]

> … though concern for an individual who is overtaken by the consequences of past wrongdoing is a very proper human feeling, it is no reason whatever for

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63 *Cummins*, above n 57, at [20].

64 *Lincoln*, above n 50, at [34(d)].

65 Commentators have questioned how successful the standard is as a "predictor of good behaviour": see, for example, Webb, Dalziel and Cook, above n 20, at 141. See also Alice Woolley "Tending the Bar: The 'Good Character' Requirement for Law Society Admission" (2007) 30 Dalhousie LJ 27 at 67–70; and Langford, above n 10, at 1194.

66 See the discussion above at [7].

67 Lawyers and Conveyancers Act, s 4(a).

68 Section 4(d).

69 See for example *Re M* [2005] 2 NZLR 544 (HC) at [18].

70 Mr Collins for the Law Society referred to the need to consider the position from the perspective of informed members of the public and their view of how admission would reflect on the profession. That perspective may provide a helpful way of viewing matters, but it is not necessary to be prescriptive about this: see *Layne*, above n 9, at [43] per Lady Arden and [69] and [71] per Lord Kerr.

71 *Re Davis* (1947) 75 CLR 409 at 426. See similarly *Law Society of Upper Canada v Schuchert* [2001] LSDD No 63 at [20].

> impairing in his interests the standards of a profession which plays so indispensable a part in the administration of justice.

[40] The evaluation is accordingly a protective exercise focussed on either the need for public protection or the maintenance of public confidence in the profession. The approach is not punitive.[72] The High Court in *Re M* adopted the words used in *Incorporated Law Institute of New South Wales v Meagher* and said that the question is as to the applicant's "worthiness and reliability for the future".[73] Further, as Lady Arden observed in *Layne*, what comprises fitness to practise must be referable to the good character appropriate to the particular profession.[74] For an applicant for admission to the legal profession, as the authorities state, the appropriate aspects of the fit and proper person standard are whether the applicant is honest, trustworthy and a person of integrity.[75]

[41] When assessing the effect of prior convictions in this context, the Act indicates three aspects of previous convictions may be relevant. Those aspects are the nature of the offence, the time that has elapsed since the offending, and the applicant's age when the offence was committed.[76]

[42] The nature of the offence is an important consideration.[77] Some convictions will inevitably be problematic by their very nature. Dishonesty offences are in that category because of the direct connection with legal practice.[78] Offending involving

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72 *Lincoln*, above n 50, at [34(b)], citing *Re Lundon*, above n 61, at 658; and *Brown*, above n 20, at [39(b)]. For examples of a similar approach in England and Wales, Australia and Canada, see respectively *Jideofo*, above n 54, at [16(ii)] and [17]; *Cohen v Legal Practitioners Admissions Board (No 2)* [2012] QCA 106 at [12]; and *DeMaria v Law Society of Saskatchewan* [2013] SKQB 178, (2013) 420 Sask R 230 at [46].

73 *Re M*, above n 69, at [21], citing *Incorporated Law Institute of New South Wales v Meagher* (1909) 9 CLR 655 at 681 per Isaacs J.

74 *Layne*, above n 9, at [38].

75 See *Lincoln*, above n 50, at [34(e)], citing *New Zealand Law Society v Mitchell* [2010] NZCA 498, [2011] NZAR 81 at [24]–[25]; and *Brown*, above n 20, at [39(d)].

76 Lawyers and Conveyancers Act, s 55(1)(c).

77 GE Dal Pont *Lawyers' Professional Responsibility* (6th ed, Thomson Reuters, Sydney, 2017) at [2.60]. See also in the context of strike-off *Hart v Auckland Standards Committee 1 of The New Zealand Law Society* [2013] NZHC 83, [2013] 3 NZLR 103 at [186].

78 *Re Owen* [2005] 2 NZLR 536 (HC) at [34]. For examples of a similar approach in England and Wales, Australia and Canada, see respectively *Jideofo*, above n 54, at [17]; *Thomas v Legal Practitioners Admission Board* [2004] QCA 407, [2005] 1 Qd R 331 at 335; and *Preyra v Law Society of Upper Canada* [2003] LSDD No 25 at [69] (but see at [78] about the possibility of genuine rehabilitation even where there has been prior egregious dishonesty).

a failure to comply with disclosure obligations is treated in a similar way.[79] Very serious prior convictions, such as murder, pose their own issues.[80]

[43] Some convictions will be in the trivial category or, anticipating the second and third factors referred to in s 55(1)(c)(ii) and (iii), be so dated as to lose any significance or reflect youthful immaturity. Further, the Clean Slate legislation is also relevant and provides "an appropriate register of the preparedness of the community to put prior criminal behaviour into the past finally".[81]

[44] Other offending will not fit into any of the categories discussed so far but will require further inquiry.

[45] In the authorities, the inquiry into the effect of prior convictions has been expressed as an inquiry into whether the "frailties" or "defects of character" reflected by the previous convictions can now be regarded as "entirely spent" or "safely ignored".[82] Updating that language, the decision maker is essentially trying to assess whether the convictions remain relevant to whether the applicant meets the fit and proper person standard and, if so, to what extent the conduct remains relevant at the time of the current inquiry.[83] The inquiry into relevance will commonly require consideration of the circumstances of the offending[84] and of whether the applicant can be seen to have moved on in the sense of being either reformed or having undertaken

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79 Lack of candour and failure to disclose material relevant to character is generally treated seriously.

80 *Layne*, above n 9, is an illustration of this. Mr Layne had been convicted of murder in the context of a political coup nearly 40 years prior to seeking admission as an attorney-at-law in Grenada. The Privy Council upheld the decision to refuse him admission on the basis he did not meet the good character criterion.

81 *Re Owen*, above n 78, at [33]. The prescribed application form for a certificate of character explicitly directs applicants to "note [their] rights under the Criminal Records (Clean Slate) Act 2004 before providing details of any criminal record", and the question regarding prior convictions asks applicants whether they have "ever been convicted of any crime … other than one concealed by the Criminal Records (Clean Slate) Act 2004": available at New Zealand Law Society: Te Kāhui Ture o Aotearoa "Certificate of Character" <www.lawsociety.org.nz>.

82 See *Brown*, above n 20, at [39(e)]; and *Lincoln*, above n 50, at [34(f)]. In *Re Lundon*, above n 61, the question asked was whether the applicant's "purgation [was] complete, his repentance real": at 668.

83 See *Layne*, above n 9, at [58] per Lord Sumption.

84 *Ziems*, above n 57, at 283 per Dixon CJ.

steps towards rehabilitation.[85] Alternatively, there may be other features of character which mean that the convictions should assume less relevance. That it is not always easy to draw the line emphasises the fact-specific nature of the inquiry.[86]

[46] Expanding upon that last point, not a great deal can be drawn from the authorities on the approach to excess breath/blood alcohol offending. That reflects, at least in part, the fact-specific nature of the assessment and the need to consider the evidence in the round.[87]

[47] Two examples, both from Australia, suffice to illustrate the sorts of issues that may arise and the approach taken. The appellant in *Ziems* was removed from the roll following a conviction for manslaughter.[88] The case at his criminal trial was that the accident resulting in the death of the victim had occurred as a result of the appellant driving whilst under the influence of alcohol. The appeal against removal from the roll was allowed by a majority of the High Court of Australia and an order for suspension substituted.[89] For the majority, the offending was not seen as decisive.[90] What was necessary was to assess the nature and quality of the conduct and how it was relevant to the practice of the law. For example, Kitto J in his reasons made the point that the conviction was for a serious offence but the ground for treating it as serious was not one going to "the propriety of the barrister's continuing a member of his profession".[91] It was an isolated incident, not involving a premeditated crime, and had "neither connexion with nor significance for any professional function".[92]

[48] More recently, in a case involving an application for removal from the roll following conviction for supplying drugs, the Queensland Court of Appeal also saw

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85 See for example *Re Owen*, above n 78, at [35] and [37]; *Brown*, above n 20, at [66]; and *Pou v Waikato/Bay of Plenty District Law Society* HC Rotorua CIV-2004-463-0511, 10 May 2005 at [43]. For examples of a similar approach in England and Wales, Australia and Canada, see respectively *Venton v Solicitors Regulation Authority* [2010] EWHC 1377 (Admin) at [17]; *Re an application for admission as a legal practitioner by MCF* [2015] QCA 154 at [10] and [18]; and *Law Society of British Columbia v De Jong* 2017 LSBC 44, [2017] LSDD No 293 at [117]–[118].

86 Webb, Dalziel and Cook, above n 20, suggest case law can provide "only limited guidance at the level of principle": at 144.

87 *Lincoln*, above n 50, at [34(g)]; and *Brown*, above n 20, at [39(f)].

88 *Ziems*, above n 57.

89 Per Fullagar, Kitto and Taylor JJ. Dixon CJ and McTiernan J dissenting.

90 See at 288 per Fullagar J, 299 per Kitto J and 303 per Taylor J. Compare at 286 per Dixon CJ dissenting and 287 per McTiernan J dissenting.

91 At 299.

92 At 299.

the offending conduct as different from that directly relating to the conduct of the profession.[93] The Court noted that *Ziems* emphasised the "need for conduct revealing the character of the practitioner to be of a kind that threatens the professional function of the practitioner".[94] The Court also suggested that the same result might not necessarily follow now if the facts in *Ziems* were repeated given the emergence of "a more marked attitude of public disapproval of drink driving".[95]

[49] It is clear from the cases both here and in the comparable jurisdictions we have discussed that a highly influential factor in determining whether a person is a fit and proper person given prior convictions is evidence as to rehabilitation and as to insight into the offending. It is sufficient to refer to two cases, one from New Zealand and one from Canada, to illustrate the point.

[50] The applicant in *Re Owen* had a long history of criminal offending from a young age.[96] The offending included convictions for theft, burglary, wilfully setting fire to property, drug possession and driving offences. The Court saw the burglary convictions as particularly relevant, given the importance of honesty to legal practice. Despite the offending having "the hallmarks of outright dishonesty",[97] the Court was satisfied that the applicant had "achieved such a complete turnaround, or reformation, that the convictions … [could] be safely ignored".[98] After completing a law degree the applicant had utilised his legal skills by working at the community legal centre and as an employment advocate. He also stopped abusing drugs and alcohol. This evidence of complete reformation was corroborated by positive character references, and satisfied the Court that the applicant was now of good character and a fit and proper person to be admitted.[99]

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93 *Barristers' Board v Darveniza* [2000] QCA 253, (2000) 112 A Crim R 438 at [33].

94 At [35].

95 At [36].

96 *Re Owen*, above n 78.

97 At [36].

98 At [35]. See also at [37]–[38].

99 Webb, Dalziel and Cook, above n 20, at 145 describe the case as "appear[ing] to turn entirely on rehabilitation". The authors note that, "While the wrongdoing was in many ways of the most serious kind and wholly inconsistent with status of a barrister and solicitor, the Court was convinced the [applicant] was a 'new man' in a real and not trivial sense." For an Australian example see *Re Application by Saunders* [2011] NTSC 63, (2011) 29 NTLR 204; and *Saunders v Legal Profession Admission Board* [2015] NSWSC 1839; and for an English and Welsh example see *Davis v Solicitors Regulation Authority* [2011] EWHC 3645 (Admin).

[51] In Canada, the applicant in *Law Society of Upper Canada v Schuchert* had a number of criminal convictions including convictions for damaging property, breaking and entering, theft and welfare fraud.[100] He also had a long history of drug and alcohol abuse which in part coincided with his criminal offending. After a conviction in 1984, the applicant was medically treated for his drug and alcohol dependencies and had been sober and drug-free since 1984. His offending continued past that date and he was dealing with other ongoing difficult issues in his personal life. In deciding to admit him, the Hearing Panel pointed to his "full and frank" self-reporting without attempting to understate or minimise the severity of his offending,[101] character evidence, and the lapse of 12 years since his last offending. Ultimately, the Panel was satisfied that the applicant's criminal convictions "were in a different life", noting that he had "turned the corner … rehabilitated himself and … shown that he [was] now a person of good character".[102]

[52] Further, because of the focus on the potential risk to the public and to the public confidence in the profession, the fit and proper person standard is necessarily a high one.[103] But the Court should not lightly deprive someone who has otherwise met the qualifications of the opportunity of practising as a lawyer.[104] Perfection is not required.[105]

[53] Finally, the onus is on the applicant to show that he or she is a fit and proper person, although questions of onus are not generally going to feature largely.[106] It is also accepted in the authorities that the onus on the person who has "erred in a professional sense" after admission "is a heavier one than that upon [an applicant] for admission".[107]

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100 *Schuchert*, above n 71, at [4]. The applicant had later been pardoned of a majority of these convictions.
101 At [12]–[13] and [21].
102 At [22].
103 *Jideofo*, above n 54, at [16(i)] and [17].
104 *Lincoln*, above n 50, at [34(a)].
105 *Ziems*, above n 57, at 298. See similarly *Preyra*, above n 78, at [71].
106 *Re M*, above n 69, at [16].
107 At [22], citing *Ex parte Lenehan* (1948) 77 CLR 403 at 422.

Summary

[54] From this discussion, the relevant principles can be summarised in this way:

(a) The purpose of the fit and proper person standard is to ensure that those admitted to the profession are persons who can be entrusted to meet the duties and obligations imposed on those who practise as lawyers.

(b) Reflecting the statutory scheme, the assessment focusses on the need to protect the public and to maintain public confidence in the profession.

(c) The evaluation of whether an applicant meets the standard is a forward looking exercise. The Court must assess at the time of the application the risk of future misconduct or of harm to the profession. The evaluation is accordingly a protective one. Punishment for past conduct has no place.

(d) The concept of a fit and proper person in s 55 involves consideration of whether the applicant is honest, trustworthy and a person of integrity.

(e) When assessing past convictions, the Court must consider whether that past conduct remains relevant. The inquiry is a fact-specific one and the Court must look at all of the evidence in the round and make a judgement as to the present ability of the applicant to meet his or her duties and obligations as a lawyer.

(f) The fit and proper person standard is necessarily a high one, although the Court should not lightly deprive someone who is otherwise qualified from the opportunity to practise law.

(g) Finally, the onus of showing that the standard is met is on the applicant. Applications are unlikely to turn on fine questions of onus.

[55] The next question is whether, measured against these principles, the Court of Appeal was correct to determine Mr Stanley was a fit and proper person to be admitted.

Factual background

[56] The relevant facts are set out in the High Court judgment.[108] For the purposes of this appeal the following are the key points.

[57] In his application of 8 February 2017 to the Law Society for a certificate of character, Mr Stanley disclosed, as required, that he had relevant criminal convictions and noted "Car EBA". The record of criminal convictions Mr Stanley subsequently provided to the Law Society is as follows:

20 March 1978	Driving with excess blood alcohol level	Disqualification from driving; fine
31 August 1988	Drove a motor vehicle at a dangerous speed	Disqualification from driving; fine
19 November 1991	Operated a vehicle carelessly	Fine
23 January 2002	Drove with excess blood alcohol content	Fine
12 September 2007	Drove with excess breath alcohol – 3rd or subsequent	Special circumstances found – no disqualification; fine
6 December 2013	Failed to stop when followed by red/blue flashing lights	Fine
9 May 2014	Drove with excess blood alcohol – 3rd or subsequent	Disqualification from driving; fine

[58] The Law Society sought and was provided further information by way of explanation from Mr Stanley about his convictions. Mr Stanley was then interviewed by the President and Vice-President of the Wellington Branch of the Law Society. In the interview, Mr Stanley expressed his regret for his offending and told the

[108] HC judgment, above n 1, at [3]–[24].

interviewers he had been diagnosed as having early indications of an alcohol dependency but had responded by "curtailing" his drinking. He also said that following heart surgery he would be putting his health at risk if he were to drink too much.

[59] The interviewers were not satisfied as to Mr Stanley's insight into his offending and what it might mean in terms of his fitness to practise. Nor were they satisfied there was no risk of future lapses in judgement or behaviour. Ultimately, as has been foreshadowed, the application was referred on to the Law Society's Practice Approval Committee. In considering the application the Committee had before it Mr Stanley's response to the notes of his interview. In this response Mr Stanley described his remorse.

[60] The application was considered at a meeting of the Committee on 18 July 2017 and declined. A letter of 20 July 2017 from the secretary to Mr Stanley setting out the decision explained the Committee's concerns. The letter referred to the following: Mr Stanley's focus on the reasons he was caught rather than the fact of the offending; his age at the time of the last three offences; the most recent offence occurred after Mr Stanley had finished his law degree; and his very poor driving history. All in all, the Committee saw Mr Stanley as lacking in insight to his offending and in judgement.

[61] Mr Stanley responded by letter of 3 August 2017 stating it was clear he had made mistakes in interpreting the questions. He apologised and requested a reassessment of his application.[109] After some further communications, in the course of which Mr Stanley was advised to seek legal advice, the application to the High Court was filed on 22 November 2017.

The judgments in the Courts below

The High Court

[62] The High Court heard evidence from Mr Stanley. In evidence in the High Court, Mr Stanley accepted that there may have been an alcohol problem "at some

[109] On the information before us the application was reconsidered but with no change to the result.

stage". He said he had questioned the early stages of what was "maybe a dependency" himself although that was never confirmed. He described his zero tolerance for drinking and driving. He also said he had not had a drink over the last four years other than one glass as a toast at his son's wedding in May 2017.

[63] The Judge's conclusion was that there was not sufficient evidence of a change in character or of reformation such that the Judge could be satisfied that Mr Stanley was a fit and proper person. While the High Court accepted Mr Stanley was sincere in his intention not to drink and drive again, the Judge did not consider that "the frailty revealed by his drink driving convictions [is] spent and can safely be ignored".[110] Nor did the Judge see Mr Stanley's most recent conviction, that in 2014, as involving "a lapse which can be relegated to the past".[111] In reaching these views, the Judge took into account what her Honour saw as Mr Stanley's tendency to blame others for what had occurred and his dismissive responses to questions in the hearing about his offending.

[64] The Judge's approach is summarised in the following excerpt:

> [65] Mr Stanley has not established he is a reformed person. I have found his assertions of reform to be unpersuasive. Mr Stanley resists any suggestion he may have an alcohol problem yet points to his self-imposed abstinence as being the substantial step which demonstrates there will be no further offending. Mr Stanley proposes to rely only on willpower and self-discipline when, manifestly, this has consistently failed him over a period of decades including into mature adulthood. I accept Mr Collins' submission that the peril for the legal profession is that Mr Stanley will reoffend and bring the profession into disrepute. Further, I hold the view that the public generally, and members of the profession, would not regard Mr Stanley as a person of such integrity, probity and trustworthiness as to be a suitable candidate for admission.
>
> (footnote omitted)

The Court of Appeal

[65] The Court of Appeal accepted that there was a doubt as to Mr Stanley never again offending by driving unlawfully having drunk alcohol, but concluded that Mr Stanley was nonetheless a fit and proper person. In reaching that conclusion the

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110 HC judgment, above n 1, at [48].
111 At [48].

Court said that the High Court put too much emphasis on the risk of reoffending and did not consider Mr Stanley's position in the round. The Court noted first, Mr Stanley's conviction did not go "directly to fitness to practi[s]e as a lawyer".[112] Second, Mr Stanley was a person of good character, having "lived a productive life and pursued a career as an insurance broker".[113] He was a person who had continued to contribute to the community.

[66] The Court did not consider the risk of drink driving again meant Mr Stanley would not meet the fundamental obligations in s 4 of the Act. Nor was the Court convinced reoffending would bring the profession into disrepute given the Law Society does not "commonly remove practising certificates from lawyers who incur drink driving convictions".[114] The Court said that Mr Stanley was "entitled to be treated more liberally" than someone already in practice.[115]

[67] In summary, the Court said this:

> [53] In the round, Mr Stanley is a 65-year-old who has acquired four convictions for drink driving in the period 1978 to 2014. He is of good character and he continues to contribute to society, particularly through his church. He has, as more than one of his referees attests, a commitment to fairness and justice. His attitude to his offending does not show the wholesale reform which led the Courts in *Owen*[116] and *Burgess*,[117] in circumstances where the offending in question was prima facie disqualifying, to grant admission. However, he does have a genuine commitment not to reoffend and were he to reoffend similarly that would not create a meaningful risk of his bringing the profession into disrepute. There is no reason to suspect that, if admitted, Mr Stanley would not comply with the fundamental obligations of a lawyer.

Our assessment

[68] The detail of the submissions from the parties is addressed in the discussion which follows. To put that discussion in context, the essence of the Law Society's case can be stated shortly. The primary submission is that Mr Stanley's convictions remained relevant when combined with his lack of insight and relationship with

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112 CA judgment, above n 2, at [45].
113 At [47].
114 At [49].
115 At [49].
116 *Re Owen*, above n 78.
117 *Re Burgess* [2011] NZAR 453 (HC).

alcohol and that the Court of Appeal was wrong to ignore the resultant risk of further offending with its inevitable consequences for professional discipline. The Law Society also submits that the Court of Appeal "set the bar too low" in terms of the fit and proper person standard. In response, Mr Stanley says that the Court of Appeal was correct to conclude that the frailties of character represented by his previous offending could now be safely ignored, particularly when his character was viewed in the round.

[69] In assessing the relevance of the previous convictions, a number of points can be made. The first point relates to the nature of the offending. Although obviously conduct which is of concern, the Court of Appeal was right to say that the offending is not of the character that has a direct connection with legal practice. Nor was there a suggestion of a lack of candour given Mr Stanley's full disclosure and cooperation with the Law Society's requests for further information.

[70] Next, in terms of the time that has elapsed and Mr Stanley's age at the relevant times, some weight could be placed on the fact that the primary offending is dated. Simply to illustrate the point, if the matter is viewed from the date of this Court's judgment, the first drink driving conviction was some 42 years ago, and the second and third were over 18 and 12 years ago respectively. The Court could also take some confidence from the gap since the last offence, which occurred in June 2013 and for which Mr Stanley was convicted in May 2014. While the Clean Slate legislation does not yet apply to Mr Stanley, as it only applies seven years after the date of his last sentence, it is of some relevance that Mr Stanley would be entitled to the protections in that Act from 9 May 2021.[118]

[71] In addition, on the evidence before it, the Court of Appeal was correct to say that the offending was "not at the serious end of the range of drink driving".[119] In terms of the 2002 conviction, Mr Stanley said he had not drunk alcohol but had been taking "hospital linctus" for pain relief that day. The High Court said of this occasion that "Mr Stanley appeared in person and satisfied the Judge he had no knowledge of

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118 See Criminal Records (Clean Slate) Act 2004, ss 4 definition of "rehabilitation period", 7(1) and 8.
119 CA judgment, above n 2, at [48].

the alcohol content and was convicted without loss of licen[c]e".[120] Mr Stanley was not disqualified from driving for the 2002 and 2007 convictions. In terms of the latter conviction, it has to be noted that his criminal history records he was not disqualified from driving because of special circumstances. He was not imprisoned for the 2014 conviction.[121]

[72] We accept that in questioning the sense in which Mr Stanley's offending was a failure to uphold the rule of law, there is some force in the Law Society's submission that the Court of Appeal thereby understated the seriousness of excess breath/blood alcohol offending and this had the effect of downplaying the importance of the obligation on lawyers to uphold the rule of law.[122] The relevant aspect of the rule of law is that no one is above the law. Mr Stanley can be seen in respect of his convictions as having acted as though different rules applied to him, albeit this was not premeditated offending. Moreover the context is of conduct, drink driving, which is not now tolerated[123] and which is inherently dangerous.[124]

[73] It is also fair to say, as the High Court found of Mr Stanley's attitude, that the explanations Mr Stanley gave for his offending tended to avoid an acceptance of his own responsibility for what had occurred. For example, in his letter of 11 May 2017 he referred to the high level of "scrutiny" to policing of excess breath/blood alcohol in the Hutt Valley area and he attributed his 2014 conviction to a failure to consider metabolism after drinking some wine at lunch with a friend. The Judge was obviously concerned about this lack of insight.

[74] Against this background, given both the number of alcohol-related offences and his insistence that any problem with alcohol was, at the most, incipient, Mr Stanley should have provided the High Court with evidence from an appropriately qualified

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120 HC judgment, above n 1, at [8].

121 That offending is the only conviction for which the blood alcohol sample results were available. The analysis showed a blood alcohol level of 141 milligrams of alcohol per 100 millilitres of blood.

122 Lawyers and Conveyancers Act, s 4(a).

123 See similarly *Darveniza*, above n 93, at [36] where, as noted above at [48], the Court observed that recently "a more marked attitude of public disapproval of drink driving has emerged".

124 See similarly *Davis*, above n 99, at [14] noting that driving with excess blood alcohol is "in itself … a real danger"; and *Montenegro v Law Society of NSW* [2015] NSWSC 867 at [89] observing that "drink driving offences, even those not involving personal injury or death, are considered seriously when deciding questions of professional fitness".

expert as to his relationship with alcohol.[125] That said, we do not accept the Law Society's submission that the Court of Appeal set the bar too low in accepting Mr Stanley's assurances of reform. These issues all had to be assessed in the round.

[75] In terms of that assessment, in addition to the matters referred to above about the nature of the offending, it is relevant that the sincerity of Mr Stanley's commitment to reform was accepted by both of the Courts below. Mr Stanley explained he now had a self-imposed "zero tolerance" on drinking and driving and had decided his health was more important. He also appears to have at least realised that he had not put his best foot forward in his responses, noting he "probably [had not] used the right words". Furthermore, as discussed above, the Court can take some confidence in the sincerity of Mr Stanley's assurances given the gap of almost seven years since he last offended in this manner. In addition, there were other features of good character identified by the Court of Appeal which were attested to by his four referees, all of whom were aware of his criminal history. Mr Stanley had maintained a career in the insurance business and led a productive life having made, and continuing to make, contributions to the community.

[76] The latter point is also relevant to the response to the Law Society's submission that the Court of Appeal should not have substituted its views for those of the High Court Judge. We consider that the Court of Appeal was entitled to conclude that the Judge had applied too exacting a test.[126] That was because of the focus on the aspect that suggested bad character, being the previous convictions and Mr Stanley's approach to those. The fact that Mr Stanley was otherwise of good character was a part of the equation but, in all of the circumstances, too much weight was given to the one bad feature.[127]

[77] It is necessary next to address the Law Society's submission relating to the risk of reoffending. The submission is that the Court of Appeal could not find that Mr Stanley's previous convictions were no longer relevant when the Court

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125 Mr Stanley did not receive a great deal of assistance from the Law Society in this respect. He asked twice whether further information was required but was advised to consult his lawyer.

126 As it was a general appeal, the Court of Appeal was required to make its own assessment of the merits of the case: *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 at [5].

127 As discussed above at [54](e).

acknowledged there was a risk that Mr Stanley would reoffend. The Law Society says that the Court's finding that there was "prima facie doubt as to whether Mr Stanley is reformed"[128] was inconsistent with the Court's ultimate decision that Mr Stanley was a fit and proper person.

[78] The first point to note is that the Court did not consider that the risk of Mr Stanley reoffending was high given he was genuinely committed to reform. But the Court correctly acknowledged that risk could not reasonably be excluded. Where there are other factors to put into the mix it is not necessarily inconsistent to conclude that, although the risk was not one that could be discounted, Mr Stanley was a fit and proper person.

[79] The comparison with the way in which lawyers who offend in a similar way post-admission are treated, a factor also considered by the Court of Appeal, is relevant in this context. It is particularly relevant to the Law Society's submission that the risk of future offending meant Mr Stanley would be likely to engage professional discipline and cause damage to the reputation of the profession.

[80] Of course the analogy between admission and the disciplinary context is not entirely apt. In the case of offending whilst in practice, the disciplinary body has a number of options. For example, ongoing practice may be permitted but subject to conditions as to practice.[129] By contrast, in New Zealand, at the admission stage, the applicant for admission is either admitted or not admitted.[130] Further, in the disciplinary context, references are often made to the desirability of adopting "the least restrictive outcome", which may mean suspension rather than strike-off is preferred.[131] Again, that factor is not a feature of the decision whether or not the fit and proper person standard is met prior to admission.

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128 CA judgment, above n 2, at [42].

129 Lawyers and Conveyancers Act, s 242(1). Restoration to the roll can also be made conditional: s 246(3)–(4).

130 *Re Owen*, above n 78, at [13]. See also Webb, Dalziel and Cook, above n 20, at 142. In some jurisdictions, such as the Australian Capital Territory and South Australia, it is possible to impose conditions on admission: see *Re an Application by L for Admission as a Legal Practitioner* [2015] ACTSCFC 1 at [27] and [36].

131 *Daniels v Complaints Committee 2 of the Wellington District Law Society* [2011] 3 NZLR 850 (HC) at [22].

[81] However, the way in which such offending is treated in the disciplinary context is nonetheless of some relevance in assessing the risks of admission. That is because compliance with the fit and proper person standard is a factor in both contexts.[132] The reality is that quite serious offending of this type, even where combined with other aggravating factors such as obstruction of the police and dishonest conduct, has not in fact been treated as requiring striking off.

[82] The parties provided the Court with five cases dealt with by the New Zealand Lawyers and Conveyancers Disciplinary Tribunal (the Tribunal) involving excess breath/blood alcohol offences.[133] We have also considered *Otago Standards Committee v Copland*,[134] another more recent excess breath alcohol authority; and *Auckland Standards Committee 1 v Ravelich*, a slightly older excess breath/blood alcohol case which is referred to in some of the recent cases.[135]

[83] In all of these cases apart from *Copland*, the relevant offending included drink driving where there had been a history of multiple instances of drink driving. In one case, for example, the practitioner had been convicted of an excess breath alcohol offence in 2011, and had two previous convictions: one for an excess breath alcohol offence in 2007 and one for excess blood alcohol in 2002.[136] The 2007 and 2011 convictions were post-admission. Subsequently, in 2012, the practitioner was convicted for resisting a police officer and obstructing another police officer, and in 2011 had also been abusive towards officers. Mr Copland had been convicted of an excess breath alcohol offence in July 2018 and then, in September 2018, had been

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132 The Disciplinary Tribunal may not make an order striking off a lawyer from the roll unless it is of the opinion that the lawyer is not a fit and proper person to be a practitioner: Lawyers and Conveyancers Act, s 244(1). See also the definition of misconduct in s 7(1)(b)(ii) and s 41(1) which provides that a practising certificate may be refused on the ground that the person is not a fit and proper person to hold a practising certificate. See also GE Dal Pont *Lawyer Discipline* (LexisNexis Butterworths, Chatswood (NSW), 2020) at [1.5] where the author describes the disciplinary jurisdiction as "the flipside" of the court's jurisdiction relating to admission.

133 *Hawke's Bay Lawyers Standards Committee v Beacham* [2012] NZLCDT 29; *Canterbury-Westland Standards Committee v Taffs* [2013] NZLCDT 13; *Waikato/BOP Lawyers' Standards Committee No 1 v Pou* [2014] NZLCDT 86; *Auckland Standards Committee No 5 v Rohde* [2016] NZLCDT 9; and *Auckland Standards Committee No 1 v Chen* [2017] NZLCDT 7.

134 *Otago Standards Committee v Copland* [2019] NZLCDT 29.

135 *Auckland Standards Committee 1 v Ravelich* [2011] NZLCDT 11. See also Dal Pont, above n 132, at [15.54], n 216 for a description of New Zealand disciplinary case law in relation to drink driving.

136 *Beacham*, above n 133, at [1].

convicted for driving whilst disqualified.[137] In all but two of these cases the practitioner was suspended for varying periods ranging from two years plus censure to two months plus censure and costs.[138] Mr Rohde and Mr Copland were not suspended but were censured, fined and ordered to pay costs.

[84] It is the case that in reaching the view that the penalty imposed was the appropriate penalty rather than strike-off, the fact that the practitioner had taken steps towards rehabilitation was, generally, an important factor in these cases.[139] *Rohde* provides a good illustration. Mr Rohde admitted a disciplinary charge of being convicted for offences reflecting on his fitness to practise or tending to bring the profession into disrepute. The three convictions were excess breath alcohol convictions in May 2014 and September 2015, and a dangerous driving conviction in September 2015. Mr Rohde had very promptly begun attending Alcoholics Anonymous meetings, filed an affidavit annexing a number of references expressing confidence in his recovery from addiction, and was in constant contact with his sponsor. In deciding that it was not necessary to suspend Mr Rohde, the Tribunal observed that his evidence of rehabilitation provided "strong mitigating features"[140] and that "the steps he ha[d] taken to safeguard his sobriety [were] a sufficient safety net" such that the public, as consumers, did not need to be directly protected from him.[141]

[85] Although there are distinctions to be made between these disciplinary proceedings and the present case, these cases indicate at the least that a practitioner convicted of drink driving can remain on the roll, albeit a need for further reformation

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137 *Copland*, above n 134, at [1]. Mr Chen's case also concerned his failure, over a six-year period, to disclose his offending: *Chen*, above n 133, at [8].

138 Ms Beacham and Mr Chen were suspended for two years and censured. Mr Chen was also fined and ordered to pay costs. Mr Taffs was suspended for three months and ordered to pay costs. Mr Pou was suspended for two months, censured and ordered to pay costs. Mr Ravelich was suspended for around four and a half months, censured and ordered to pay costs.

139 This feature is less obvious in a case such as *Taffs*, above n 133, in which the Tribunal referred to Mr Taffs' "denial of what would appear to be a longstanding problem with alcohol": at [40]. Mr Taffs had sought the assistance of a psychologist. He also said he had made changes to his life in that he now used taxis on days where he was drinking, had organised a restorative justice meeting and had proposed to give lectures to community work offenders about moving on from bad choices. The shorter suspension compared to Ms Beacham and Mr Ravelich appears to reflect the fact that Mr Taffs' drink driving convictions were "not clustered in the same manner": at [42].

140 *Rohde*, above n 133, at [20].

141 At [8] and [15].

has generally been recognised. And, as discussed, an applicant for admission is entitled to be treated more liberally than a practitioner.[142]

[86] In conclusion, viewed in the round, the Court of Appeal was correct to conclude that the concerns reflected in Mr Stanley's convictions and the inadequacy of his responses to questions about them were not a controlling factor. On this basis, given his otherwise good character, the Court of Appeal did not err in determining that Mr Stanley met the standard for admission.

Effect of admission

[87] On our approach, it is not necessary to consider the effect of the fact that Mr Stanley has already been admitted. But in any event we doubt that, absent some more recent disqualifying conduct on Mr Stanley's part, the Court of Appeal was correct to suggest in the judgment declining a stay that ss 266 and 267 of the Act would provide a basis for striking Mr Stanley's name from the roll.[143] Our reasons can be expressed briefly.

[88] The Court of Appeal declined the stay on the basis that the balance of convenience fell against granting a stay. The Court said this:[144]

> First, Mr Stanley's ability to earn a living as an admitted lawyer is the most powerful factor. Second, and also cogent, is the fact that refusing a stay will not render the Society's appeal nugatory. Third, Mr Stanley would be admitted knowing full well that he may face an application to have his name removed from the roll if the Society's appeal ultimately succeeds. So he opposes a stay knowing of the potential implications of his being admitted at this stage. Further, he could avoid any public stigma by consenting to his name being removed, should the Society ultimately succeed on appeal.

[89] The reason for the Court's view that granting a stay would not render the Law Society's appeal to this Court nugatory rested on two possibilities. The Court said that the Law Society could take steps to have Mr Stanley's name removed either by

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142 See the discussion above at [53].

143 Section 268(1) of the Lawyers and Conveyancers Act provides that nothing in the Act affects the inherent jurisdiction and powers of the High Court over enrolled lawyers "other than sections 266 and 267".

144 Stay judgment, above n 3, at [13].

consent under s 60 of the Act or by order of the Court under ss 266 and 267(1) of the Act.[145]

[90] Section 60(1) provides for any person, with the prior consent of the Council of the Law Society, to request the Registrar to remove his or her name from the roll. Under s 60(3), if the Registrar is satisfied that the necessary consent has been given, the Registrar must remove the person's name from the roll. This avenue is not open whilst Mr Stanley does not consent to removal.

[91] Section 266 provides that on application to the High Court, a person's name "may be struck off the roll for reasonable cause, whenever and wherever it arises, in accordance with section 267".

[92] Section 267 sets out the powers of the High Court when such an application is made. Section 267(1) provides for the following:

> (a) the High Court may, if it thinks fit, dismiss the application; or
>
> (b) if the High Court is of the opinion that the application ought to be granted, or that it is doubtful whether the application ought to be dismissed or granted, the High Court must reserve the case for the consideration of the Court of Appeal.

[93] Where a case is reserved in this way for the consideration of the Court of Appeal, s 267(2) provides that the High Court:

> (a) must cause the application and all affidavits made in support of the application, and all other proceedings, to be sent forthwith to the Registrar of the Court of Appeal; and
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> (b) may order that the person enrolled be suspended from practice as a barrister or as a solicitor or as both until the decision of the Court of Appeal on the application is given.

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[145] The other statutory mechanism for removal from the roll is by strike-off under s 242(1)(c) of the Lawyers and Conveyancers Act. However, the Law Society submitted that this was a disciplinary response and did not suggest that a successful appeal in this Court would result in disciplinary consequences for Mr Stanley.

[94] The Court of Appeal must then consider the application, as soon as practicable, and grant or dismiss it.[146] It may also make such other order in relation to the application as it thinks fit.[147]

[95] As is apparent from this description, the Court under these sections can only strike off for "reasonable cause". The Law Society submits that a judgment of this Court allowing the appeal to the effect that Mr Stanley was not a fit and proper person to be admitted would constitute "reasonable cause" under s 266.[148]

[96] Section 266 refers to reasonable cause "whenever and wherever" that arises. However, even that expansive wording seems inapt to apply to Mr Stanley's case. That is because Mr Stanley's name was properly placed on the roll in accordance with the Court of Appeal judgment. This was not a case where, for example, admission was obtained on a false or fraudulent basis. A contrast can be made with the position in *New Zealand Law Society v Mitchell*.[149] Mr Mitchell was struck off the roll under s 266 on the basis that he was not a fit and proper person to be on the roll. Between 1989 and 1994, he had been convicted of 39 criminal offences covering a range of offending.[150] He had not disclosed these convictions either at the time of his application for admission and nor, later, when applying for a practising certificate over several years.[151] The High Court was not satisfied that the Society's application for strike-off should be dismissed so the matter was referred to the Court of Appeal.[152] The Court of Appeal concluded Mr Mitchell's conduct fell short of the standard given that he had "deliberately concealed his convictions on a number of occasions, right up to denying the convictions related to him when the list was put before him".[153]

[97] In addition, reference should be made to s 41 of the Act. That section relevantly provides that the Society may refuse to issue a practising certificate "on the ground

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146 Lawyers and Conveyancers Act, s 267(3)(a).
147 Section 267(3)(b).
148 We have not been referred to any authority on the ss 266 and 267 procedure in analogous circumstances where a person who has been properly admitted on the basis of a lower court decision subsequently has their grounds for admission overturned on appeal.
149 *Mitchell*, above n 75.
150 At [5].
151 At [4] and [7]–[8].
152 *New Zealand Law Society v M* HC Wellington CIV-2009-485-1944, 4 May 2010 at [4].
153 *Mitchell*, above n 75, at [26].

that the person is not a fit and proper person to hold a practising certificate".[154] In determining whether a person is fit and proper to hold a practising certificate, the Law Society may consider any of the matters listed in s 55. However, s 41 does not assist in the present case. The Law Society accepts that the inquiry relating to a practising certificate is as to present matters, so it could only be denied here if there was some disqualifying conduct since admission.

[98] Finally, the position is not altered by the fact that Mr Stanley opposed the application for a stay knowing that he might face an application to have his name removed. That fact cannot change the position, which is that Mr Stanley's name was properly entered on the roll. If the Law Society wanted to preserve the position, an application for a stay should have been made to this Court.[155]

Result

[99] For these reasons, in accordance with the view of the majority, the appeal is dismissed.

[100] We did not hear from the parties on costs.[156] Unless the parties are able to agree on costs, we seek submissions on that issue. Submissions for Mr Stanley should be filed and served by 27 August 2020. Submissions from the Law Society should be filed by 10 September 2020 and reply submissions from Mr Stanley should be filed by 16 September 2020. We reserve costs.

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154 Lawyers and Conveyancers Act, s 41(1).
155 This was an available course of action under r 30(4) of the Supreme Court Rules 2004.
156 Mr Gwilliam advised the Court that Mr Stanley was legally aided.

WINKELMANN CJ AND GLAZEBROOK J
(Given by Glazebrook J)

Summary

[101] We would have allowed the appeal. We consider the High Court was correct to hold that Mr Stanley was not a fit and proper person to be admitted as a barrister and solicitor of the High Court.[157]

[102] Driving while impaired due to alcohol is inherently dangerous and can cause serious injury and death.[158] It is thus very serious offending. Multiple drink driving convictions would in many cases signal either a drinking problem, a contempt for the law,[159] or both. In our view, both directly affect a person's ability to practise as a lawyer.[160] There must be a risk that a drinking problem could adversely affect a lawyer's judgement and thus their ability to serve their clients competently. Contempt for the law raises serious questions as to a lawyer's ability to fulfil their fundamental obligation to uphold and promote the rule of law.[161]

[103] In this case, Mr Stanley had multiple drink driving convictions over a long period, including one following the completion of his law degree.[162] We accept that Mr Stanley did express regret for his offending but he continued, even before the High Court, to minimise the seriousness of his offending.[163] He admitted he may have had an alcohol problem but asserted that he had largely stopped drinking.[164] He did not, however, provide any evidence of an independent alcohol assessment or of having undertaken any treatment.

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157 *Stanley v New Zealand Law Society* [2018] NZHC 1154, [2018] NZAR 1210 (Clark J) [HC judgment].

158 As recognised by the majority above at [72] and in particular at n 124.

159 At least in the sense of a perpetrator considering the law does not apply to them.

160 Contrary to the view of the Court of Appeal and the majority: *Stanley v New Zealand Law Society* [2019] NZCA 119, [2019] NZAR 1001 (French, Dobson and Brewer JJ) [CA judgment] at [45]; and majority reasons above at [69].

161 Lawyers and Conveyancers Act 2006, s 4(a).

162 Following the completion of his law degree, Mr Stanley was also convicted for failing to stop when followed by red/blue flashing lights on a separate occasion. These convictions evidence a disrespect for the rule of law notwithstanding Mr Stanley's legal education (including legal ethics).

163 HC judgment, above n 157, at [15], [52], [55]–[56] and [59].

164 At [49] and [52].

[104] In our view, the High Court was right to consider that the effect of Mr Stanley's latest conviction (in 2014) could not be considered "spent" and thus that it could not safely be ignored.[165] That conviction has to be seen in the context of Mr Stanley's long history of drink driving, the possibility of an untreated drinking problem and the minimisation of his offending.

The test

[105] We are in general agreement with the majority's discussion of the principles to be applied, including the importance of rehabilitation and insight into the offending.[166]

[106] The majority update the language of whether the effect of a conviction is "spent"[167] to a question of whether the conviction remains relevant to whether the applicant meets the fit and proper person standard at the time of the current inquiry.[168] We accept updating the language is appropriate.

[107] We agree with the majority that not a great deal can be drawn from the authorities on drink driving offending.[169] We do, however, make the following comments on *Ziems v The Prothonotary of the Supreme Court of New South Wales*, a case which illustrates the serious consequences that can arise if a person drives while impaired.[170] It seems to have been accepted in that case that the offending was an isolated incident and did not warrant any conclusion as to the barrister's general

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165 At [33] and [48].

166 See majority reasons above at [5]–[45], [49]–[53] and the summary at [54]. Mr Stanley's lack of insight and minimisation of his offending was quite rightly of particular concern to the High Court.

167 The test of whether the frailty or defect of character indicated by the earlier convictions can now be regarded as "entirely spent" comes from *Re Owen* [2005] 2 NZLR 536 (HC) at [35]. See also *Lincoln v New Zealand Law Society* [2019] NZCA 442 at [34(f)]; *Brown v New Zealand Law Society* [2018] NZHC 1263, [2018] NZAR 1192 at [39(e)]; *Gibbs v New Zealand Law Society* [2014] NZHC 1141 at [29]; and *Re Burgess* [2011] NZAR 453 (HC) at [31] and [41]. The origin of the test of whether a conviction is "spent" is *Re Lundon* [1926] NZLR 656 (CA) at 658–659 which states that the candidate is not to be punished for past crimes. Rather the test is a prospective one ("a question of [their] worthiness and reliability for the future"). The issue is whether the candidate can satisfy the court that their "repentance [is] real" and that they have amended their ways and character. The question in Australia has been phrased in different ways but is essentially the same, that is, "whether the deficiencies of character revealed by past misconduct are shown to be no longer present": *Prothonotary of the Supreme Court of New South Wales v Montenegro* [2015] NSWCA 409 at [78].

168 See majority reasons above at [45].

169 See majority reasons above at [46].

170 *Ziems v The Prothonotary of the Supreme Court of New South Wales* (1957) 97 CLR 279.

behaviour or inherent qualities.[171] If that was truly the case (in other words, if the offending was not indicative of a drinking problem or a contempt for the law), Kitto J's comment that it had "neither connexion with nor significance for any professional function" might be understandable.[172]

[108] As noted above,[173] however, we consider that drink driving is directly related to "professional function" where there are multiple convictions or other indications that can be seen as indicative of a wider drinking problem[174] or a contempt for the law.[175]

Factors taken into account by the majority

[109] We reiterate that we disagree with the majority's view that the Court of Appeal was right to say that Mr Stanley's offending is not of the type that has a direct connection with fitness to practise as a lawyer.[176]

[110] We agree that there was no lack of candour on Mr Stanley's part.[177] We do not, however, consider it of much relevance that the Criminal Records (Clean State) Act 2004, assuming no further convictions, would apply from 9 May 2021.[178] That time has not yet arrived.

[111] We would agree that, had Mr Stanley shown insight into his offending and provided an expert report on his possible drinking problem, the time that had lapsed since the 2014 conviction should be given weight.[179] We would, however, see Mr Stanley's age as counting against him. These drink driving offences were

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171 At 299 per Kitto J. See also at 301 and 303–304 per Taylor J.

172 At 299.

173 Above at [102].

174 In *Barristers' Board v Darveniza* [2000] QCA 253, (2000) 112 A Crim R 438 at [36], the Court suggested that the result in *Ziems*, above n 170, may not be the same today, given a shift in social attitudes towards drink driving.

175 It seems to us that the supply of drugs would also raise real issues about professional function: *Darveniza*, above n 174, at [41]. See also the comments on *Darveniza* in the majority reasons above at [48]. For a New Zealand case about a practitioner's involvement in drug possession and use in the context of professional discipline (rather than admission), see *Jefferies v National Standards Committee* [2017] NZHC 1824, [2017] NZAR 1323 at [31].

176 See majority reasons above at [69]; and CA judgment, above n 160, at [45].

177 See majority reasons above at [69].

178 Criminal Records (Clean State) Act 2004, ss 4 definition of "rehabilitation period", 7(1) and 8. Our view is contrary to the majority reasons above at [70].

179 See majority reasons above at [70].

committed as a mature man. None of them can be explained away as "false steps of youth".[180]

[112] Further, because driving while impaired is inherently dangerous, in our view multiple drink driving convictions should always be treated as very serious offending for the purpose of admission and professional disciplinary decisions, even where they are "not at the serious end of the range of drink driving".[181]

[113] We agree with the majority's comments that Mr Stanley can be seen as acting as though different rules applied to him.[182] We also agree with the comments about Mr Stanley's minimisation of his offending and that he should have provided the High Court with evidence from an appropriately qualified expert as to his relationship with alcohol.[183] Contrary to the view of the majority, however, we see the lack of an expert report as fatal to Mr Stanley's case.

[114] We would accept the Law Society's submission that the Court of Appeal set the bar too low in accepting Mr Stanley's assurances of reform.[184] We also accept the submission that this was a case where the High Court Judge, having seen and heard Mr Stanley, had a major advantage over the Court of Appeal and that the Court of Appeal should have exercised caution in coming to a different view.[185]

[115] We accept that Mr Stanley has indicated a commitment to reform and says he has given up drinking altogether for health reasons.[186] Absent an expert report, however, there was nothing other than assertions from Mr Stanley about having stopped drinking and thus that he was a reformed character. In our view, assertions were not sufficient for the Court of Appeal legitimately to have concluded that

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180 *Re M* [2005] 2 NZLR 544 (HC) at [22], citing *Ex parte Lenehan* (1948) 77 CLR 403 at 424.

181 Contrary to the view of the Court of Appeal and the majority: CA judgment, above n 160, at [48]; and majority reasons above at [71].

182 Majority reasons above at [72].

183 Majority reasons above at [73]–[74].

184 Contrary to the majority reasons above at [74].

185 *ANZ Bank New Zealand Ltd v Bushline Trustees Ltd* [2020] NZSC 71 at [59]; and *Sena v Police* [2019] NZSC 55, [2019] 1 NZLR 575 at [38]–[40].

186 The notes of evidence taken before Clark J on 16 February 2018 were that the last drink Mr Stanley had was a toast at his son's wedding in May 2017. Some of Mr Stanley's referees said he had reformed his drinking habit but it does not seem they were necessarily in a position to attest to this.

Mr Stanley's risk of reoffending was not high.[187] This is particularly in light of his minimisation of his past offending.

[116] The effect of Mr Stanley's convictions remains relevant. It is therefore of no moment if he is otherwise of good character.[188] In our view, the High Court did not give too much weight to one bad feature. The Court was assessing whether the drink driving convictions remain relevant.[189]

[117] In terms of the comparison with lawyers in the disciplinary context,[190] it seems to us that the decisions that the majority discusses may not have sufficiently taken into account the inherently dangerous nature of drink driving and the change both in public and legislative attitude to how drink driving is viewed.

[118] The emphasis on rehabilitation in those decisions was, however, appropriate.[191] It is important to stress that, while we are of the view that Mr Stanley was not a fit and proper person to be admitted as a barrister and solicitor at the time of the High Court hearing, this does not mean he could never be admitted. He would need to supply an expert report, complete any treatment recommended and provide independent and cogent evidence that he has given up drinking. This can be seen as analogous with the periods of suspension imposed in the disciplinary cases discussed in the majority reasons.[192]

Effect of Mr Stanley's admission

[119] In terms of the effect of Mr Stanley's admission and the failure of the Law Society to ask this Court for a stay, we agree with the majority that ss 266 and 267 of the Lawyers and Conveyancers Act 2006 would not provide a basis for striking Mr Stanley off the roll (even had our view prevailed).[193] We also agree that it does

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187 We thus disagree with the majority reasons above at [78].
188 Contrary to the majority reasons above at [45].
189 Contrary to the majority reasons above at [76].
190 Discussed in the majority reasons above at [82]–[84].
191 See the majority reasons above at [84].
192 See the majority reasons above at n 138.
193 See majority reasons above at [87]–[96] and [98].

not make a difference that Mr Stanley knew he might face an application to have his name removed from the roll at the time of the stay application.[194]

[120] We are less sure about the majority's statement that s 41 of the Lawyers and Conveyancers Act would not assist.[195] Section 41(1) provides that the Law Society may refuse to issue an annual practising certificate on the ground that the person is not a fit and proper person to hold a practising certificate. Even if this section is confined to current matters, assuming Mr Stanley did not provide evidence of rehabilitation, then his convictions would still be relevant to his character and his current ongoing ability to practise law. But, as our view has not prevailed, it is not necessary to come to a definitive conclusion on this point.

Result

[121] We would have allowed the appeal.

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194 See majority reasons above at [98].
195 See majority reasons above at [97].