LEGAL COMPLAINTS REVIEW OFFICER
ĀPIHA AROTAKE AMUAMU Ā-TURE

[2020] NZLCRO 153

Ref: LCRO 103/2020

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the [Area] Standards Committee
BETWEEN	**ZA** Applicant
AND	**APPLICATION FOR REVIEW OF A PROSECUTORIAL DECISION**

DECISION

The names and identifying details of the parties in this decision have been changed

Introduction

[1] Mr ZA has applied for a review of a decision by the [Area] Standards Committee which, following completion of an own motion investigation, made a determination that the matter under investigation be considered by the New Zealand Lawyers and Conveyancers Disciplinary Tribunal.

Background

[2] In April 2016, Mr ZA was a shareholder and director of a company [YB Limited] ([YBL]).

[3] Mr ZA had enjoyed a close relationship with a Mr and Mrs XC over a number of years (the XCs).

[4] In 2015, the XCs decided to renovate their family home.

[5] In 2016, Mr ZA acted for a Mr WD on matters that were before the Court.

[6] Mr WD had experience in the construction industry.

[7] Around April 2016, Mr ZA discussed with the XCs the possibility of [YBL] carrying out renovation work on their family home.

[8] The XCs agreed to pay [YBL] $150,000 to do the job.

[9] On 20 April 2016, Mr ZA sent a WhatsApp message to Mr XC.

[10] The message said this:

> Bro TH has come up with 150 K as a "cashie"
>
> That will when you move in the whole place will have been painted white to finish level.
>
> It doesn't include the kitchen.
>
> 7 week build time & 1 week paint time.
>
> You can deposit the money into our solicitor's trust account if that gives you a sense of security. But if we have to generate an invoice it will attract GST.
>
> That will include……
>
> TH will send me an email with a list off what is NOT included for the sake of clarify bro.

[11] Unfortunately the project did not progress well. Little work was done.

[12] The XCs cancelled the contract and sought refund of the $150,000 paid.

[13] Mr ZA declined to refund monies paid.

[14] Mr and Mrs XC lodged a complaint with the New Zealand Law Society Complaints Service on 5 February 2019.

[15] The Standards Committee tasked with conducting an investigation into the complaints, delivered its decision on 16 July 2019.

[16] The Committee determined to take no further action on the complaints.

[17] Mr and Mrs XC sought a review of the Committee decision.

[18] A decision on that review (LCRO 130/2019) was delivered on 8 January 2020.

[19] The Review Officer confirmed the Standards Committee decision.

The complaint and the Standards Committee decision

[20] On 13 June 2019, a Legal Standards Officer wrote to Mr ZA on behalf of the [Area] Standards Committee advising that:

(a) The New Zealand Law Society Complaints Service was commencing an own motion investigation under s 130(c) of the Lawyers and Conveyancers Act 2006 ("the Act").

(b) The investigation concerned an element of the evidence filed in Mr and Mrs XCs complaint of 5 February 2019.

(c) That evidence was the message recorded at [10] above.

(d) The message raised concern that Mr ZA may have committed a possible breach of r 2 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules), in that the statement appeared to have purpose of enabling [YBL] to avoid meeting its obligations to the Inland Revenue Department to pay GST and income tax.

[21] Mr ZA was advised of his right to provide a response to the Committee.

[22] He did so in correspondence to the Law Society Complaints Service of 2 July 2019.

[23] In that response, Mr ZA submitted that:

(a) there had been no attempt or intention to encourage Mr and Mrs XC to evade taxes; and

(b) he had initially believed that payment into the trust account might attract an immediate need to pay GST, whereas [YBL]'s "accounting treatment" was on a cash basis; and

(c) efforts were being made to reduce costs to Mr and Mrs XC, but there was no attempt to have them avoid their tax liability; and

(d) GST was paid on all purchases including staff contracted through the company [VE Ltd].

[24] On 18 November 2019, the Standards Committee issued a notice of hearing of the own motion investigation.

[25] The notice of hearing identified the conduct issue under investigation as being whether Mr ZA had committed a breach of r 2 of the Rules, by promoting arrangements with purpose to avoid obligations owed to the Inland Revenue Department.

[26] Again, Mr ZA was provided opportunity to provide a response.

[27] In correspondence to the Standards Committee of 29 October 2019, Mr ZA advised that:

(a) Mr and Mrs XC were not his clients; and

(b) he had not advised Mr and Mrs XC in any capacity to engage in conduct that was known by Mr ZA to be fraudulent or criminal; and

(c) the use of the term "cashie" was not intended to convey impression that either himself or Mr YB accepted money as "cash", rather it was intended to convey that there would be no profit for the company in the work being completed, as the work was being undertaken for friends; and

(d) funds paid by the XCs were deposited into the YB account and were not provided as "cash"; and

(e) work completed on the XC's property was carried out by [VEF] Ltd, and GST invoices were generated for that work; and

(f) he had not engaged in any capacity in a "cash" under the table transaction and had not advised the XCs in an effort to enable them to avoid any tax liability

[28] The Committee delivered its decision on 21 April 2010.

[29] The Committee determined that the matter should be considered by the New Zealand Lawyers and Conveyancers Disciplinary Tribunal.

Application for review

[30] Mr ZA filed an application for review on 2 June 2020. The outcome sought is that the Committee's decision to refer the matter to the New Zealand Lawyers and Conveyancers Disciplinary Tribunal be overturned.

[31] Mr ZA submits that:

(a) The Standards Committee had erroneously concluded that it had jurisdiction to raise an own motion complaint; and

(b) The failure to provide reasons for the decision to refer the matter to the New Zealand Lawyers and Conveyancers Disciplinary Tribunal constituted a breach of natural justice; and

(c) The decision to refer was based on faulty logic.

[32] The Standards Committee indicated that it did not wish to respond to Mr ZA's review application.

Hearing

[33] A hearing proceeded on Thursday 20 August 2020.

[34] Mr ZA was represented by Mr UG.

[35] Mr UG in submissions filed prior to hearing helpfully identified Mr ZA's objections to the Committee's decision as being focused on three further grounds to those initially identified by Mr ZA being:

(a) Argument that the decision of the Committee to refer the matter of Mr ZA's WhatsApp message of 20 April 2016 to the Disciplinary Tribunal was an abuse of process as the Committee had made a final ruling on the matter that embraced the subject matter of the referral,[1] and having determined to take no further action in respect of the complaint of which the WhatsApp message formed a part, it would be an abuse of process to relitigate the matter.

(b) The Committee had delayed its inquiry "far too long".

(c) The Committee was bound by the 8 January 2020 decision of Review Officer Robert Hesketh, which had affirmed the decision of the [Area] Standards Committee to take no action in respect to the complaints made against Mr ZA. The decision to refer Mr ZA to the Disciplinary Tribunal constituted a further abuse of process, as the decision seeks to re-open

[1] Referencing the [Area] Standards Committee decision of 16 July 2019.

a final ruling by a decision maker which sits higher in the hierarchy of quasi-judicial bodies under the Act.[2]

Nature and scope of review

[36] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:[3]

> … the power of review conferred upon Review Officers is not appropriately equated with a general appeal. The obligations and powers of the Review Officer as described in the Act create a very particular statutory process.
>
> The Review Officer has broad powers to conduct his or her own investigations including the power to exercise for that purpose all the powers of a Standards Committee or an investigator and seek and receive evidence. These powers extend to "any review" …
>
> … the power of review is much broader than an appeal. It gives the Review Officer discretion as to the approach to be taken on any particular review as to the extent of the investigations necessary to conduct that review, and therefore clearly contemplates the Review Officer reaching his or her own view on the evidence before her. Nevertheless, as the Guidelines properly recognise, where the review is of the exercise of a discretion, it is appropriate for the Review Officer to exercise some particular caution before substituting his or her own judgment without good reason.

[37] More recently, the High Court has described a review by this Office in the following way:[4]

> A review by the LCRO is neither a judicial review nor an appeal. Those seeking a review of a Committee determination are entitled to a review based on the LCRO's own opinion rather than on deference to the view of the Committee. A review by the LCRO is informal, inquisitorial and robust. It involves the LCRO coming to his or her own view of the fairness of the substance and process of a Committee's determination.

[38] Given those directions, the approach on this review, based on my own view of the fairness of the substance and process of the Committee's determination, has been to:

(a) Consider all of the available material afresh, including the Committee's decision; and

(b) Provide an independent opinion based on those materials.

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[2] This to engage the doctrine of *stare decisis.*
[3] *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41].
[4] *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

Discussion

[39] The issues to be addressed on review are:

(a) Did the Standards Committee erroneously conclude that it had jurisdiction to raise a complaint?

(b) Did the Committee's failure to provide reasons for its decision constitute a breach of natural justice?

(c) Was the Committee's decision to refer, based on faulty logic?

(d) Did the Committee's decision to refer constitute an abuse of process as the Committee had previously made a final ruling on the matter?

(e) Did Mr Hesketh's decision of 8 January 2020 consider, as a conduct matter, issues arising from Mr ZA's WhatsApp message?

(f) Did delay in advancing Mr ZA's complaint result in prejudice to him?

Did the Standards Committee erroneously conclude that it had jurisdiction to raise a complaint?

[40] On receipt of Mr ZA's application I completed a preliminary assessment of the file as is the practice when review applications are filed with the Legal Complaints Review Office.

[41] The purpose of that initial appraisal is to alert the Review Officer to any procedural issues that can productively be addressed before the file progresses further.

[42] If issues are identified with a file, a teleconference will on occasions be convened to allow opportunity for a Review Officer to address the matters identified with the applicant.

[43] It must be emphasised that the purpose of the exercise is to assist the applicant.

[44] A teleconference was convened.

[45] Section 130(c) of the Lawyers and Conveyancers Act 2006 ("the Act") provides that the functions of a Standards Committee include the power to "investigate of its own motion any act, omission, allegation, practice, or other matter that appears to indicate that there may have been misconduct or unsatisfactory conduct on the part of a practitioner or any other person who belongs to any of the classes of persons described

in section 121". The application of that section was discussed with Mr ZA at the conference.

[46] Mr ZA accepted that the Committee had jurisdiction to commence an inquiry, on its own motion.

[47] Suggestion that the Committee lacked jurisdiction to initiate an own motion inquiry did not need to be advanced further.

[48] This submission was however overtaken by later argument that the Committee's decision to refer constituted an abuse of process.

Did the Committee's failure to provide reasons for its decision constitute a breach of natural justice?

[49] One of the grounds of review raised by Mr ZA was concern that the Committee had neglected to provide reasons for its decision to refer the matter to the Disciplinary Tribunal.

[50] Mr ZA's objection was understandable.

[51] Lawyers are well versed in the requirement for decision makers to support their findings with reasons.

[52] However, no such obligation attaches to a Standards Committee's decision to refer a matter to the Tribunal.

[53] At the teleconference I had opportunity to discuss with Mr ZA s 158(2)(a) of the Act which provides an obligation on Standards Committees to provide reasons for any determination of the kind described in s 152(2)(b) or (c) of the Act, but no corresponding obligation to provide reasons for a decision made under s 152(2)(a), being a determination that a complaint or matter, or any issue involved in the complaint or matter, be considered by the Disciplinary Tribunal.

[54] Confirmation that a Committee is not obliged to provide reasons to support a decision to refer is found in *Orlov v New Zealand Law Society* [2013] NZCA 230 at [98].

[55] Mr ZA accepted that the Committee's failure to provide reasons did not establish a reviewable ground.

Was the Committee's decision to refer a decision based on faulty logic?

[56] This submission was not advanced at hearing by Mr ZA and, in any event, so general in its nature that it was overtaken and subsumed by the more specific grounds advanced by Mr UG.

Did the Committee's decision to refer constitute an abuse of process as the Committee had previously made a final ruling on the matter?

[57] At the core of Mr UG's submission was argument that the Committee's decision to commence an own motion inquiry constituted an abuse of process, as the subject matter of the own motion investigation essentially traversed an issue that had been addressed by the Committee in the course of its investigation into the complaints filed by Mr and Mrs XC (the XC complaints).

[58] The Committee having concluded at the conclusion of its inquiry into the XC complaints that the conduct complained of did not reach the threshold that warranted a referral to the Tribunal, that should, argued Mr UG, have been the end of the matter. It was he suggested oppressive for the Committee having completed an all-embracing inquiry, to pluck out another issue and start again.

[59] The Committee's decision to take no further action on the XC complaints (which Mr UG argued included a consideration as to whether any conduct issues arose from Mr ZA's WhatsApp message of 20 April 2016) was affirmed by the decision of Review Officer Mr Hesketh, that decision issued on 8 January 2020.

[60] Mr UG submitted that Mr Hesketh had, as had the Committee before him, traversed the question as to whether any conduct issues arose from Mr ZA's 20 April 2016 message.

[61] Mr UG submitted that the Committee's decision to initiate an own motion inquiry was an attempt to relitigate a matter that had already been decided and offended against the well understood principle that it was improper to relitigate issues that had been the subject of a final determination by a judicial body.

[62] On that issue, Mr UG said this:

> Here, there has been a final determination to take no further action on the self-same statement that was before the same Standards Committee. That determination is final by virtue of s 152(4) of the Act, (section then cited).
>
> The review having been dismissed, the determination, by operation of the statute, was final.

> It is an abuse of process for the [Area] Standards Committee to seek to make a further determination based on the same subject matter, particularly where it had considered a referral to the Tribunal premised on whether the WhatsApp message reflected on the practitioner's fitness to practice and finally determined that it did not (see paragraph 25 of its earlier decision quoted above).

[63] Mr UG was critical of the Committee commencing an own motion inquiry after it had completed its investigation and delivered its decision in respect of the XC complaints.

[64] He was also critical of the process revealed by the Committee's decision to initiate an own motion inquiry, arguing that an own motion inquiry was properly commenced when fresh information came to the attention of a Committee.

[65] Turning firstly to Mr UG's submission that the Committee's investigation of the XC complaints (culminating in its decision of 16 July 2019) had dealt with the issue of the WhatsApp message, and its determination constituted a final ruling on any issues relating to or arising from the message, I do not consider that there is force in that submission.

[66] A careful reading of the XC complaints, the submissions filed by Mr ZA in response to the complaints, and the decision issued, gives no indication that either the Committee, or Mr ZA, were, when addressing the XC's concerns, addressing or responding to complaint that Mr ZA may have promoted arrangements designed to avoid tax liability.

[67] The Committee inquiry focused on the XC complaints, which were that Mr ZA:

(a) had induced the XCs to contract with his company, when he was aware that Mr WD had convictions for criminal dishonesty; and

(b) had a conflict of interest; and

(c) had assisted or allowed a fraud in breach of r 2.4 of the Rules; and

(d) had conducted business other than law that would compromise the discharge of his professional obligations; and

(e) had failed to disclose relevant information; and

(f) had engaged in misleading and deceptive conduct.

[68] To the extent that the XC complaints had potential to engage a consideration of the question as to whether Mr ZA's WhatsApp message engaged issues of potentially fraudulent conduct, the focus of the Committee's inquiry was not on the question as to

whether a fraud had potentially been committed on the IRD, but on the circumstances surrounding Mr and Mrs XC's decision to engage Mr ZA's company to complete a renovation project.

[69] It is clear from both the complaint and submissions, that the Committee's consideration of potential r 2.4 issues was advanced from the broad context of a consideration as to whether it had jurisdiction to address the XC complaints, specifically a consideration as to whether Mr ZA was providing regulated services to the XCs.

[70] The Committee's decision at p [25] makes clear that its decision to take no further action was reached having considered (as was its obligation to do) the specific complaints advanced by Mr and Mrs XC.

[71] Having concluded that Mr ZA was not providing regulated services to the XCs, the Committee's decision to take no further action followed, as noted in the Committee's decision at p [25], its consideration of the "complaints alleged against Mr ZA".

[72] Mr and Mrs XC had not raised complaint that Mr ZA had promoted an arrangement which was designed to avoid his company's legal obligation to account to the IRD.

[73] Mr UG suggested that some relevance and import attaches to the fact that the message which prompted the Committee's own motion inquiry was included in the complainant's evidence.

[74] It was the first in a string of messages provided to the Complaints Service by the complainants.

[75] I attach no weight to this.

[76] The fact that the message was included in the chain of evidence does not establish that the Committee considered issues arising from the particular message as a separate part of its deliberations.

[77] Nor do I agree with Mr UG that there was anything untoward in the Committee electing to commence an own motion inquiry on the back of the information provided by the complainants.

[78] If I understood Mr UG's submission correctly, he appeared to be suggesting that if a Committee, in the course of conducting an inquiry into specific complaints, was alerted to other matters that may raise potential conduct issues, the appropriate

approach was for the Committee to identify those fresh concerns, and have those issues addressed as part of its broader investigation.

[79] The functions of a Standards Committee are set out in s 130 of the Act.

[80] Those functions include a wide-ranging power to "investigate of its own motion any act, omission, allegation, practice, or other matter that appears to indicate that there may have been misconduct or unsatisfactory conduct on the part of a practitioner or any other person who belongs to any of the classes of persons described in section 121".[5]

[81] That function is not, in my view, fettered by any requirement on a Committee to limit its ability to instigate an own motion inquiry to those circumstances where additional or fresh information comes to its attention during the course of conducting its investigation.

[82] It is my understanding that it is both conventional and commonplace for a Committee to instigate an own motion enquiry if, in the course of considering the evidence that has been submitted in support of a complaint, the Committee concludes that the evidence raises issues separate to those identified by the complainant which, in the opinion of the Committee members, is of sufficient concern to merit the triggering of an own motion inquiry.

[83] In any event, Mr UG's submission that the Committee had investigated the WhatsApp matter in the course of completing its investigation into the XC complaints, is contradicted by an examination of the timing of the Committee's decision to commence its own motion investigation.

[84] Mr and Mrs XC filed their complaint on 5 February 2019.

[85] Mr ZA provided his response to the complaint on 12 March 2019.

[86] On 13 June 2019, the Standards Committee advised Mr ZA of its intention to commence an own motion inquiry.

[87] It identified the subject of that inquiry as being "concern that you may have committed a possible breach of [rule 2 of the Rules] and that the payment arrangement you are alleged to have promoted appears to have had the purpose of evading the complainants and [YBL's] obligations to the Inland Revenue Department to pay GST and Income Tax".

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[5] Section 130 (c) Lawyers and Conveyancers Act 2006

[88] Mr ZA was invited to make submissions and did so on 2 July 2019.

[89] A notice of hearing on the own motion inquiry was issued on 18 November 2019.

[90] Mr ZA provided further submissions.

[91] Regrettably, there was some delay before the Committee was able to consider matters raised by its own motion inquiry. Its decision was issued on 21 April 2020.

[92] The Committee's decision on the XC complaint was issued on 16 July 2019.

[93] It is clear then that:

(a) Mr ZA was aware that the Committee had, prior to delivering its decision on the XC complaint, initiated an own motion investigation; and

(b) Mr ZA was aware that the Committee was considering his WhatsApp message as a distinct and separate matter from the complaints raised by Mr and Mrs XC; and

(c) Mr ZA had been provided with opportunity to respond to the own motion inquiry.

[94] It is difficult then to sustain argument that Mr ZA suffered an abuse of process as a consequence of the Committee relitigating a matter it had already decided.

[95] It would have been, and was, obvious to Mr ZA that the Committee was dealing with issues arising from his WhatsApp message as an entirely separate and distinct matter from its investigation into the XC complaints.

[96] It also follows that argument that Mr ZA was the victim of an oppressive delay in process which resulted from him having to respond to new matters that the Committee had identified after its initial inquiry had concluded cannot be sustained.

[97] It is important to note that in the course of the hearing, Mr UG was advancing Mr ZA's position from his understanding that the Committee had commenced its own motion inquiry after it had delivered its decision on the XC complaints.

[98] Shortly after the hearing had concluded, Mr UG emailed the Review Office to advise that it had come to his attention that the Committee had in fact commenced its own motion inquiry prior to delivering its decision on the XC complaints.

[99] It would be speculative on my part to make assumptions as to whether Mr UG would have adopted a different approach to his submissions if he had been aware of issues around the timing of the Committee's decision to commence its own motion inquiry, but indication that the Committee commenced its own motion inquiry in the course of considering the XC complaints, considerably diminishes argument that Mr ZA was the victim of an abuse of process.

[100] I am satisfied that argument cannot be sustained that Mr ZA had suffered an abuse of process.

Did Mr Hesketh's decision of 8 January 2020 consider, as a conduct matter, issues arising from Mr ZA's WhatsApp message?

[101] No.

[102] It is clear from a reading of Mr Hesketh's decision that the question as to whether Mr ZA's WhatsApp message raised conduct issues played no part in his deliberations.

[103] His decision focuses on the concerns that were before the Committee in the XC complaint.

[104] His reference to the WhatsApp message is no more than a passing reference to an element of the evidence that was before him. To the extent that he does comment, his comment is confined to the brief observation that he was unable to draw conclusion as to what a sentence in the message was intended to convey.

[105] It goes no further than that.

[106] Mr Hesketh's decision did not, as is argued for Mr ZA, make any "finding" on the WhatsApp issue. He didn't consider the issue. Nor was he required to.

Did delay in advancing Mr ZA's complaint result in prejudice to him?

[107] I accept that the task of dealing with a conduct complaint can frequently impose considerable burden on a practitioner.

[108] Mr UG properly alerted me to those provisions in the Act and Regulations that reinforce the need for complaints to be managed expeditiously.

[109] However, Mr UG accepted that the length of delay in this case would not be sufficient in itself to establish an abuse of process as a separate ground. It was his

argument that it was the degree of delay occasioned by the Committee "attempting to revisit its earlier decision at a much later stage" that created the problem.

[110] Having established that the own motion inquiry was being progressed at the same time as the complaint investigation, it is clear that any delay was not occasioned by the Committee reinvestigating a matter in which it had earlier issued a final determination.

[111] The concerns expressed regarding delay are understandable. However, in a jurisdiction where focus is on protection of the public and the requirement for there to be a robust regulatory regime, the delay that has occurred in this case would not be sufficient to persuade me that it was appropriate to curtail the conduct inquiry.

Conclusion

[112] The approach to be adopted by Review Officers when considering an application to review a Standards Committee's decision to prosecute a practitioner was considered in *Zhao v Legal Complaints Review Officer* where Fogarty J held the following:[6]

> The purpose of a review by the LCRO is to form a judgment as to the appropriateness of the charge laid in the prosecutorial exercise of discretion by the Standards Committee. It is a simple as that. ... I agree ... that "a review by the LCRO (should be) informal, inquisitorial and robust". It involves the LCRO coming to his or her own view of the fairness of the substance and process of a Committee's determination. I agree also there is room in that review for the LCRO to identify errors of fact.

[113] Fogarty J also observed that "a critical question for the LCRO is whether the degree of gravity of the matter should justify the Standards Committee exercising the power to refer [conduct] to the Tribunal".[7]

[114] Having, as I am required to do, formed my own view as to the fairness and substance of the Committee's decision, and having concluded that the gravity of the matter justified the Committee's decision to refer to the Tribunal, the Committee's decision is confirmed.

Costs

[115] Where an adverse finding is made, costs will be awarded in accordance with the Costs Orders Guidelines of this Office. Mr ZA is ordered to pay costs in the sum of

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[6] *Zhao v Legal Complaints Review Officer* [2016] NZHC 2622 at [23].
[7] At [25].

$1,200 to the New Zealand Law Society within 30 days of the date of this decision, pursuant to s 210(1) of the Act.

[116] Pursuant to s 215 of the Act, the order for costs made may be enforced in the civil jurisdiction of the District Court.

Anonymised publication

[117] Pursuant to s 206(4) of the Act, I direct that this decision be published so as to be accessible to the wider profession in a form anonymising the parties and bereft of anything as might lead to their identification.

Decision

Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the Standards Committee is confirmed.

DATED this 24th day of August 2020

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R Maidment
Legal Complaints Review Officer

In accordance with s 213 of the Lawyers and Conveyancers Act 2006 copies of this decision are to be provided to:

Mr ZA as the Applicant
[Area] Standards Committee
Mr UG as the Applicants Representative
New Zealand Law Society
The Secretary for Justice