

**LEGAL COMPLAINTS REVIEW OFFICER  
ĀPIHA AROTAKE AMUAMU Ā-TURE**

[2021] NZLCRO 133

Ref: LCRO 114/2021

**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 [X]

**BETWEEN**

**DY**

Applicant

**AND**

**WJ**

Respondent

**DECISION**

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

**Introduction**

[1] Mx DY has applied to review a decision dated 29 July 2021 made by the [Area] Standards Committee [X] (the Committee), in which the Committee decided to take no further action on their complaint concerning the conduct of Mr WJ.

[2] The Committee based its decision on s 138(2) of the Lawyers and Conveyancers Act 2006 (the Act). This allows a Committee to dispose of a complaint if it considers that further action is unnecessary or inappropriate.

## **Background**

[3] Mr WJ is a lawyer practising in [city]. Mx DY is not, and never has been, his client.

[4] The events which gave rise to Mx DY's complaint about Mr WJ were brief and occurred in a courtroom in the [city] District Court on 26 February 2021.

[5] Mx DY overheard a discussion that Mr WJ was having with an official – Mx DY recalls that it might have been a judge – about a case in which Mr WJ was acting.

[6] Mx DY said that they overheard Mr WJ ask the official about the gender of a witness in the case: whether the witness was male or female.

[7] Mx DY was distressed to hear what they considered to be a needless and insensitive question about a person's gender being asked by a lawyer in a public setting.

[8] Mr WJ then left the courtroom.

[9] Mx DY recalls that their dismay at hearing this question was apparent, and that this prompted the official, with whom Mr WJ had been discussing the case, to apologise.

## **Complaint**

[10] Mx DY made their complaint to the New Zealand Law Society Complaints Service (the Complaints Service) on 26 February 2021.

[11] In summary, Mx DY said:

- (a) Mr WJ's question about gender instantly resonated with and physically affected them.
- (b) That reaction was noted by (Mx DY believes) the judge with whom Mr WJ had been conversing.
- (c) The judge looked at Mx DY, asked if he had got something wrong about them and said he was sorry. The judge also appeared to realise that Mr WJ had been hurtful towards Mx DY.

- (d) Mx DY “couldn’t believe [that Mr WJ’s] focus was on someone’s gender identity.” Mx DY would not want Mr WJ’s focus to be on their gender identity.
- (e) Mx DY’s world embraces gender fluidity, where a focus on gender identity is unimportant.
- (f) Gender identity is quite properly a spectrum.
- (g) Mx DY had, prior to this, respected Mr WJ but his comments damaged that.
- (h) Mr WJ’s question about a person’s gender identity was disrespectful.

[12] Mx DY also noted that rainbow communities can be particularly affected by negative experiences such as this occurring in a place such as a courtroom. It creates a climate of fear and anxiety for individuals in that community.

### **Response**

[13] Mr WJ responded to Mx DY’s complaint in his letter to the Complaints Service dated 28 June 2021. In summary he said:

- (a) The courtroom in which these events occurred was being presided over by a registrar rather than a judge. This was an administrative pre-hearing appearance at which a later trial date was to be allocated.
- (b) The discussion overheard by Mx DY was between Mr WJ and a Police prosecutor. Mr WJ did not have any discussion with the registrar about the details of the case in which he was acting.
- (c) Customarily registrar pre-hearing appearances will involve a lawyer and the Police prosecutor speaking about the case. In the particular case in which Mr WJ was acting, the Police prosecutor informed him that two additional witnesses were to be called. The details had not previously been disclosed by the Police to Mr WJ.
- (d) This prompted Mr WJ to enquire “as to the names and occupations, or rank, of those witnesses and I may have enquired as to their gender [although I cannot recall].”

- (e) This was a confidential conversation, carried out by Mr WJ on behalf of his client.
- (f) It could never be misconduct for him, acting as a lawyer on behalf of a client, to enquire as to a third person's gender. This would have "an unreasonable chilling effect on [his] role and further [WJ] has wider ramifications for the profession's ability to represent its clients as a whole."

[14] Mr WJ does not accept that he was acting with either conscious or unconscious bias. The question about gender, if he asked it, was of no concern to Mx DY as they were not his client. He was at all times acting on behalf and in pursuit of the interests of his client.

### **Comment by Mx DY**

[15] In an email sent to the Complaints Service on 29 June 2021, Mx DY commented on Mr WJ's response to their complaint.

[16] Mx DY emphasised that the intention in complaining was to draw to Mr WJ's attention that his behaviour was distasteful, occurring as it did in an otherwise intimidating environment such as a courtroom.

[17] Mx DY observed that "vulnerable communities out there need better, and deserve better, and ... [Mr WJ] can be better, and do better."

### **Standards Committee decision**

[18] The Committee identified the issue for it to consider as being "whether there has been any unsatisfactory conduct on the part of Mr WJ and whether there has been a breach of any of the [Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008]" (the Rules).<sup>1</sup>

[19] In deciding to take no further action on Mx DY's complaint, the Committee held as follows:<sup>2</sup>

The facts are in considerable dispute in this case. The Committee cannot, in the circumstances of this case, determine that dispute. The Committee accepts that if someone was disrespectful to a particular group of individuals (for example, what Mx [DY] describes as the 'Rainbow Community') then that could raise professional standards issues. However, in this case there is simply not the

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<sup>1</sup> Standards Committee decision dated 29 July 2021 at [10].

<sup>2</sup> At [12].

evidence to support the claim by Mx [DY]. Mr [WJ]'s response is for some and, in the view of the Committee, has a ring of truth about it.

### **Application for review**

[20] Mx DY filed their review application on 31 July 2021. They said:

- (a) The Committee appears to have believed what Mr WJ said over what Mx DY said in their complaint.
- (b) Mx DY continues to pursue their complaint because “[Mr WJ] can’t go around asking someone’s gender identity.”
- (c) A question about gender identity is inherently personal and never a topic for prurient inquiry. Such questions are “hurtful and damaging”. Self-harm can be a consequence.

[21] Mx DY also attached to their review application a document that they had prepared after discussing the complaint with the Complaints Service, but which was apparently not taken into account by the Committee.

[22] The document is a proposed guideline for the Committee when dealing with complaints which raise issues about gender identity and diversity.

[23] Indeed, Mx DY had been encouraged by the Complaints Service, on behalf of the Committee, to prepare the guideline.

[24] Mx DY’s guideline highlights the lack of awareness that they have observed in the New Zealand legal system, when dealing with issues of gender identity and diversity. It refers to devastating personal and social issues caused by gender prejudice, which are often compounded by the attitude of the legal system.

[25] In the guideline, Mx DY advocates for appropriate training for law students and lawyers to recognise and appropriately deal with issues of gender identity or diversity.

### **Mr WJ’s response**

[26] In a letter to this Office dated 3 August 2021, Mr WJ essentially said that he relied upon the response he made to Mx DY’s complaint, to the Complaints Service.

[27] Further, Mr WJ submitted that the review application does not appear to have identified any error on the part of the Committee.

## Discussion

[28] There is undoubtedly a deeply unpleasant seam within society which focuses its prejudices (and, it might be observed, its fears) on issues of gender and gender identity. Recent media and social media comment about a New Zealand Olympian is a poignant and disappointing illustration of that.

[29] Mx DY is right to draw attention to the prejudice shown by some people in this country towards vulnerable and marginalised groups.

[30] There is no place in a civilised society for stereotyped assumptions based upon a person's characteristics. Equality is a fundamental democratic and human rights value to be treasured, and called-out when compromised.

[31] In appropriate cases, professional disciplinary bodies have an important role to play in regulating conduct of the type I have referred to above, engaged in by their members.

[32] Mr WJ was acting for a client who was appearing in court on 26 February 2021. His ethical obligations were such that he was required to represent that client's interests to the exclusion of any third party interests.<sup>3</sup> This includes third parties such as Mx DY.

[33] However, r 10 of the Rules provides:

10 A lawyer must promote and maintain proper standards of professionalism in the lawyer's dealings.

[34] Rule 10 would almost certainly capture the situation of a lawyer being overheard making gratuitous comments about another person's characteristics, in circumstances where the lawyer is otherwise acting in a professional capacity at the time.

[35] Of course, context is important when assessing whether something that a lawyer has been overheard to say, requires a disciplinary response.

[36] Although there is a small measure of disagreement between Mr WJ's account of the events and Mx DY's (for example, whether Mr WJ asked a judge or some other official the question about the gender of a witness), there is basic agreement that a question of that type was, or could well have been, asked.

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<sup>3</sup> With the exception of an overriding duty of honesty and candour to the court.

[37] To that extent, I do not necessarily accept the Committee's description of the facts being "in considerable dispute".

[38] The beating heart of Mx DY's complaint and review application is what Mr WJ said. They heard what he said and he has not denied that he asked the question overheard by Mx DY.

[39] To the extent that the Committee considered that Mr WJ's response to the complaint had "a ring of truth about it", I would observe that Mx DY's account of what they overheard Mr WJ saying, is also truthful.

[40] This is not a case about whom to believe; it is a case about whether particular words used ought to attract a disciplinary sanction.

[41] Although Mr WJ does not specifically recall asking a gender-focussed question of the Police prosecutor, he submits that it would generally never be inappropriate or improper to do so, provided it was asked in the proper context of the case in question.

[42] Of that case, Mr WJ noted that the Police were calling two additional witnesses in the hearing, and because those witnesses' details had not previously been disclosed by the Police, he asked routine and relevant questions about the witnesses.

[43] Mr WJ acknowledges that one of those questions may have been about gender.

[44] I accept that a person's characteristics may be relevant to evidence they are going to give in a hearing, and that defence counsel in a criminal prosecution may wish to know something about those characteristics.

[45] For example, a person's height, age, hair colouring – to mention but a few characteristics – may be relevant to an issue at large in the case. So too might their gender or gender identification.

[46] It will always depend upon the particular facts and issues in the case in which the lawyer is engaged.

[47] Of course, and quite properly, Mx DY knew nothing about those facts and issues. For example, they assumed that Mr WJ's focus in asking the question was on the witness's gender identity and that Mx DY "wouldn't want [Mr WJ's] focus on [Mx DY] to be about [their] gender identity."<sup>4</sup>

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<sup>4</sup> Mx DY's complaint to the Complaints Service at Complaint details.

[48] I do not consider that, in asking the Police prosecutor a question about a witness's gender, Mr WJ was focussed on that issue in the sense that Mx DY appears to imply, which is that the question was gratuitous, unnecessary and disproportionate.

[49] As indicated by me, questions about a witness's personal characteristics may be relevant to a case in which a lawyer is acting.

[50] It would be impossible, and indeed wrong, to attempt to lay down a principle which has the effect of preventing a lawyer from asking opposing counsel questions about the case in which they are involved, including about witnesses, which might have a bearing on the issues to be determined (provided those questions are asked in that professional context and not in a prurient or gratuitous manner).

[51] Mx DY has not said that Mr WJ asked his gender-focussed question in an inappropriate manner – merely that, in their view, the question itself was inappropriate.

[52] In their complaint Mx DY said, of the discussion between Mr WJ and the Police prosecutor, that they “heard everything” and that “[their] antenna went up” when Mr WJ “asked if someone was male or female.”

[53] Mx DY was in the courtroom for purposes that were unrelated to Mr WJ's case, and they described their anxiety at being there in the first place.

[54] Despite Mx DY saying that they had “heard everything” before the gender question was asked, I am not entirely persuaded that they listened to everything that had been said before that question was asked.

[55] Hearing that something is being discussed and listening to what is being discussed, are two different things. Added to that is the fact that Mx DY was anxious about their own reasons for being in the courtroom.

[56] Support for my conclusion that Mx DY did not listen to the discussion before the gender question was asked by Mr WJ, is to be found in their comment that their attention to what was being said was captured by the reference to gender.

[57] So, it would seem to me that Mx DY did not have a broader context in which to properly assess Mr WJ's question.



[58] I am not persuaded on the facts before me that the question asked by Mr WJ – as I am satisfied that it was asked – was in the context, unprofessional, discourteous or disrespectful.

[59] I do not want to be taken as saying that such a question asked (or comment made) by a lawyer – or indeed any other question or comment about a person’s personal characteristics – can never be the subject of disciplinary sanction.

[60] Whether it would lead to that will always depend upon the context.

[61] However, as I have endeavoured to point out above, the context in which Mr WJ asked the question about gender of a witness, does not in my view raise a disciplinary issue.

[62] Finally, I make brief comment about the guideline prepared by Mx DY at the encouragement of the Committee.

[63] It presents as a thoughtful and compelling document, and its themes could be said to apply to people from any vulnerable or marginalised group interacting with lawyers and the court system.

[64] My observation is that lawyer training (that is, from law school through to professionals bodies) in 2021, devotes considerable resources to raise awareness about and provide training in dealing with communities whose life experiences make them vulnerable to prejudice, being overlooked and becoming marginalised as a result.

### **Section 205 of the Lawyers and Conveyancers Act 2006**

[65] Section 205(1) of the Act provides:

The Legal Complaints Review Officer may strike out, in whole or in part, an application for review if satisfied that it—

- (a) discloses no reasonable cause of action; or
- (b) is likely to cause prejudice or delay; or
- (c) is otherwise frivolous or vexatious; or
- (d) is otherwise an abuse of process.

[66] Section 205 of the Act is expressed in terms substantially identical to the provisions of r 15.1 of the High Court Rules 2016. The principal difference is that r 15.1

is directed to pleadings (which is how claims and defences are expressed in the High Court), whereas s 205 of the Act relates to applications for review.

[67] A strike out application in the High Court under r 15.1 will be made at the early stage of a case: normally very soon after a claim (or defence) has been filed.

[68] On the other hand, s 205 of the Act empowers only this Office to strike out an application for review, not Standards Committees where complaints are initially, and usually finally, adjudicated.

[69] In my view, s 205 of the Act is intended to arm this Office with the summary ability to bar applications for review that lack merit, in order to focus what are limited resources to cases where there is an arguable case for the review application proceeding further.

*Reasonable cause of action*

[70] In the context of this Office's review jurisdiction, whether an application for review "discloses no reasonable cause of action" translates neatly to an assessment of whether there are in fact reasonable grounds of complaint against the practitioner in question.

[71] The approach will be whether a set of facts viewed objectively, could arguably justify reconsideration of a Standards Committee decision.

[72] I am satisfied that Mx DY's application for review discloses no reasonable cause of action. Put another way, I cannot see any basis for this complaint against Mr WJ to be dealt with under the Lawyers and Conveyancers Act 2006.

[73] I have come to that conclusion because my view is that, in the context of what took place in the courtroom, there is no evidence that the question asked by Mr WJ was one which engages a consideration of the obligations of professionalism demanded of lawyers by r 10 of the Rules.

[74] Having carefully considered all of the material that was before the Committee, as well as Mx DY's submissions in support of their application for review, I am satisfied that the Committee's decision to take no further action on this complaint was appropriate.

## **Decision**

[75] Pursuant to the provisions of s 205(1)(a) of the Act, Mx DY's application for review is struck out on the grounds that I am satisfied that it discloses no reasonable cause of action, as that term is explained at [70] above.

## **Anonymised publication**

[76] Pursuant to s 206(4) of the Lawyers and Conveyancers Act 2006, I direct that this decision may be published but without any details that may directly or indirectly identify the parties, or any other person named in this decision.

**DATED** this 20<sup>th</sup> day of August 2021

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**R Hesketh**  
**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:

Mx DY as the Applicant  
Mr WJ as the Respondent  
Mr SM as a Related Person  
[Area] Standards Committee [X]  
New Zealand Law Society