LCRO 178/2010

CONCERNING	An application for review pursuant to Section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the Auckland Standards Committee 2 of the New Zealand Law Society
BETWEEN	**Mr FERNESS** of Auckland Applicant
AND	**LAMPETER** of Auckland Respondent

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

DECISION

[1] Mr Ferness seeks a review of a decision by the Standards Committee which found him guilty of unsatisfactory conduct and imposed a variety of orders.

[2] The Standards Committee decision is dated 27 July 2010. The review application was received by this office on 10 September. A preliminary question is whether I have jurisdiction to consider the matter or whether the application was not properly made and therefore cannot be considered.

[3] Section 198 of the Lawyers and Conveyancers Act 2006 provides that every application for review must be lodged with the Legal Complaints Review Officer within 30 working days after the determination, requirement, or order is made, or the direction is given, or the function or power is performed or exercised, by the Standards Committee (or by any person on its behalf or with its authority). The last day for making an application for review in this matter was 7 September 2010. Mr Ferness's review application was received three days after that date.

[4] The application is made by D on behalf of Mr Ferness, who made a number of submissions in relation to the matter. He particularly relies on section 158(1) of the Act which requires the Standards Committee to give written Notice of a determination to the parties. He submits that the Standards Committee has not given written notice to Mr Ferness, and until it does so, the statutory time for a review application does not start to run.

[5] The background is that the Standards Committee sent its Notice of Determination to Mr Ferness c/- of his counsel, D. D received it on 30 July 2010, and he advises that Mr Ferness received it in the week commencing 2 August. It is D's submission that this posting does not count as a Notice being sent to Mr Ferness. He says that the Standards Committee had no authority to have sent the notice to him, D. His submission is that the notice period of 30 days has not yet started to run because Mr Ferness has not yet received from the Standards Committee the Notice of determination in accordance with the provisions of section 158.

[6] D compares this to LCRO Regulation 3 (Form and Fee Regulations 2008) which explicitly provides for a review applicant to authorise another person to represent him, stating that no such authority existed with regard to the exchange between the Standards Committee and Mr Ferness, and that Mr Ferness must be taken to have not yet been notified of the decision. He considers this failure of process amounts to a breach of natural justice if Mr Ferness is denied the opportunity to pursue his review application.

[7] D was referred to prior decisions from this tribunal which have considered the impact of late applications. He seeks to distinguish this present case on the basis that prior situations involved applicants who had in fact received the application personally. He says, *"This case is different. Mr Ferness was not (and still has not been) notified by the Standards Committee."*

[8] I have received a copy of the Standards Committee file and noted that the majority of the correspondence was exchanged between the Standards Committee and D on Mr Ferness's behalf. This includes a Notice of Hearing which was in fact addressed to Mr Ferness, c/- of D. There is clear prior pattern of communications between the Standards Committee and Mr Ferness occurring through D. The practice of D receiving correspondence and also responding to the Committee on behalf Mr Ferness commenced as early as 9 March 2010 when D wrote to the Standards Committee advising that he acted for Mr Ferness. Other items of correspondence show D asking for certain information to be sent to him. There is nothing to show that Mr Ferness questioned this practice at any time, and in the circumstances there is no

proper basis for questioning D's authority to have received the correspondence on Mr Ferness's behalf. If there is an argument that there was no explicit authority (which seems doubtful), then the authority was clearly implied. Notices are throughout in fact *addressed to* Mr Ferness, the postal destination being c/- D. In this case the Notice of decision was, as per the prior practice, addressed to Mr Ferness, c/- of D. I conclude that a Notice of determination addressed to Mr Ferness and sent c/- of D amounts to receipt of that notice by Mr Ferness.

[9] In the alternative D submits that the review application was made within 30 days of the Notice having been received by D and was therefore within the prescribed time. I do not accept this submission. The Act proves a timeframe of 30 working days from the determination, not the date the recipient receives it.

[10] D also submits that an ambiguity exists in the legislation, one that should be construed in Mr Ferness's favour. I do not accept that there is an ambiguity; the legislative provisions are clear and explicit.

[11] A further submission relies on section 202 of the Act which D argues confers on the LCRO a broad discretionary power to carry out his or her functions concerning the LCRO's power to extend time. The question of whether a discretionary power exists has previously been considered by this tribunal in LCRO 36/2009 where LCRO Mr Webb concluded:

> The Jurisdiction of the Legal Complaints Review Officer is entirely statutory and I have only the powers conferred by that Act. While the Act gives broad powers to determine the appropriate procedures for review (for example in s 200 and s 206(3)) such discretion does not extend to the question of whether jurisdiction to hear the review exists.
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> The Act sets out in s 198 the basis upon which my powers to conduct a review are triggered. There is no provision in that section (or elsewhere) for time to be extended. I acknowledge that this may be a harsh result and there may be numerous instances where for one reason or another a party to complaint may have been unable to make an application within the required period (although I make no finding as to whether this is such a case).
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> I am reinforced in this conclusion by the fact that similar conclusions have been reached in other jurisdictions. Thus in *Inglis Enterprises Ltd v Race Relations Conciliator* (1994) 7 PRNZ 404 it was held that the High Court had no jurisdiction to extend time for the making of an appeal where the empowering statute set clear time limits. Some guidance can also be taken from *Commerce Commission v Roche Products (New Zealand) Ltd* [2003] 2 NZLR 519. In that case the Court of Appeal strictly applied time limits applicable to the bringing of

> penalty proceedings under the Commerce Act 1986 refusing to recognise any power to extend time in respect of a statutorily imposed limitation period.
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> Similarly applications for review under s135 of the Accident Insurance Act 1998 (since amended and renamed the Injury Prevention Rehabilitation and Compensation Act 2001) were subject to a strict 3-month time limit prior to the 2001 amendments. The courts repeatedly upheld the strictness of that time limit and rejected the existence of any power to extend time (see for example *Zehnder v ARCIC* 12/7/95, Judge Middleton, DC New Plymouth 73/95).
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> I note further that had the legislature intended to give me a power to extend the time for accepting an application for review it could have done so by the addition of words to that effect. Such words are found in other comparable legislation. See for example s 66 of the Legal Services Act 2000 and s 135(3) of the Injury Prevention Rehabilitation and Compensation Act in 2001.
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> It should also be observed that my jurisdiction is a summary one and that it is an express statutory purpose that complaints against lawyers be processed and resolved expeditiously (s 120(2)(b)). The absence of a power to extend the time to make an application for review ensures that there is finality to the complaints process.
>
> In light of this I conclude that I have no power to extend the time within which an application for review may be made.

[12] D provides a commentary about the doctrine of judicial precedent in LCRO decisions, which I have carefully considered. The arguments may be compelling in circumstances where an error is identified, but in this case I am in agreement with the approach taken in the above decision. Moreover, there is a strong argument for consistency in the decisions of this tribunal, and particularly in the approach taken to statutory compliance. I see no reason to depart from the above in this case.

[13] A number of D's submissions are in essence based on concepts of fairness, justice and the facilitation of rights. If these were required to be considered in relation to the review application provisions, I would add the observation that it would be difficult to see how Mr Ferness could claim to have been deprived of a reasonable opportunity to file for a review given that he personally received the Notice at least 3 weeks ahead of the closing date.

[14] The overall result is that there is no jurisdiction to consider Mr Ferness's review application which is out of time.

DATED this 18th day of November 2010

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Hanneke Bouchier
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 Ferness as the Applicant
D as Counsel for the Applicant
XX as Counsel for the Respondent
The Auckland Standards Committee 2
The New Zealand Law Society