LCRO 259/2010

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the National Standards Committee
BETWEEN	**FT** of Auckland Applicant
AND	**THE NATIONAL STANDARDS COMMITTEE** Respondent

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

Background

[1] On 18 December 2009 Justice Randerson wrote in his then capacity as Chief High Court Judge of New Zealand to the President of the New Zealand Law Society. This is the same letter as is referred to in LCRO 260/2010 and the two matters overlap significantly, arising as they do from this letter.

[2] The purpose of the letter was to acquaint the President or the relevant body of the actions of FT and another lawyer with regard to a series of complaints that they had made against Justice Harrison. In those complaints, FT accused Justice Harrison of racism, bias and discrimination.

[3] On 23 April 2010 the Committee resolved of its own motion to inquire into the matter.

[4] In its decision, the Standards Committee noted that some of the conduct complained of took place prior to 1 August 2008 and therefore the transitional provisions of the Lawyers and Conveyancers Act 2006 applied to that conduct.

[5] Following a hearing attended by FT, the National Standards Committee determined that "the intemperate and persistent manner in which [FT] had made complaints about Harrison J was capable of meeting (if proven) the standards of professional misconduct under the Law Practitioners Act 1982 and (if proven) sufficient to meet a threshold test of misconduct as defined by section 7 (1)(b)(ii) of the Lawyers and Conveyancers Act, and pursuant to section 152 (2)(a) of the Lawyers and Conveyancers Act determined that the matter be considered by the New Zealand Lawyers and Conveyancers Disciplinary Tribunal."

[6] FT has applied for a review of that decision.

[7] This review covers much of the same ground as was considered in LCRO 260/2010 and submissions made by FT and Counsel for the Committee, UQ, related to both matters. As a result, large portions of my decision in that matter are relevant to this decision and for the sake of completeness I will incorporate those parts in full into this decision.

[8] In submissions filed by FT prior to the hearing, he stated that he had but one submission, namely that the LCRO either "rule that it is perfectly acceptable in a purported Western democratic society that I can potentially be disbarred for misconduct (as I was not providing regulated legal services) for having the audacity to complain to legitimate authorities about a judicial officer and you allow the prosecution to go ahead or you rule that I have a human right to air any grievances I have about their Honours in an appropriate forum and as such I cannot face punitive sanctions as a result". He emphasised that he was not seeking any other ruling from this Office.

Recusal

[9] At the commencement of the review hearing, FT sought that I recuse myself from this hearing and the other two hearings to take place at the same time. This application was made on the grounds of bias.

[10] In support of this application for recusal, FT referred to a previous decision issued by me in which FT was also the applicant. The respondent in that case was the brother of the LCRO who FT refers to as "my superior" – in the terminology of the Act I am the Deputy LCRO. He submits in that decision I have ignored his main complaint, which raises a concern on his behalf that I will not properly fulfil my functions in these proceedings.

[11] I did not consider that this constituted any basis for recusal and declined FT's application. If FT considered that the decision in the prior matter was defective, then he had remedies available to him to seek redress in respect of that decision. If, following the issue of this decision and the decisions in respect of the other two matters heard at the same time, FT considers that those decisions are also defective, then he has remedies available to him in respect of those decisions.

[12] FT raised this matter again when providing further written submissions subsequent to the first day of the hearing and complains that I have provided no reasons for declining to recuse myself. The reason is simply as provided in the preceding paragraph – namely that I did not consider there was any strength in his application. It is difficult to see what further reason need be provided.

[13] UQ has subsequently referred me to a Court of Appeal decision (*Taylor v The Queen* [2010] NZCA 628) where the Court applied earlier authorities that the giving of earlier adverse rulings, even adverse findings of credibility, will only "in the rarest of circumstances" (*Muir v Commissioner of Inland Revenue* [2007] 3 NZLR 495 at [98] CA) call for recusal. This is supportive of the view that I have taken.

[14] In his written submissions provided following the first hearing, FT also refers to what he considers to be evidence of predetermination on my behalf in respect of this matter and the related complaint about Justice Randerson. This arose because I saw no reason why these two matters should be deferred while further material was agreed between FT and UQ in respect of the third matter being dealt with at the same time. That matter is not related to the complaints concerning Justices Randerson and Harrison. However, as both FT and UQ had understood all three matters were to be deferred, that is how they proceeded. FT has therefore indicated that he makes no accusation of bias in that regard.

Scope of review

[15] FT then raised the preliminary issue as to the scope of a review by the LCRO. This was a submission made more particularly in connection with the unrelated application to be heard on the same day, but it is nevertheless a submission that affects all three applications for review.

[16] In a number of previous decisions, the LCRO has had cause to consider the question as to whether a decision to lay charges before the Disciplinary Tribunal, is a determination which is subject to review by the LCRO.

[17] In *Poole v Yorkshire* LCRO 133/09, the LCRO came to the conclusion that a decision by a Standards Committee to lay charges before the New Zealand Lawyers and Conveyancers Disciplinary Tribunal was a decision which was subject to review. That is not in question.

[18] The LCRO went on to note that "it must be stated at the outset that it will only be in exceptional cases that a decision to prosecute will be reversed on review." He then identified four situations in which a decision to prosecute may be revisited. These situations were identified in *Kumar v Immigration Department* [1978] 2NZLR 553 and in *Polynesian Spa Limited v Osborne* [2005] NZAR 408. Both of these decisions were referred to by FT and UQ during the course of the hearing.

[19] In Poole *v Yorkshire*, at [21], the LCRO noted that "the cases cited above indicate the kinds of basis upon which a decision to prosecute might be revisited. They include situations in which the decision to prosecute was:

(a) significantly influenced by irrelevant considerations;

(b) exercised for collateral purposes unrelated to the objectives of the statute in question (and therefore an abuse of process);

(c) exercised in a discriminatory manner;

(d) exercised capriciously, in bad faith or with malice

[20] FT considers that the LCRO was wrong in applying the principles derived from these decisions for the reason that the decisions referred to involve applications for judicial review and that the LCRO should not restrict himself or herself to the grounds available on a judicial review application.

[21] In identifying the situations in which a decision to prosecute may be revisited in *Poole v* Yorkshire, the LCRO did not assert that the list was exhaustive. In [23] the LCRO notes that if "conduct was manifestly acceptable then this might be evidence of some improper motivation in the bringing of the prosecution." This can be expressed in a different way, in that if the LCRO forms the view that the evidence considered by the Standards Committee clearly could not support a decision to prosecute, was irrational or substantively unfair, then that would constitute a reason for the LCRO reversing the decision to prosecute.

[22] To that extent therefore, the review to be conducted by the LCRO is not as limited as FT suggests it could be.

[23] In coming to its decision the Standards Committee is not required to determine whether a prosecution will succeed or not. Rather, it involves a consideration as to whether the allegations made by FT are (if proven) capable of meeting a threshold test of misconduct. This is another way of expressing the role of the Standards Committee as referred to in *Mr Rugby v Auckland Standards Committee* LCRO 67/2010, where the LCRO described the role of the Committee as being "to do the preliminary screening and to present the case."

[24] It is relevant therefore, to give consideration to the material considered by the Standards Committee to consider whether the matters considered by the Committee were capable of supporting that decision.

The Review

[25] FT presents the same arguments in respect of this matter as he does in respect of LCRO 260/2010. In essence, FT argues that he is being singled out for prosecution merely because he has dared to complain about a Judge. As noted in LCRO 260/2010 that is not the case. The Standards Committee determination was made in relation to the "intemperate and persistent manner in which [FT] has made complaints against Harrison J".

[26] FT has made complaints about Justice Harrison to the Chief High Court Judge, and the Judicial Conduct Commissioner, and has brought proceedings against him in the High Court, the Court of Appeal and the Human Rights Tribunal. FT has made allegations that Harrison J is biased, malicious, vindictive, punitive, oppressive, and racist. It would be correct to say that the complaints are persistent, and include language which is "intemperate."

[27] FT does not accept his language is intemperate. He concedes that his language may be colourful but does not accept that it is derogatory or insulting. He also submits that on this basis the matter becomes a question of form over substance - namely that he is entitled to make the allegations about a Judge providing the complaints are expressed in appropriate language. I cannot disagree with that. The charges to be laid against FT are not that he has complained about a Judge. The Standards Committee decision was that he made his allegations in a persistent and intemperate manner.

[28] FT argues that because his statements were made outside of his professional capacity (or more accurately that he was acting as a non-lawyer) he is free of any professional standards obligations. He cites a number of cases from international jurisdictions in support of this submission. However, I need look no further than section 7 (1)(b)(ii) of the Lawyers and Conveyancers Act, which defines misconduct as being conduct unrelated to the provision of regulated services which would justify a finding that a lawyer is not a fit and proper person to engage in practice as a lawyer. This makes it clear that a charge of misconduct in New Zealand can be brought in respect of a lawyer's conduct which is unrelated to the provision of legal services. Charges in these circumstances have been successfully brought before the Tribunal - (see for example *Waikato Bay of Plenty District Law Society v Baledrokadoka* [2002] NZAR 197). In *H (a law practitioner) v Auckland District Law Society* [1985] 1 NZLR 8, the Court noted at [23] that *"it is clear that misconduct by a professional man outside his professional activities and in his private life can, in some circumstances, render him liable to discipline by a professional tribunal."* Similarly, in Australia, the Supreme Court has held that a lawyer convicted of involuntary manslaughter was conduct of such a serious nature that the disciplinary body was required to take action. (*Ziems v Prothonotary of the Supreme Court of New South Wales* (1957) 97 CLR 297 (HCA)). The combined weight of the plain wording of the Act, and these authorities, leaves me in no doubt that the charges may properly be brought before the Tribunal, notwithstanding that the statements were made when FT was not acting as a lawyer.

[29] The Committee has formed the view, that FT's conduct is such that it is capable of meeting a threshold test of misconduct, and even if I did not restrict myself in the manner as set out in previous decisions of this Office, I would concur with the Committee.

[30] The Office of the LCRO is an inappropriate forum to consider any evidence that FT wishes to adduce in support of his allegations against Justice Harrison. In hearings before the Tribunal, witnesses can be called, and cross examined on the evidence which they provide. In this way, all evidence that is relevant to the proceedings can be properly adduced and assessed by the Tribunal. LCRO proceedings do not provide the opportunity for this to take place, and it is not the role of the LCRO to undertake this exercise. FT is elevating the role of the LCRO beyond its function.

[31] FT advances a defence of freedom of speech, referring to a number of cases in other jurisdictions. He considers that the jurisprudence in New Zealand relating to this is "immature" and "New Zealand is a non-democratic nation and does not deserve to

call itself that because it is no different from third-world countries where lawyers that dare speak out against the system face personal retribution." He considers that the "LCRO is in a unique position to show the courage necessary to change that abhorrent mentality." It seems to me that again, FT is elevating the role and function of the LCRO to that of the Tribunal. It is not the role of the LCRO to consider and make determinations on defences advanced by FT. That is the function of the Tribunal.

[32] FT himself accepts that the Tribunal is the appropriate forum for the matters he raises to be argued. In his letter to this office of 26 April 2011 he says:- "Moreover, I do not think that the substantive allegations against me are appropriately dealt with by this body as I reserve the right to defend myself on the merits in the New Zealand Lawyers and Conveyancers Disciplinary Tribunal which is the appropriate trial jurisdiction should these allegations be allowed to advance that far."

[33] Having read and heard the submissions of both FT and UQ I have no hesitation in concurring with the determination of the Standards Committee that these are matters are matters which should properly be addressed before the Tribunal.

[34] FT has appealed to the LCRO to protect him from vindictive prosecution by the Standards Committee. He urged me to consider the cases that he has referred to in his application to the United Nations Human Rights Council. Having reached my decision for the reasons set out above, I do not consider that it is necessary for me to consider those cases in any detail. FT will have the opportunity of presenting that material to the Tribunal.

Decision

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

Costs

[36] The National Standards Committee's determination to lay charges has been upheld. This review application was one of three to be heard at the same time. The hearings occupied a large part of one day and part of a second day. The review involved matters of some complexity. In the circumstances, it is appropriate that an order for costs be made against FT. Pursuant to section 210(1) of the Lawyers and Conveyancers Act FT is ordered to pay the sum of $800 by way of costs, such sum to be paid to the New Zealand Law Society within 30 days of the date of this decision.

DATED this 21st day of October 2011

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Owen Vaughan
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:

FT as the Applicant
The National Standards Committee as the Respondent
UQ as Counsel for the Respondent
The New Zealand Law Society