LCRO 280/2013
LCRO 324/2013
LCRO 34/2014
LCRO 281/2013
LCRO 325/2013
LCRO 118/2014

CONCERNING	applications for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	determinations of the Standards Committee
BETWEEN	**BRETT COOPER** Applicant
AND	**STANDARDS COMMITTEE [X]** Respondent

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

DECISION

Introduction

[1] Mr Cooper applied for a review of six related Standards Committee [X] decisions on the basis that they were wrong, and the Committee had made the wrong orders. Over the course of time since those applications were filed, Mr Cooper's views have changed. He seeks a review only of those parts of the determinations which ordered him to pay two fines of $5,000 each,[1] and that his name be published in respect of both such decisions.[2] Otherwise, he raises no challenge to the decisions, and accepts the orders that he be censured and pay costs.[3]

[1] LCRO 281/2013 and LCRO 280/2013.
[2] LCRO 325/2013 and 118/2014; LCRO 324/2013 and 34/2014.
[3] LCRO 281/2013 and LCRO 280/2013.

Background

[2] Both complaints arise from Mr Cooper's conduct between 2011 and 2012. The first is a result of a complaint by Mr AQ, the second arises from a memorandum sent by a Judge that gave rise to the Committee commencing an own motion investigation.

AQ complaint (Complaint No 6700)

[3] A complaint was laid by Mr AQ raising concerns about Mr Cooper having repeatedly sought adjournments, and failed to attend Court to represent him on a defended drink-driving charge. After several months' delay, Mr AQ entered a guilty plea and was sentenced, in Mr Cooper's absence. Mr AQ objected to having paid Mr Cooper $7,000 for services Mr Cooper did not provide. Mr Cooper refunded the $7,000, and Mr AQ withdrew his complaint.

Standards Committee Decisions

16 August 2013 (LCRO 280/2013)

[4] The Committee did not consider any further action was necessary in respect of Mr AQ's service provision complaints, Mr Cooper having refunded his fees, and decided to take no further action pursuant to s 152(2) of the Lawyers and Conveyancers Act 2006 (the Act).

[5] However, arising from Mr AQ's complaint the Committee found that Mr Cooper had not met his obligations under rules 3.4 and 3.5[4] to provide information to Mr AQ in advance, and more significantly, that Mr Cooper appeared to have receipted funds directly into his practice account, in breach of rule 9.3, regs 9 and 10 of the Lawyers and Conveyancers Act (Trust Account) Regulations 2008, and s 110 of the Act.

[6] The Committee considered:[5]

> …that the protection of client money is of paramount importance under the Act and the reason why there are stringent rules around the handling of client money by lawyers.
>
> Mr Cooper's conduct is in direct contravention of these requirements and is a serious breach of the Act and the Rules.

[7] The Committee determined, "pursuant to s 152(2)(b), that there has been unsatisfactory conduct on the part of Mr Cooper as defined in s 12(c) of the Act", and that:[6]

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[4] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.
[5] Standard Committee determination (6700) 16 August 2013, at [12]–[13].

> Having made findings of unsatisfactory conduct against Mr Cooper, the Committee considers it appropriate to censure Mr Cooper and impose a fine of $5,000 to reflect the seriousness of the breaches. Furthermore the Committee considers that Mr Cooper should pay costs of $1,500 to the Law Society.

[8] The Committee deferred making any direction on publication, and allowed the parties 14 days to file submissions.

Own Motion Investigation (Complaint No 6701)

16 August 2013 (LCRO 281/2013)

[9] The Committee commenced an own motion investigation pursuant to s 130(c) of the Act having received a memorandum from Judge TR[7] (the memorandum) raising concerns about aspects of Mr Cooper's conduct, and being aware of two related articles that had been published on the [newsmedia] website.

Memorandum

[10] The memorandum and attachments detailed the Judge's concerns over Mr Cooper's conduct in respect of three of his clients, Mr YE, Mr AQ, and Mr DB, and concerns about Mr Cooper's conduct expressed in a decision[8] made by another District Court Judge.

Mr YE

[11] The decision refers to a minute and oral judgment issued by Judge TR following a formal proof hearing on 9 January 2012 of charges against Mr YE.[9] The Committee recorded the Judge's concern that Mr Cooper's conduct appeared "unprofessional and contrary to his client's interests."[10]

[12] The Judge recorded that Mr YE did not appear on the day scheduled for his defended hearing, and Mr Cooper handed up what the Judge considered to be a plainly inadequate medical certificate for Mr YE. The Judge stood the matter down, but when it was recalled neither Mr YE nor Mr Cooper was present, although Mr Cooper had not been excused by the Court. In the circumstances, the case proceeded, in the absence of lawyer and client, by way of formal proof. The Committee referred to the

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[6] At [16].
[7] Memorandum of Judge TR (19 September 2012).
[8] *Police v IX* [2012] DCR [XXX] (DC).
[9] *New Zealand Police v YE* DC [City], CRI-2011-016-[XXXX], 9 January 2012.
[10] Standards Committee determination (6701), 16 August 2013 at [2.b.].

Judge's comment in the oral judgment dated 9 January 2012, before he issued a warrant for Mr YE:[11]

> [8] It is not for the Court at this stage to speculate on what might be Counsel's motivation in the matter, simply to say, his failure to attend to this matter in Court as the morning developed is extraordinary. In the circumstances, the information is proved.

DB

[13] The Committee referred to the Judge's concern about the quality of a submission put by Mr Cooper on an application for dismissal after a defended hearing. The Judge's view was that Mr Cooper persisted with a submission that was "unstructured and poorly expressed", lacked any "evidential foundation", was "plainly inaccurate" and that "even a basic reading of the relevant section would have shown that the submission was wrong".[12] The Committee recorded the Judge's view that:[13]

> In this matter, while allowing for the disorganisation and poor advocacy revealed by the transcript, it is difficult to view Mr Cooper's submission as otherwise than deliberately inaccurate and intended to mislead the Court.

AQ

[14] The Committee recorded the concerns expressed by the Judge in the memorandum relating to the series of adjournments covering more than a year, of Mr AQ's defended hearing between 18 August 2011 and 6 September 2012, following which Mr AQ entered a guilty plea and was sentenced, after terminating Mr Cooper's retainer and seeking alternative representation. The Committee recorded the Judge's observation that "Mr Cooper's conduct appears discourteous, unprofessional, wasteful of court time and prejudicial to his client's interests".[14]

IX

[15] The Committee also noted another proceeding recording a similar history of repeated adjournments, over the course of 11 months, heard by Judge SW in [City].[15] That matter ultimately proceeded by way of formal proof in the absence of the defendant, and of Mr Cooper as counsel. The decision describes aspects of Mr Cooper's practice as being "far from satisfactory".[16]

Newsmedia Reports

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[11] Above n 9.
[12] Above n 7 at p3.
[13] At p4.
[14] At p6.
[15] *Police v IX* [2012] DCR [XXX] (DC).
[16] At [9].

[16] The Committee also referred to two articles published on the [newsmedia] website.

[17] The first article related to Mr AQ, the Judge's reaction to Mr Cooper repeatedly seeking adjournments, and the Judge's concern that "similar problems have afflicted cases of other clients of Mr Cooper in Court".[17]

[18] The second article referred to complaints by Mr AQ and Mr EN who reportedly believed they had received poor advice from Mr Cooper, and Mr Cooper's reported comment that "it has quite a lot to do with the Judge hearing the case. Unfortunately for Mr AQ, he ran into Judge TR…".[18]

Standards Committee Decisions

<u>16 August 2013 (LCRO 281/2013).</u>

[19] The Committee considered Mr Cooper's response, including his view that Judge TR harboured a "distinct grudge" against him, his explanation of the basis of his submissions, and a letter from Mr YE saying he was a satisfied client. Mr Cooper also referred to allegedly inappropriate comments he had made to the media, and his evidence that he had no intention of making inappropriate comments about Judicial Officers.

[20] The Committee considered that Mr Cooper "adopted a mode of operating that relies on delay and adjournments, and in providing medical notes to Courts to avoid hearings". Mr Cooper's treatment of the Court and its processes was described as disdainful, and the Committee concluded that he had breached rules 2.1, 2.2 and 2.3[19] which regulate lawyers' conduct as officers of the Court, saying:[20]

> Mr Cooper's conduct breaches his duty to the Court and is an attempt to obstruct the course of justice. It is also using the law for an improper purpose. The Committee considers the conduct is such that it breaches the above Rules and would be regarded by lawyers of good standing as being unacceptable.
>
> Accordingly, the Committee finds there has been unsatisfactory conduct on his part as defined in sections 12(b) and (c) of the Act.

[21] The Committee did not consider further action was necessary in relation to the Judge's concern that Mr Cooper's submissions in Mr DB's case had been deliberately misleading. The Committee reasoned that Mr Cooper had based his submissions on principles used in another similar case, accepting Mr Cooper's evidence of his honest, but inaccurate, belief that the facts in Mr DB's case supported his submission.

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[17] Above n 10.
[18] At [1.b.].
[19] Above n 4.
[20] Above n 10 at [8]-[9].

[22] In relation to Mr Cooper's comments to the news media, the Committee considered it inappropriate for a lawyer to criticise a Judge through the media, saying that the "appropriate forum for raising conduct issues in relation to Judges is through the Judicial Conduct Commissioner". The Committee formed the view that Mr Cooper's conduct was unsatisfactory, on the basis that making comment to the media as he did was unprofessional and amounts "to conduct that would be regarded by lawyers of good standing as being unacceptable".[21]

[23] The Committee also considered whether Mr Cooper had complied with the obligation to receive instructions only through an instructing solicitor, which he had, and whether he had complied with his obligations to provide information in advance, pursuant to rule 3.4 and 3.5, which he had with respect to Mr YE and Mr DB, but not, as mentioned above, with respect to Mr AQ. As the Committee had already dealt with that breach, it did not consider it necessary to consider the issue again in its own motion investigation.

[24] The Committee then found that Mr Cooper had breached rule 9.3 of the Conduct and Client Care Rules, regs 9 and 10 of the Trust Account Regulations, and s 110 of the Act, by receiving and receipting funds from Mr YE directly into his practice account. The Committee considered:

> Mr Cooper's conduct in paying money directly into his practice account is a serious breach of the Act and in direct contravention of the stringent rules governing the handling of client money by lawyers.
>
> Accordingly, the Committee determined pursuant to s 152(2)(b) that there has been unsatisfactory conduct on the part of Mr Cooper as defined in s 12(c) of the Act.

[25] Having made a finding of unsatisfactory conduct, the Committee censured Mr Cooper, imposed a "fine of $5,000 to reflect the seriousness of the breaches", and ordered him to pay costs of $1,500 to NZLS.

[26] The Committee again deferred making any direction on publication, and allowed the parties 14 days to file submissions.

<u>17 October 2013 (LCRO 324/2013 and LCRO 325/2013)</u>

[27] The Committee reconvened to consider publication in respect of Mr AQ's complaint and its own motion investigation. Neither party filed submissions in respect of either matter. Both decisions record the Committee having taken into account the following factors when considering publication:

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[21] That is, unsatisfactory conduct as defined in s 12(b) of the Act.

a. Disciplinary proceedings are taken in the public interest and public interest factors are of primary importance at each level of decision-making.

b. The public interest requires consideration of the extent to which publication would provide some degree of protection to the public and the profession (*S v Wellington District Law Society* [2001] NZAR 465, at p469).

c. The common law of New Zealand recognises the major interest in the openness of proceedings before courts and tribunals . The value of public accountability is one of the values to be imputed by way of parliamentary intention in the absence of clear indications to the contrary and the values of public education and alerting to risk are related and of significance (*Director of Proceedings v Nursing Council of New Zealand* [1999] 3NZLR 360 at 378).

d. The public's right to know when practitioners have infringed the standards of the profession (*Gill v Wellington District Law Society* (HC Wellington, AP 120/93, 7 December 1993, Barker, Ellis and Doogue JJ) at p9).

e. The maintenance of the reputation of the legal profession (*Bolton v Law Society* [1994] 2 All ER 486).

f. The deterrent and educative value of publication to the legal profession.

[28] Noting that Mr Cooper had not filed any submissions opposing publication, the Committee directed publication of both determinations including Mr Cooper's name in the public interest.

[29] The decisions record that the Committee had regard to reg 30(1) of the Lawyers and Conveyancers Act (Lawyers: Complaint Service and Standards Committees) Regulations 2008, which provides that where a Standards Committee has made a censure order pursuant to s 156(1)(b) of the Act, the Committee may, with the prior approval of the New Zealand Law Society Board (Board), direct publication of the identity of the person who is the subject of the censure order.

[30] The Committee considered that publication of Mr Cooper's identity was desirable in the public interest, and resolved to refer the matter to the Board to seek prior approval to publish his identity.

[31] In both cases, the Committee recorded that, if the Board approved publication, it would issue a direction pursuant to section 142(2) of the Act.

<u>20 January 2014 (LCRO 34/2014)</u>

[32] The Committee reconvened, and considered correspondence from NZLS confirming that the Board had approved publication of Mr Cooper's name with respect to Mr AQ's complaint.[22] The Committee directed publication of the determination, including Mr Cooper's identity, but not that of other parties, pursuant to s 142(2) of the Act.

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[22] Letter to NZLS to the Standards Committee (3 December 2012).

<u>23 April 2014 (LCRO 118/2014)</u>

[33] The Committee reconvened, and considered correspondence from the New Zealand Law Society (NZLS) confirming that the Board had approved publication of Mr Cooper's name with respect to its own motion enquiry.[23] The Committee directed publication of the determination, including Mr Cooper's identity, but not that of other parties, pursuant to s 142(2) of the Act.

Review application

[34] As mentioned above, although Mr Cooper applied for review of all six decisions, his only remaining objection in both instances is to the quantum of fine, and to publication.

Review hearing

[35] Mr OJ attended an applicant only hearing in [City] as counsel for Mr Cooper on 20 March 2015. Mr Cooper did not attend, and the Standards Committee indicated it did not wish to participate in the review, and would abide the decision of the Legal Complaints Review Officer (LCRO).

Review issues

[36] As Mr Cooper generally accepts the findings in the decisions, and there are no apparent procedural deficiencies in either, there are only two issues to address on review. The two issues on review are whether there is good reason to interfere with the decisions:

(a) Ordering Mr Cooper to pay fines of $5,000 in respect of the two separate Standards Committee decisions; and

(b) Directing Mr Cooper's name be published.

[37] For the reasons discussed below, the answers to those questions are "no" and "yes" respectively. The end result for Mr Cooper, however, is the same, because this decision, including his name, is the subject of a direction to publish under s 206(4) of the Act on the basis that publication is necessary and desirable in the public interest.

New information

[38] At the review hearing, Mr OJ tendered written submissions which referred to a recent diagnosis of Mr Cooper's psychiatric condition,[24] attaching three reports by Dr

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[23] Letter to NZLS to the Standards Committee (27 February 2014).
[24] OJ Submissions, 19 March 2015.

CC, neuropsychiatrist, and an affidavit prepared by Mr Cooper's GP, Mr FG. Those materials were not before the Committee when it made the decisions under review.

[39] The reports and affidavit were prepared in respect of a separate disciplinary matter concluded before the New Zealand Lawyers and Conveyancers Disciplinary Tribunal (the Tribunal) on 2 March 2015.

[40] Dr CC's three reports are dated 18 February 2015, 27 February 2015, and 18 March 2015. The first two reports were prepared in advance of the Tribunal's disciplinary hearing, the third was prepared specifically to address the prospect that Mr Cooper's name would be published as a result of the outcome of the Tribunal hearing.

[41] After the review hearing Mr OJ also submitted a memorandum dated 23 March 2015 in which he confirmed that Mr Cooper's instructions to him. Contrary to earlier indications, including those made in his written submissions filed prior to the hearing, Mr OJ says Mr Cooper "may very well in fact wish to recommence the practice of law in the future, when his period of suspension [imposed by the Tribunal] ends".

[42] Mr Cooper relies on the medical evidence he has tendered as influential in deciding whether his name should be published. No sensitivity has been expressed about the medical evidence being referred to in any decision. It is necessary and desirable to set out the parts that have influenced this decision which relate to Mr Cooper's state of health over the ten most recent years he has been in practice as a lawyer.

Dr CC's Reports

<u>18 February 2015</u>

[43] Dr CC refers to a consultation with Mr Cooper on 18 February and relevantly says of Mr Cooper that he is a:

> …busy lawyer who has not worked for some time. He became aware in January 2014 that he was "not right" and that he had "run out of fuel". He was involved in a difficult legal case at the time, and realised that he could not manage the Court procedures…
>
> This followed on from issues that had built up over some years. Certainly several years ago he [and his wife] were aware that he was not keeping up, becoming overloaded. He had tried to take more time off, doing a month on and a month off. This did not work however with the nature of the work and scheduling of Court cases. This also created issues with some Judges…
>
> Although [Mr Cooper] has now been off work for over a year, he continues to have significant issues…
>
> …

> [Mr Cooper] presents with a remarkably common condition that defies standardized psychiatric diagnosis. In essence he has a chronic stress reaction. The consequences of this are not dissimilar to individuals with chronic post-traumatic stress disorder, but he does not suffer from post-traumatic stress disorder. However, the biological symptoms are the same, and do, on the basis of clinical assessment, appear to match those now defined well in the literature by PTSD…

[44] Dr CC recommended a minimum of 30 minutes daily aerobic exercise, and prescribed medication.

<u>27 February 2015 Report</u>

[45] Dr CC refers to having carried out an assessment on Mr Cooper which:

> …involved assessing his current state, and also obtaining an (sic) historical impression of his state in recent years. This has been aided significantly by being able to peruse a summary by his general practitioner of presentations and illness…
>
> …
>
> At recent assessment, Mr Cooper presented with a range of chronic stress related disturbances… If he had been assessed in May 2012…would have resulted in the writer advising him that he was unfit to engage in his duties as a legal professional at the time without appropriate treatment and recovery. This is the advice that would have been given also currently.
>
> …
>
> It is important to note that the symptoms and issues that Mr Cooper presents with are amenable to treatment, and while he is not currently fit to engage in practice as a Lawyer simply as a result of illness, with appropriate treatment he should be able to return to this.

<u>18 March 2015 Report</u>

[46] Dr CC's third report refers to his previous dealings with Mr Cooper, and his earlier reports. The focus of this report is on the possible consequences to Mr Cooper of publication of his name. Dr CC says Mr Cooper:

> … arrives where he is as a result of significant stressors in his life. It is because of these stressors that he has developed his mental health issues.
>
> The publication of name is a significant stressor. It follows that this will further aggravate his mental state, and make it much more difficult for him to engage in appropriate therapeutic input.
>
> This will in a circular fashion leads to him becoming more markedly impaired. Arising from this, and given the presence of depressive symptoms, the risk of suicidality becomes much greater. I note that the rate of suicide in those with a major depressive episode is approximately 15%. This does account for the high suicide rates seen in New Zealand currently.
>
> Given the above, it is my strong recommendation that Mr Cooper does not have his name published. This will add to his current mental health load, interfere with the capacity for engaging appropriately in treatment, and place him at further risk. This is not advisable in my opinion…

GP Affidavit 26 February 2015

[47] It is also helpful to summarise the affidavit prepared by Mr Cooper's GP, Mr FG, which includes evidence of Mr Cooper's mental state from 2004 onwards, including in 2011 and 2012, when the unsatisfactory conduct occurred.

[48] Mr FG says Mr Cooper had been a patient at his medical centre since 2001, and expressed the view that some of Mr Cooper's past history may have impacted on his conduct. He says that Mr Cooper visited him on 9 February 2015. He refers to Mr Cooper's medical history, and symptoms going back to at least May 2004.

[49] The doctor describes Mr Cooper as experiencing various symptoms that he believes may have affected Mr Cooper's decision-making, and resulted in him taking time off work, and reporting in 2009 that he "was unable to face work as a lawyer".

[50] Generally similar symptoms persisted, with further periods off work from 2010 to 2012. His medical records indicate he had three weeks off in August 2011 when he was under stress at work, and again in September and October 2012 Mr Cooper had approximately five weeks off work when he reported not performing at work and feeling generally run down.

[51] Mr Cooper stopped work on 14 January 2014, only days before the Committee made the 20 January 2014 decision to publish the decision identifying him.

[52] On 17 April 2014 Mr Cooper was diagnosed with underlying chronic anxiety and depressive features and adjustment disorder and Dr FG says those conditions have kept him away from work since January 2014. That diagnosis was made a matter of days before the Committee made the 23 April 2014 decision to publish Mr Cooper's name.

[53] The doctor says that in May 2014 Mr Cooper commenced counselling with a clinical psychologist, and that continues on a monthly basis.

Referral Back

[54] Whether the quantum of the fines is reasonable is not affected by the medical evidence. I have, however, considered whether to refer the question of publication back to the Committee for it to reconsider and determine, because the reports and affidavit are relevant to that matter. They include Mr Cooper's current diagnosis, and evidence of Mr Cooper's medical history including references to his health in 2011 and 2012 when the conduct under review occurred.

[55] Mr OJ said Mr Cooper's preference is that I do not refer the new information back to the Committee for it to reconsider and make a decision at first instance.[25] Mr OJ submitted that Mr Cooper's anxiety is exacerbated by the unresolved reviews, and raised no objection to me determining the reviews without a referral back.

[56] The Committee has expressed no view.

[57] I have decided not to refer either matter back to the Committee for the following reasons:

a. The conduct is relatively serious given the Act's purposes including maintaining public confidence in the provision of legal services and protecting consumers of legal services.

b. Referral back would add to the delay in determining the disciplinary consequences of the conduct that are the subject of this review.

c. Further delay is inconsistent with the Act's guiding principles of dealing with complaints expeditiously, and according to Mr OJ's submission, is not in Mr Cooper's interests.

d. Referral back would be inconsistent with the emphasis of the Act on consumer protection[26] and expedition in determining disciplinary matters.[27]

e. If Mr Cooper's name is to be published, the public interest would be better protected by that occurring sooner rather than later.

f. Referral back would not be an efficient or effective use of the Committee's resources.

Submissions on Fine

[58] On behalf of Mr Cooper, Mr OJ submits that Mr Cooper's ground for review of the $5,000 fines imposed on him is that it was manifestly excessive in all circumstances. The circumstances Mr OJ highlights relate to Mr Cooper "at all material times… labouring from extreme anxiety", and:

> …his condition as described in the psychiatrist's report is as it was in 2012. To this end, Dr CC's report refers to issues that had built up over some years.

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[25] Section 209 of the Act provides an LCRO with the discretion to direct a Committee to reconsider and determine part of a decision to which a review application relates.
[26] Section 3(1)(b).
[27] Section 120(2)(b) and (3); *Deliu v New Zealand Law Society* [2015] NZCA 12, at [22].

[59] Mr OJ also refers to Mr FG's affidavit confirming Mr Cooper's medical history dating back to 2006. Mr OJ says that Mr Cooper relies on the recent diagnosis of his psychiatric condition as a mitigating factor in respect of the level of fine he should properly have been ordered to pay in August 2013.

[60] That submission is linked to Mr OJ's submission that a more moderate fine is appropriate because:

> …when imposing the fine of $5,000 the Standards Committee overlooked the stressors faced by Mr Cooper in his capacity as a one-barrister operation lacking support from colleagues, partners, staff or members of chambers; and overlooked also the busy and nation-wide nature of his practice.

[61] I accept that Mr Cooper operated as a barrister sole in the manner Mr OJ describes. However, Mr Cooper's mode of operating was his choice, apparently freely made. I accept that Mr Cooper carries the burden of his choices, but he also enjoys the benefits of operating as he did, not least of which is the freedom that comes with operating as a barrister sole without chambers.

[62] With freedom comes responsibility. Mr Cooper was responsible for managing himself. His failure to do so resulted in a member of the independent judiciary taking the highly unusual step of intervening to protect Mr Cooper's clients. As Dr CC says in his 18 February 2015 report, Mr Cooper "arrives where he is as a result of significant stressors in his life", and that it "is because of these stressors that he has developed his mental health issues".

[63] It is largely, if not solely, Mr Cooper's failure to manage his own workload that brought him to the attention of the Standards Committee, resulting in the decisions that are the subject of this review. As a barrister sole, Mr Cooper was in a privileged position. I do not accept that the stressors Mr OJ highlights were matters the Committee should have taken into account in imposing a fine, or that they support the imposition of a lesser fine, because they were the result of his choices.

[64] Mr OJ also refers to what he describes as emphasis placed by the NZLS on "Practising Well", saying that the emphasis "seems to be to provide a support network for lawyers who are faced with stress and its related disorders and symptoms".[28]

[65] The Practising Well initiative Mr OJ refers to is not linked to the regulatory functions of NZLS set out in s 65 of the Act. It is a product of NZLS's representative functions for its members under s 66. I therefore cannot see a logical connection

[28] Above n 24.

between the Practising Well initiative and the quantum of a fine ordered by a Standards Committee in the regulatory context of s 156(1)(i) of the Act.

[66] Mr OJ says that "Mr Cooper's financial position has changed in that he ceased practising law on 30 June 2014 when his practising certificate expired. He has not recommenced practice…". Although there is no dispute that Mr Cooper is not presently in practice, there is no evidence that he has no present income or assets. As there is no evidence to support the proposition that he is unable to pay two fines of $5,000, Mr OJ's submission on that point can be taken no further.

[67] At the review hearing Mr OJ tentatively advanced the submission that the totality principle may be applicable when considering whether the quantum of the fines ordered under s156(1)(i) of the Act was manifestly excessive. I was unaware of any authority for the proposition that the totality principle applies to fines imposed in the disciplinary framework of the Act, and asked Mr OJ to identify any authorities he considered relevant. I indicated I would issue a direction to that effect on the next working day after the review hearing. Mr OJ pre-empted the issue of that direction by providing a memorandum and copy of *Commerce Commission v O'Neill*[29] in support of his submissions that the totality principle applies:

a. Implicitly to the assessment of fines [generally]; and
b. Regardless of a defendant's financial capacity.

[68] I am not confident that the *Commerce Commission v O'Neill* provides sufficient support for the breadth of the first submission.

[69] I do not consider the second submission advances the position because, assuming the totality principle does apply, it would do so regardless of Mr Cooper's (undisclosed) financial position.

[70] Section 156(1)(i) of the Act provides for a Committee to impose a fine of up to $15,000 having made a finding of unsatisfactory conduct. The quantum of a fine is a matter for the discretion of a Standards Committee. The exercise of that discretion takes into account the general functions of imposing sanctions for disciplinary offences which include "to punish the practitioner; as a deterrent to other practitioners; and to reflect the public's and the profession's condemnation or opprobrium of the practitioner's conduct".[30]

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[29] *Commerce Commission v O'Neill* [2007] 12 TCLR 1 at [48]–[50].
[30] *Wislang v Medical Council of New Zealand* [2002] NZAR 573 (CA).

[71] In the present case there is no overlap between the Committee's findings of unsatisfactory conduct in respect of Mr AQ's complaint, and its own motion inquiry. Although Mr AQ's situation was mentioned in the course of the own motion inquiry, it is clear from the decisions that there is no duplication between the findings.[31] Mr OJ's concern appears to be that there may be some duplication between the penalties imposed therefore appears unfounded.

[72] Each decision was based on separate and distinct breaches of the Act, regulations and practice rules by Mr Cooper. The Committee was correct to consider those breaches were serious, given the consumer protection purposes of the Act, and the requirement for strict compliance with the Trust Account Regulations that govern lawyers' handling of client money.

[73] There is no scale of fines, only the statutory cap of $15,000. A fine of $5,000 is one third of the available statutory amount. It is an identical amount to the fine upheld in the only other decision I have been able to identify from this Office that relates to similar breaches of the Act and the Trust Account Regulations.[32] Although I am not bound by other decisions of this Office, I agree with the comment by the LCRO:[33]

> …that the conduct in respect of which the adverse finding has been made involves client funds. That must automatically raise the bar somewhat in terms of the level of fine imposed. In the High Court decision of *B v Auckland Standards Committee*[34] the Court recognised that fines can be seen to be "backing up" a censure and the fine imposed by the Committee reflects the degree of concern. I share that concern and in the circumstances have come to the view that the fine imposed by the Committee is appropriate.

[74] A fine at the level imposed acts as a punishment for Mr Cooper, and reflects the public's and the profession's condemnation or opprobrium of the practitioner's conduct. That function originates in the Committee being constituted a lay member representing the public, and lawyer members representing the profession. The $5,000 fine "backs up" the censure.

[75] The level of the fine can only act as a significant deterrent to other practitioners if the decision were published. The publication aspect of this review is discussed in more detail below, but suffice to say at this point that it is not necessary to publish a practitioner's name to achieve general deterrence.

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[31] See paragraph [23] above. "As the Committee had already dealt with that breach, it did not consider it necessary to consider the issue again in its own motion investigation."
[32] *XB and XC v [A North Island] Standards Committee* LCRO 207 & 208/2012.
[33] At [57].
[34] *B v Auckland Standards Committee* 1 HC Auckland, CIV-2010-404-8451, 9 September 2011 at [38].

[76] The $5,000 fine in respect of Mr AQ's complaint is confirmed as reasonable and appropriate in the circumstances of that complaint bearing in mind the seriousness of the conduct being punished, and the absence of any good reason to interfere with the Committee's discretion.

[77] Mr Cooper does not appear to have profited from representing Mr AQ, because he provided him with a full refund of his fees. It is unclear whether he retained fees in relation to the other conduct matters raised by Judge TR.

[78] In relation to the own motion inquiry, by his conduct Mr Cooper breached the Act and Trust Account Regulations on a second occasion. In addition, he breached his duty to the Court in an attempt to obstruct the course of justice, and used the law for an improper purpose. As he has not challenged that aspect of the decision, his criticism of a Judge in the media is accepted as unprofessional and unsatisfactory, albeit Mr Cooper says he did not intend any offence.

[79] Bearing in mind the Committee made three separate findings of unsatisfactory conduct following the own motion inquiry, it was open to the Committee to have imposed a more substantial fine than it imposed in relation to Mr AQ's complaint. Instead the Committee imposed the $5,000 fine "to reflect the seriousness of [all] the breaches". If there is a place for the totality principle to operate in a disciplinary context, it seems to have affected the Committee's reasoning at this point.

[80] Given the multiple findings of unsatisfactory conduct arising from the own motion inquiry, I have considered whether it is appropriate on review to increase the level of this fine. Although it was open to the Committee to impose a greater fine, on balance I consider that a fine of $5,000 acts as a sufficient punishment for Mr Cooper, and reflects the public's and the profession's condemnation or opprobrium of his conduct as well as "backing up" the censure. I have been unable to identify any sufficiently compelling reason to interfere with the Committee's discretion.

[81] The two fines, each of $5,000, are therefore confirmed on review. That brings me to the question of whether it is necessary or desirable in the public interest to publish Mr Cooper's name.

Publication

[82] The Committee, with approval from New Zealand Law Society Board, made orders under s 142(2) of the Act that it was necessary or desirable in the public interest to publish Mr Cooper's name. Mr Cooper seeks to have those orders reversed on the basis of the new information provided by Dr CC on review.

[83] Dr CC's report dated 18 March 2015 refers to the assessment he carried out on Mr Cooper on 18 February 2015, which formed the basis of his 27 February 2015 report. At that stage Dr CC's view was that it was important to note that Mr Cooper's symptoms and issues "are amenable to treatment", and that he should be able to return to practice "with appropriate treatment", referring to the contents of Dr CC's report referred to above.

[84] In his submissions at the review hearing Mr OJ said:

> Mr Cooper seeks name suppression for the reasons set out in the third of Dr CC's reports (dated 18 March). These reasons are that publication could aggravate Mr Cooper's mental condition, making therapy more difficult, and lead to more marked impairment. This would increase the risk of suicide.

[85] Dr CC made a "strong recommendation that Mr Cooper does not have his name published" because publication "will add to his current mental health load, interfere with the capacity for engaging appropriately in treatment, and place him at further risk". In Dr CC's opinion, for the good of Mr Cooper's mental health, publication by the Tribunal "is not advisable".

Publication Principles

[86] The LCRO considered the principles that apply in determining whether an order for publication of a practitioner's name should be made by a Standards Committee in LCRO 301/2013.[35] That review concerned a Standards Committee decision finding the lawyer had breached an undertaking to retain funds in a particular way. The LCRO referred to the factors set out in Regulation 30 of the Complaints Service and Standards Committee Regulations,[36] which applies when a Committee is considering publication, and provides:

> When deciding whether to publish the identity of a person who is the subject of a censure order, a Standards Committee and the Board must take into account the public interest and, if appropriate, the impact of publication on the interests and privacy of -
>
> (a) the complainant; and
>
> (b) clients of the censured person; and
>
> (c) relatives of the censured person; and
>
> (d) partner, employers, and associates of the censured person; and
>
> (e) the censured person.

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[35] *Stevenson v WB* LCRO 301/2013.
[36] Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008.

[87] The LCRO also said:[37]

> The proper approach to publication more generally has been the subject of a number of decisions of this Office and elsewhere. This was traversed in *HF v SZ*.[38] There it was noted that a useful summary of the relevant principles could be found in *Krishnayya v Director of Proceedings,*[39] *S v Wellington District Law Society,*[40] *and F v Medical Practitioners Disciplinary Tribunal.*[41] The applicable principles were identified as follows:
>
> (a) the public interest referred to in the interest of the public, including the members of the profession, who have a right to know about proceedings affecting a practitioner. The interests of any person includes the interests of the practitioner being disciplined;
>
> (b) The proceedings before a disciplinary tribunal are not criminal proceedings. Nor are they punitive. Their purpose is to protect the public and the profession;
>
> (c) In considering the public interest the tribunal is required to consider the extent to which publication of the proceedings would provide some degree of protection to the public or the profession. It is the public interest in that sense that must be weighed against the interests of other person, including the appellant, when exercising the discretion whether or not to prohibit publication.
>
> (d) The exercise of the discretion should not be fettered by laying down any code or criteria, other than the general approach dictated by the statute.
>
> (e) The issue will generally be determined by considering whether the presumption in favour of publication, and all the circumstances of the case, is outweighed by the interests of the appellant or the public interest.
>
> (f) Often the answer to that question will be to consider whether the interests of the public, including the profession will be adequately protected if a suppression order is made. In many cases the issue is whether or not the balance is in favour of protecting the public by means of publication, or against the interests of the appellant in carrying on his profession uninhibited by any adverse publicity.
>
> [5] I note immediately that unlike some disciplinary jurisdictions, the proceedings of a Standards Committee are presumptively private. Accordingly the "open justice" reasons are not dominant. Rather the focus must be on the protective role that professional orders play.
>
> [6] The analysis therefore requires a balancing of the promotion of the interests of the public (in which is included other practitioners who deal with Ms Stevenson) against the adverse effect that publication of Ms Stevenson's name would have on her interests.

[88] The LCRO then considered the grounds upon which Ms Stevenson's application for review proceeded, which can be summarised as the argument that her conduct was

[37] Above n 35 at [4].
[38] *HF v SZ* LCRO 186/2009, 16 January 2012.
[39] *Krishnayya v Director of Proceedings* HC Napier, CIV-2007-441-631, 16 October 2007.
[40] *S v Wellington District Law Society* [2001] NZAR 465 (HC).
[41] *F v Medical Practitioners Disciplinary Tribunal* HC Auckland, AP21-SW01, 5 December 2001.

unintentional and at the less serious end of the scale, and that the impact on her would be very significantly adverse. The LCRO did not accept the first argument, but considered:

> Of most weight in determining whether publication of identity is appropriate is the question of what impact such publication would have on the individuals identified in regulation 30 of the Complaint Service and Standards Committee Regulations 2008.

[89] It is important to remember that Dr CC's reports were not available to the Committee or the Board when they were considering publication. There can be no criticism of the Committee's decision to publish Mr Cooper's identity. Although he was given ample opportunity to do so before the Committee indicated its intention to publish his identity, and throughout the time the question of publication was before the Board, there is no evidence on the Standards Committee file of any attempt by Mr Cooper to communicate any concerns at all about publication in respect of either publication decision.

[90] There is no evidence of any concerns being raised in relation to any of the other interests identified in reg 30. There is no reason to believe that the Committee or the Board failed to take the relevant interests into account. Given Mr Cooper's conduct, publication was entirely proper to protect the public interest.

[91] However, if Mr Cooper had provided medical evidence, the Committee and the Board would have taken it into account. The medical evidence may not have altered the ultimate decision that publication was necessary to protect the public interest, but Dr CC's reports must now be given some weight when balancing Mr Cooper's interests in remaining anonymous against the public interest in publication on review. To enable that to occur in the course of this review, it is necessary to reverse the Committee's decision and proceed with a fresh analysis including an analysis of the medical evidence.

<u>Analysis of Medical Evidence</u>

[92] Although Mr Cooper has left it very late to obtain medical evidence, and clearly could have done so much earlier in the complaint and review processes, it would be unreasonable now to dismiss out of hand the strong recommendation of Mr Cooper's medical specialist.

[93] I have been unable to identify any decisions by this Office or the New Zealand Lawyers and Conveyancers Disciplinary Tribunal in which a practitioner has raised the risk of suicide as having potential relevance to a publication or name suppression decision.

[94] I have therefore found it helpful to consider decisions from other disciplinary jurisdictions, and in the criminal jurisdiction, where the risk of suicide has been considered in the context of orders for name suppression.[42] I have borne in mind that the Standards Committee and LCRO processes are presumptively private, whereas the presumption in the other jurisdictions mentioned is in favour of publication.

[95] As one might expect, there is a strong emphasis in all those decisions on exactly what the medical evidence does and does not say. In particular courts and tribunals are far more likely to grant name suppression if there is reasonably compelling evidence that the person concerned is at risk of suicide. The lower the likely risk of suicide, the lower the chance that name suppression will be granted.

[96] It is therefore necessary to consider what the medical evidence says, and what it does not say, about Mr Cooper's risk of suicide.

[97] The affidavit from Mr Cooper's GP covering 2004 to February 2015 makes no mention of suicide whatsoever.

[98] Dr CC's first two reports, prepared in February this year, also make absolutely no mention of suicide.

[99] Dr CC's third report, which was prepared specifically to be placed before the Tribunal, is predictive and contains the first and only mention of suicide. Dr CC predicts that publication will further aggravate Mr Cooper's mental state. That, Dr CC says, will make it much more difficult for Mr Cooper to "engage in appropriate therapeutic input". There is evidence of three types of treatment that have been made available to Mr Cooper in the form of:

a. Regular monthly counselling with a clinical psychologist, which he commenced on 29 May 2014, and which remains available to him.

b. Regular daily exercise; and

c. Medication to improve his response delay and reduce irritability, and perhaps to provide innominate "additional benefits".[43]

[100] Dr CC says that, in a circular fashion, failure to engage in therapeutic input will result in Mr Cooper becoming more markedly impaired. I note that Dr CC expresses that view with a high degree of certainty – more marked impairment **will** occur.

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[42] *R v Suttie* [2007] NZCA 201; *BL v R* [2013] NZHC 2878; *Biernat v R* [2013] NZHC 3478; *R v D* [2014] NZHC 2233; *Davey* [2010] NZHPDT;397 *D* [2003] NZMPDT 235.

[43] Last page of CC report of 18 February 2015.

[101] Dr CC says that the combination of more marked impairment and “the presence of depressive symptoms” greatly increase the risk of suicidality. This prediction appears to be based on the generalisation that a “rate of suicide in those with a major depressive episode is approximately 15%”.

[102] Although I accept Mr CC’s diagnosis in that Mr Cooper has “depressive symptoms”, I have been unable to identify any evidence that Mr Cooper has had a major depressive episode. Dr CC makes no prediction as to the possibility that a major depressive episode may occur in Mr Cooper’s future.

[103] I accept also Dr CC’s evidence that publication will add to Mr Cooper’s current mental health load, interfere with his capacity for engaging appropriately in therapeutic treatment and place him at further risk. Those concerns, however, do not amount to evidence that Mr Cooper is at risk of suicide.

[104] Dr CC appears to be saying that Mr Cooper’s symptoms place him in a higher risk category than a person with little or no stress in their lives, but (in the absence of a major depressive episode) not in a category of persons who face a predictable risk of suicide based on what is known of that person’s present circumstances and past history.

[105] On that basis, Mr CC’s evidence does little to set Mr Cooper apart from any other busy practising lawyer.

Mr Cooper’s Future

[106] Mr Cooper’s intentions regarding his continued practice of law have fluctuated between feeling “unable to face work as a lawyer” in 2009, and having no intention of resuming the practice of law,[44] to the most recent report of his intention that he “may very well in fact wish to recommence the practice of law in the future, when his period of suspension ends”.[45] That apparent change of heart could mean that either Mr Cooper is feeling more positive about the prospect of resuming his career, or he is currently unable to identify any other realistic alternative as a way to earn a living once the Tribunal’s suspension order ends.

[107] Mr Cooper’s suspension under the Tribunal’s order will end in mid-2016, assuming it remains intact. In the meantime Mr Cooper has no current practising certificate.

[44] Which was the basis on which Mr OJ’s submissions proceeded at the review hearing on 20 March 2015.
[45] OJ Memorandum 23 March 2015.

[108] Mr OJ questioned whether it may be possible for a LCRO to make an order to meet the contingency that if Mr Cooper did choose to return to practice at some future date, orders to publish would take effect.

[109] There is no power for a LCRO to make a contingent order under the Act. The Act does not provide for "if, then" orders. Having completed a review a LCRO is functus officio.

[110] This decision therefore proceeds on the basis that Mr Cooper may very well wish to recommence the practice of law when his period of suspension ends.

[111] If Mr Cooper does wish to practise again, he will have to apply to the NZLS for a practising certificate, and satisfy the pre-requisites to that being issued. Those include consideration of whether he is fit to practice. The public interest is protected to an extent by that process because Mr Cooper's disciplinary record, including the unedited version of this decision, will form part of NZLS's record.

[112] The requirements in reg 4(1)(b) that Mr Cooper is a "fit and proper person to hold a practicing certificate", and 5(3)(b) to declare any matter that does or might affect his fitness to be issued with a practising certificate, will be of particular significance, given his disciplinary history. The public interest will be better protected by publication than by relying on Mr Cooper to self-report, because his medical condition may mean he is unaware of incidents in the course of his professional practice that may warrant inquiry.

[113] That view is supported by the lack of any real evidence from Mr Cooper that he recognises he has done wrong. There is no expression of contrition by him and no suggestion that an apology may be appropriate. The general thrust of his early responses to the Committee is that he feels his situation is the product of a Judge holding a grudge against him. There is no evidence that supports that contention.

[114] What is of greater concern, however, is that this is not the first time Mr Cooper has been the subject of an own motion investigation by a Standards Committee for matters of this ilk. Although the Committee may have been unaware of the existence of a previous decision dated 9 July 2012,[46] it is relevant to the extent that it shows a pattern of conduct by Mr Cooper. The conduct in that case also occurred in 2012, and was virtually identical to the concerns raised by Judge TR. In that case Judge MH had written to NZLS raising concerns about Mr Cooper's conduct of a client's matter, a series of adjournments, inadequate application for adjournment shortly before a defended hearing was scheduled to commence, and double booking (which was the conduct that was also of concern in the recent Tribunal hearing).

[46] Decision number 5674.

[115] Mr Cooper responded to the Committee's inquiries attempting to excuse his conduct, but the Committee concluded that his conduct was unsatisfactory in that it fell short of what a member of the public could expect of a reasonably competent lawyer.[47]

[116] In those circumstances, I do not consider that the protections afforded to the public by the requirement on Mr Cooper to satisfy the criteria in the Practice Rules before being eligible to hold a practising certificate provide sufficient protection for the public.

Application of Principles of Publication

[117] The principles that apply to publication in this jurisdiction require me to balance the promotion of the interests of the public, including other practitioners who deal with Mr Cooper, against the adverse effect that publication of Mr Cooper's name would have on his interests, in particular his interest in recovering his health. I note again that this process of review, and that of the Standards Committee, is presumptively private. Thus, the focus must be on the protective role that professional orders play, rather than the "open justice" reasons.

[118] In this case, publication may identify past conduct issues as well as helping to prevent future harm.

[119] The public and practitioners have a right to know that Mr Cooper has failed to meet his duties to the Court and his clients. It is also relevant to note that, while the conduct involved is serious unsatisfactory conduct, the Committee did not consider that it should have been referred to the Tribunal.

[120] Publication is not punitive. Although it acts as a deterrent, it is not necessary to publish a practitioner's name to achieve deterrence. Deterrence, and education, can be achieved by publishing facts without identifying the practitioner concerned.

[121] Publication of Mr Cooper's name in the context of this decision would provide a higher degree of protection to the public and the profession than non-publication.

[122] The most serious aspects of the conduct under review are Mr Cooper's treatment of other people's money and his failures to show proper respect for the Court and its processes. Assuming Mr Cooper responds to treatment and wishes to return to practice, the medical evidence indicates that is a real prospect. It is unlikely that publication will seriously inhibit Mr Cooper being able to return to practice.

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[47] The standard in s 12(a) of the Act.

[123] On balance, on the evidence available in the course of this review, I consider that the adverse effect that publication of Mr Cooper's name is likely to have on his interests carries less weight than the promotion of the interests of the public.

[124] As it has been necessary to reverse the Committee's publication orders, and this Office does not require Board approval before directing publication, publication of this decision is directed pursuant to s 206(4) of the Act including Mr Cooper's name, but not that of any other identifiable individual.

Outcome

[125] The decisions by the Committee to publish Mr Cooper's name are reversed. The decisions are otherwise confirmed including the requirement that Mr Cooper pay two fines each of $5,000.

[126] Pursuant to s 206(4) of the Act I direct publication of this decision, including Mr Cooper's name but with all features that may identify any other individual being removed.

Costs – s 210

[127] Pursuant to s 210 and the LCRO's Costs Orders Guidelines, a LCRO has discretion to make such orders as to the payment of costs and expenses as she thinks fit, after conducting a review under the Act.

[128] The Guidelines provide for a practitioner to be ordered to pay costs in favour of NZLS where a finding of unsatisfactory conduct is upheld against him. The guideline amount for a hearing in person is $1,200 where the review is straightforward. There are six files under review, which I have treated as two sets of three decisions.

[129] On that basis, it is appropriate that Mr Cooper pay two sets of costs.

[130] Mr Cooper is therefore ordered to pay costs on review of $2,400.

Decision

[1] Pursuant to s 211(1) of the Lawyers and Conveyancers Act 2006, the decisions by the Committee to publish Mr Cooper's name are reversed. The balance of the decisions is confirmed including the requirement that Mr Cooper pay two separate fines each of $5,000.

[2] Pursuant to ss 211(1)(b) and 156(3) of the Lawyers and Conveyancers Act 2006, Mr Cooper is to pay both fines within 30 days of the date of this decision.

[3] Pursuant to s 210 of the Lawyers and Conveyancers Act 2006, Mr Cooper is ordered to pay costs on review of $2,400 in respect of all six decisions under review within 30 days of the date this decision.

[4] Pursuant to s 215 of the Lawyers and Conveyancers Act 2006 the costs order may if necessary be enforced in the District Court at Rotorua.

[5] Pursuant to s 206(4) of the Act publication of this decision is directed, including Mr Cooper's name, but with all features that may identify any other individual being removed.

DATED this 17th day of April 2015

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D Thresher
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 B Cooper as the Applicant
Mr OJ as counsel for the Applicant
Standards Committee as the Respondent
The New Zealand Law Society