LCRO 62 / 09

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 No 1
BETWEEN	**CLIENT M** of Auckland Applicant
AND	**LAWYER C** of Auckland Respondent

DECISION

Background

[1] Client M complained to the New Zealand Law Society regarding the conduct of Lawyer C. The matter was referred to the Auckland Standards Committee 1 for consideration. On 20 March 2009 the Auckland Standards Committee 1 resolved to take no action on the complaint. That decision was notified to the parties by a letter sent on 26 March 2009. Client M sought a review of the decision of the Standards Committee by an application received by this office on 18 May 2009.

[2] This decision is concerned with whether I have jurisdiction to consider the matter in light of the time that elapsed between the decision of the Standards Committee and the making of the application.

[3] Section 198 of the Lawyers and Conveyancers Act 2006 provides that:

> Every application for a review under section 193 must -
>
> a) be in the prescribed form; and
>
> (b) 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); and
> (c) be accompanied by the prescribed fee (if any).

[4] The decision of the Standards Committee was made when it was despatched to the parties and the role of the Committee was at an end. That was on 26 March 2009. For the application to have been made in time it must have been received by this office by 11 May 2009 (taking into account Easter).

[5] A letter from Client M seeking a review was received by the registry of this office on 21 April. That letter was not on the "prescribed form" nor was it accompanied by the "prescribed fee" (which is $30). The application did not contain the contact details of the applicant. Other than reasons for seeking a review it contained only the name of the applicant (Client M) and the reference numbers of the Law Society file. After some communications (which are discussed below) a full application on the prescribed form and with the prescribed fee was received by this office on 18 May 2009.

Status of 21 April letter

[6] I first consider the status of the letter received by this office on 21 April 2009. Section 198 of the Act requires that the application be in the prescribed form. The Lawyers and Conveyancers Act (Legal Complaints Review Officer) Form and Fee Regulations 2008 prescribing that form allow for some flexibility "as the circumstances of a particular case require". In the present case it might be argued that the failure to use the prescribed form should not be fatal and that in the circumstances the informal application should be accepted. The reasons for using a prescribed form are to ensure that essential information for the progressing of the review are obtained. The informal application received on 21 April 2009 was deficient in this regard. Client M failed to provide any means by which she could be contacted, failed to provide contact details for the respondent and failed to identify the Standards Committee which determined the matter.

[7] I do not consider it necessary to decide whether regulation 3 of the regulations empower me to relax the requirement that an application be made on

the prescribed form. It is enough to say that if such a power existed this would not be a case in which it could be exercised. In particular, the informal application was deficient in significant respects. Contact details for the applicant and respondent are essential aspects of an application. I consider that the informal application of 21 April 2009 was not made "in the prescribed form".

[8] It should also be noted that the letter of 21 April was not accompanied by the prescribed fee. There is no provision for the waiver or acceptance of late payment of the prescribed fee. The failure to pay a prescribed fee for the bringing of an appeal or other application that a decision be reviewed will be fatal to an application. This will be the case even where the fee is subsequently paid: *Cahayag v Removal Review Authority* [1998] 2 NZLR 72; [1998] NZAR 145. As such the informal application of 21 April was also deficient in that regard.

Registry failure

[9] It is necessary to traverse the manner in which this application was made and dealt with initially. On receipt of the non-complying application of 21 April 2009 Registry staff contacted the Law Society to obtain details of the applicant.

[10] Those details were provided by the Law Society by telephone on or around 23 April. In response to this registry staff attempted to contact the applicant on the landline number provided without success. They then attempted to contact her on a mobile telephone number provided by the Law Society. This was unsuccessful and they then re-contacted the landline and left a message with a member of the household to return the call. Registry staff also sent an email to an address provided by the Law Society and posted an application pack by fast-post outlining the formalities required for the application to be properly made. It appears that the letter and email were both mis-addressed. The email clearly did not arrive at the intended address. Client M states that the mis-addressed application material did not arrive and this appears likely to have been the case.

[11] On Tuesday 12 May Client M telephoned this office. At this time the registry staff became aware that their written communications had not been received. The applicant was informed that the application if now made would be out of time and that any if any further steps were to be taken they should be undertaken as a matter of urgency. The relevant forms were provided and as

outlined above an application which met the requirements of s 198 was received some six days later on Monday 18 May 2009.

[12] Client M raises failures with registry staff of this office as a ground upon which her application for review ought to be considered.

[13] It should first be acknowledged that systemic failures in respect of the manner in which this matter has been handled have occurred. In particular there was a failure to address a letter correctly and a failure to direct an email to the proper address. The question is whether failures of registry staff can operate to extend the time for making an application where no discretion to extend time otherwise exists.

[14] An argument that a duty exists to explain defects in an application was raised in *Cahayag*. There the Court of Appeal concluded that on the facts of that case that no such duty arose but did not conclusively state whether such a duty could exist. Where a discretion to consider a material submitted out of time exists the courts have found that administrative failures which were not the fault of the applicant are relevant to the exercise of the discretion: *Lal v Removal Review Authority* (10 March 1994, High Court, Wellington, McGechan J, AP95/92). However the LCRO has no such discretion – the terms of s 198 are mandatory.

[15] As Baragwanath J noted *in Patel v Chief Executive of Department of Labour* [1997] 1 NZLR 102 (in a case concerning the Residence Review Board) the nature of the function discharged by the relevant statutory body is relevant in determining whether that body has special obligations to applicants to correct errors or assist in the making of applications. Without deprecating unduly the importance of the matters considered by this office, they do not approach the gravity of the questions considered by the Removal Review Authority or the Residence Review Board in terms of the impact on applicants. Accordingly, a strict approach placing greater responsibilities of compliance on applicants is more justifiable.

[16] The provisions of s 198 are stated in mandatory terms and there is no statutory discretion to ameliorate their harshness. The obligation to comply with the procedural requirements in making an application clearly lies with the applicant. While registry officials endeavour to assist in pointing out defects in

applications, the primary obligation to ensure compliance must lie with the applicant. I am supported in the conclusion that the primary obligation to make a complying application lies with the applicant by the comments of Williams J in *Talialau v Minister of Immigration* (4 May 1999, High Court, Auckland, Williams J, M171-SW99).

[17] It should also be noted that in the decision of the Standards Committee the New Zealand Law Society Complaints Service provided comprehensive details of how to contact the registry of this office including an "0800" number, web-site address, physical address and a PO Box. It appears that Client M did not make any enquiries or investigations as to how an application should be made. Any enquiry would have indicated that an application had to be on a prescribed form and with the prescribed fee and made within 30 working days.

[18] Judge Barber observed in *Customs Appeal Authority No 29/98* (1999) 1 NZCC 51,128 the jurisdiction of a tribunal cannot be extended by the conduct or omissions of its staff. In that case a notice of appeal in respect of an assessment of customs value was received on time but without the required fee. The registrar wrote to the appellant notifying him of the defect, but the letter was not received on time. The Authority rejected the suggestion that the failure of the registrar to fax or otherwise contact the appellant could enlarge the time for payment of the fee.

[19] I have concluded that the errors of registry staff in this case do not operate to enlarge the time within which the application to this office could be properly made. Accordingly the application was not made in compliance with the provisions of s 198 of the Lawyers and Conveyancers Act 2006.

Decision

[20] I decline to consider the application for review on the basis that I have no jurisdiction to do so because the formalities prescribed by s 198 of the Lawyers and Conveyancers Act were not complied with.

DATED this 28th day of May 2009

Duncan Webb
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:

Client M as applicant
Lawyer C as respondent
The Auckland Standards Committee 1
The New Zealand Law Society