

**CONCERNING**

an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006

**AND**

**CONCERNING**

a determination of the X Standards Committee

**BETWEEN**

**AF**

Applicant

**AND**

**X STANDARDS COMMITTEE**

Respondent

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

**DECISION**

**Introduction**

[1] Ms AF seeks to review the X Standards Committee's request for her to produce files and documents, those documents sought by the Committee in order to assist with pursuing enquiry into a complaint made against Ms AF by Mr Z.

**Background**

[2] In 2009, Mr Z instructed a [town] law firm to act in respect to a dispute Mr Z was engaged in with his former employer.

[3] Ms AF was a litigator in the firm and assumed responsibility for managing Mr Z's file.

[4] Ms AF subsequently resigned from the law partnership and commenced practice as a barrister sole.

[5] In 2010, Ms AF filed proceedings in the [town] High Court on behalf of Mr Z. Those proceedings did not have a positive outcome for Mr Z.

[6] In a decision delivered on [date], the High Court dismissed Mr Z's claims.

[7] Throughout the course of the litigation, Ms AF rendered invoices which were paid by Mr Z.

[8] The hearing proceeded longer than initially anticipated. An additional hearing day was required, and further submissions were sought from counsel.

[9] In March 2012, Ms AF rendered a final invoice. That invoice covered work required as a consequence of the matter proceeding to an additional day, and work involved in the preparation of further submissions.

[10] Receipt of that account precipitated Mr Z's first complaint to the New Zealand Law Society Complaints Service.

[11] Following the hearing, Mr Z raised complaint with Ms AF concerning her fees.

[12] Ms AF, in the face of concerns raised by Mr Z, advised him that she could not continue to represent him.

[13] Subsequent to the hearing being concluded it was the expectation of the Court that the parties would be able to agree on costs. They were unable to do so. The matter was set down for a costs hearing. Mr Z instructed other counsel to represent him at the costs hearing.

[14] In a costs decision delivered on [date], the Court awarded costs against Mr Z on a 2B basis, but allowed a 50 percent uplift on schedule costs.

[15] In departing from usual principle that costs are to be awarded on a scale basis, the Court placed particular emphasis on the plaintiff's rejection of settlement offers that had been made during the course of the proceedings.

[16] It is clear from the costs decision that the Judge regarded the plaintiff's decision to reject three offers for settlement as imprudent.

### **The Complaints and the Review Applications**

[17] Mr Z lodged his first complaint on 2 May 2012.

[18] Whilst the complaint, as expressed by Mr Z, contains hint of suggestion that he was dissatisfied with the conduct of his lawyer, the focus of the complaint is on the fees charged and in particular the final invoice rendered in the sum of \$23,000.00.

[19] Mr Z makes complaint that additional work was completed without his authority.

[20] Mr Z lodged his second complaint on 6 September 2012.

[21] The complaint is expressed as being directed towards NA and AF (AF Chambers Limited), and in essence makes complaint that Ms AF continued, throughout the course of the proceedings, to provide Mr Z with positive expectation of an optimistic outcome from the litigation, a position starkly at odds with the Judge's view of the case as being one which presented significant litigation risk. Mr Z says he was poorly advised.

[22] On 16 August 2013 the Complaints Service advised Ms AF that the Committee had appointed Mr S in the dual role of cost assessor and investigator pursuant to s 144 of the Lawyers and Conveyances Act 2006 (the Act).

[23] Ms AF responded with application to the Legal Complaints Review Office (LCRO), seeking a review of the Committee's decision to appoint Mr S.

[24] Ms AF's first application for review was expansive, but in brief, challenged the Committee's decision to enquire into the complaints, and the process adopted by the Committee in proceeding its investigation. Ms AF objected to the appointment of Mr S as a cost assessor and investigator. Ms AF contended that the process had been procedurally unfair.

[25] The LCRO refused to consider Ms AF's application. It took the view that it did not fall within the jurisdiction of the LCRO to review the Committee's administrative decisions, relying upon an earlier decision of this office, *Lydd v Maryport*.<sup>1</sup>

[26] On 5 March 2014 Mr S wrote to Ms AF making request of her to produce her files.

[27] On 16 April 2014, Ms AF filed this second application for review.

[28] In seeking to overcome objection that there was no jurisdictional basis for her first review application, Ms AF laid challenge to the request made of her to produce documents.

[29] That request, made pursuant to s 147(2)(a)(i) of the Act was, Ms AF submitted, a 'requirement' and therefore a decision which could properly be the subject of review by the LCRO.

[30] Whilst Ms AF sought to open the jurisdictional door to review by seeking to review the investigator's request for her to provide files, in both her written submissions

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<sup>1</sup> *Lydd v Maryport*, LCRO 164/2009.

and in the submissions made at the hearing, she expanded the scope of the issues she sought to review, to include arguments that:

- a. The requirement to produce documents resulted from a flawed process.
- b. The Committee should have referred the complaint to mediation.
- c. The Committee should have exercised its discretion and dismissed the complaint.

[31] Argument that the direction to require her to provide her files was a result of flawed process was premised on the following:

- a. The Committee had failed to take steps to establish the bona fides of the complainant.
- b. The Committee's decision to dismiss the complaint against NA had materially impacted the way in which the Committee had managed her complaint.
- c. The Committee failed to explain the basis for proceeding with a conduct inquiry.
- d. The appointment of Mr S as cost assessor and investigator was unsound.
- e. One member of the Committee should have recused themselves.

*Scope of the LCRO's power of review*

[32] The functions of the LCRO are to exercise the powers of review conferred on that office by the Act.<sup>2</sup>

[33] Those persons able to exercise a right to review are detailed in ss 194 to 197 of the Act. A practitioner who is the subject of a complaint may exercise the right to review.

[34] The scope of the LCRO's power to review is set out in s 194 of the Act which provides that:

- (1) This section applies to any determination, requirement, or order made, or direction given, by a Standards Committee (or by any person on its behalf or with its authority)—
  - (a) in relation to a complaint (including a decision to take no action or no further action on a complaint); or
  - (b) on a matter arising from a complaint.

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<sup>2</sup> Lawyers and Conveyancers Act 2006, s 192(a).

- (2) A person may apply under section 193 for a review of a determination, requirement, order, or direction to which this section applies if that person is—
- (a) the complainant; or
  - (b) the person in respect of whom the complaint was made; or
  - (c) a person who, or body that, at the time when the complaint was made, was, in relation to the practitioner or former practitioner in respect of whom the complaint was made, a related person or entity; or
  - (d) the New Zealand Law Society (if the person in respect of whom the complaint was made was, or had been, a lawyer or an incorporated law firm or an employee of a lawyer or incorporated law firm); or
  - (e) the New Zealand Society of Conveyancers (if the person in respect of whom the complaint was made was, or had been, a conveyancing practitioner or an incorporated conveyancing firm or an employee of a conveyancing practitioner or incorporated conveyancing firm).

[35] A right to review exists then in respect of the following:

- a. A determination under s 152;
- b. A requirement under ss 141 or 147;
- c. An order made under s 156; and
- d. A direction given pursuant to ss 142 or 143.

[36] The parameters of the LCRO's power to review was considered in the decision of *Lydd v Maryport*. In that decision it was noted, "It is clear that not every step taken by a Standards Committee is reviewable. Rather the action must fall within one of the categories set out in s 194(1)."<sup>3</sup>

[37] This application raises immediate question as to whether the LCRO has jurisdiction to review decisions taken by a Committee during the course of its inquiry into a complaint, being administrative decisions made prior to the merits of the complaint being considered and a determination delivered.

[38] For the most part, applications filed with the LCRO seek to review Standards Committee determinations, i.e. final and decided outcomes of a complaint.

[39] It is uncommon for applications to come before the LCRO which seek to review matters arising from a Committee's enquiry into a complaint which have arisen prior to the Standards Committee delivering its determination.

[40] A number of LCRO decisions have reinforced that "determination", as applied in s 194(2) of the Act, is intended to refer to determinations which constitute a final decision.

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<sup>3</sup> Above n 1 at [10].

[41] In *Lydd* the LCRO gave careful consideration to the construction to be placed on the term determination and noted that:<sup>4</sup>

The Act uses the word “determination” in respect of complaints in a number of places in a quite specific way. On every occasion it is used it appears to refer to the disposal of the complaint. Nowhere is it used in a way that might suggest it refers to some preliminary or quasi interlocutory decision of the Committee. Moreover, in relation to the power of appointment exercised by the Committee in this case there is no use of the word “determination” at all.

[42] Further, it was noted, that:<sup>5</sup>

In the context of the consideration of a dispute or complaint, the natural and ordinary meaning of the word “determination” refers to the conclusive disposition of the complaint. See for example the Oxford English Reference Dictionary which provides as a definition “the conclusion of a dispute by the decision of an arbitrator”, and “a judicial decision or sentence”. The natural meaning of determination relates to some final decision on the matter in hand in a way which is inconsistent with the appointment of an investigator being a “determination”.

[43] At first blush, Ms AF’s second review application may be seen as an attempt to re-litigate the issues that the LCRO had previously refused to consider.

[44] In her initial application, Ms AF sought to review the Committee’s decision:

- a. Not to pursue mediation.
- b. To consolidate the two complaints.
- c. To pursue inquiry.
- d. To appoint Mr S.

[45] The LCRO declined to consider Ms AF’s application on grounds that the jurisdiction of the LCRO was confined to reviewing:

- a. Determinations (s 152).
- b. Requirements (ss 141, 147).
- c. Orders (s 156).
- d. Directions (ss 142, 143).

[46] Ms AF disagreed with the approach adopted by the LCRO but accepted the Officer’s decision to decline to review her application.

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<sup>4</sup> Above n 1 at [18].

<sup>5</sup> Above n 1 at [20].

[47] In *Lydd* the Review Officer rejected argument that a Committee's decision to appoint an investigator was a "requirement" that was reviewable under s 194, but considered that a request made by a Committee of a practitioner to produce files, was capable of review:<sup>6</sup>

However, there is a significant practical distinction from a document of appointment requiring an agent of the Committee to take certain steps and requirements on lawyers and third parties to produce documents or provide explanations. I conclude that the former is not a "requirement" captured by s 194, whereas the latter are.

[48] I accept Ms AF's submission that a Committee's request of a practitioner to provide files and documents, constitutes a 'requirement' which falls within s 194 and is therefore a decision which is open to review. That position is consistent with the approach previously adopted by this Office in *Lydd*.

[49] In accepting that position I emphasise however that I do not consider that challenge to a Committee's decision to request a practitioner to produce their files, legitimate as that may be in meeting the description of a 'requirement' under s 194, is an application that would frequently come before the LCRO.

[50] Several decisions have emphasised the importance of practitioners providing their full co-operation with the disciplinary process.<sup>7</sup>

[51] It is difficult to envisage an obligation more basic than a practitioner's obligation to provide their files when required.

[52] There would be limited situations where it would present as reasonable for a practitioner to resist request to provide their files when asked to do so by a Standards Committee.

[53] It has been observed that an "essential feature of co-operation with the institution of discipline is the timely provision of information and relevant documentation".<sup>8</sup>

[54] In *Legal Complaints Review Officer v B*, the High Court considered an application to compel a practitioner to produce files to the office of the LCRO, and noted that:<sup>9</sup>

A statutorily granted power to request documentation necessarily implies an intention that its production be compellable. In the absence of a frank power to do so, but in the light of the purposes of the Act and the fundamental obligation on B as a lawyer to uphold the rule of law and to facilitate the administration of justice, it

<sup>6</sup> Above n 1 at [29].

<sup>7</sup> *Parlane v New Zealand Law Society* HC Hamilton CIV-2010-419-1209, 20 December 2010, and *Hart v Auckland Standards Committee 1 of the New Zealand Law Society* [2013] 3 NZLR 103 (HC).

<sup>8</sup> Paul Collins "Lawyers' Duty to Co-operate", Law Talk 844, 20 June 2014.

<sup>9</sup> *Legal Complaints Review Officer v B* [2012] NZHC 1349 at [47].

is appropriate to exercise the inherent jurisdiction to this Court to order production of the documents B has thus far failed to produce. To so order could not be conferring on an administrative body powers that were not by implication contemplated by the statute.

[55] Ms AF emphasises that she is not opposed in principle to producing her files. She contends that the direction to produce her files is the end result of a flawed process.

[56] The Act places considerable focus on consumer protection and the need for public confidence in the provision of legal services.

[57] Part 7 of the Act establishes the mechanism for complaints and professional discipline.

[58] Pivotal to the complaints process is the role played by the Standards Committees.

[59] Each Standards Committee consists of at least three persons, one of whom is required to be a lay member (s 129(1) & (2)).

[60] Standards Committees have a number of functions. These include:

- a. Receiving complaints from the Complaints Service established under the Act.
- b. Deciding whether to take action on a complaint.
- c. Determining whether to undertake an inquiry.
- d. Considering the possibility of alternative dispute resolution, involving negotiation, conciliation and mediation.
- e. Inquiring into the complaint, including obtaining and evaluating information.
- f. Hearing a complaint.
- g. Determining what action to take on a complaint; including whether to make orders following any determination of unsatisfactory conduct or to refer a complaint to the Tribunal.

[61] Committees may appoint a person to inquire into a complaint and prepare a report.

[62] A Committee may exercise discretion to take no further action on a complaint (s 138).

[63] If a Standards Committee decides to inquire into a complaint it must do so as soon as practicable (s 140).



[64] A Committee has a broad discretion to receive evidence (s 151) and must advise the person against whom the complaint has been made of the process to be adopted in respect of the complaint (s 137(2)).

[65] A Standards Committee must exercise and perform its duties, powers and functions in a way that is consistent with the rules of natural justice (s 142(1)).

[66] In the course of progressing its inquiry into a complaint, a Standards Committee will inevitably be called on to make a number of decisions which impact on how the enquiry will proceed. Not every action or decision of a Standards Committee is subject to review by the LCRO. Only those decisions which constitute a determination, requirement, order or direction, are subject to review.

[67] Decisions will be made on matters such as whether files need to be produced, if further evidence is required, and whether it is appropriate to seek specialists' reports.

[68] Whilst the office of the LCRO plays an important role in monitoring the work of Committees (particularly their decisions) it would be calamitous to the process of expeditious resolution of complaints if parties were allowed unfettered opportunity to challenge every aspect of a Committee's decision making process.

[69] The requirement to limit the LCRO's power of review to the circumstances set out in s 194 is a necessary and important constraint, and ensures that Committees are free to manage the process of inquiry, without hindrance of oppressive intervention cloaked in the disguise of review.

[70] It is within that context that Ms AF's challenge to Mr S's request of her to provide her files must be considered.

### **Grounds advanced for review**

[71] Ms AF provided written submissions in support of her application which were expanded on at the hearing. In addition, she sought to place reliance on the information provided with her first review application.

### *Merits*

[72] A number of the submissions advanced by Ms AF were simply challenges to the basis of the complaints. In this category she:

- a. Postulates that the stimulus for an element of the complaint was the professional work carried out by another practitioner.
- b. Contends that the complaint is supported by false and misleading documentation.
- c. Contends that the Committee should have compelled the complainant to give evidence on oath.

[73] Ms AF may have reservations about the merits of the complaint, the motivation for the complaint, and the bona fides of the complainant, such is not an uncommon response from professionals on the receiving end of a complaint, but her decision to challenge the Committee through the review process in respect to those issues ignores the fundamental fact that the Standards Committee has not delivered its decision, and has not had an opportunity to make any findings on the matters which are encompassed by those aspects of Ms AF's submissions.

[74] Her application to review matters which go to the merits of the complaint before the Committee has had an opportunity to consider the complaint and deliver its decision, presents as precipitous.

#### *Composition of the Committee*

[75] Ms AF submits that one member of the Committee should have recused himself. She maintains that this particular practitioner has a long history of antipathy towards her which had its genesis in an incident which occurred in a non-professional context some years ago. This is an allegation of bias.

[76] It does not fall within the scope of the LCRO to interfere with appointments made to Standards Committees. Decisions as to a Committee's composition do not constitute a determination, order or direction and do not therefore fall within the scope of review as directed by s 194 of the Act.

[77] The New Zealand Law Society must, by practice rules, establish one or more Standards Committees. Those rules also determine the process for appointment of Committee members.

[78] It would be expected that practitioners appointed to Committees would have a good awareness of, and indeed an acute sensibility to, conflict issues and any bias. This is a requirement for any public body and flows necessarily from the statement that the procedure of a Standards Committee must be consistent with the rules of natural

justice found in s 142(1) of the Act. A determination of a Committee that failed to adhere to the rules of natural justice would clearly be reviewable under s 194.

[79] It would be approaching the trite to record that no Committee could countenance a practitioner being part of that Committee if the practitioner had an established history of personal or professional conflict with the subject of the inquiry, such as to materially prejudice the practitioner's capacity to bring an open mind to the inquiry.

[80] However the fact that a Committee is composed in a particular way, or that a particular person is a member is not, in my view, a matter which falls within the scope of the LCRO's power to review prior to a determination being issued.

[81] Matters as to composition of the membership of the Committee are not determinations, requirements, orders or directions of that Committee and do not therefore fall within the parameters of s 194.

*Failure to refer to mediation*

[82] Ms AF submits that the Committee should have referred the parties to mediation.

[83] She contends that the Committee's "outright objection of a mediated outcome is not only unsupported by any rationale but is perverse in the circumstances".<sup>10</sup>

[84] Section 143 of the Act provides that a Standards Committee may give, in relation to any complaint reviewed by it, a direction that, within a time or before a date fixed by a Standards Committee, the parties explore the possibility of resolving the complaint by negotiation, conciliation or mediation.

[85] There is no compulsion on a Committee to direct mediation, nor is a Committee's decision to exercise its discretion to decline to refer a matter to mediation, in my view, a matter which is reviewable by the LCRO.

[86] It is arguable that a Committee's decision to direct mediation (a direction) could fall within the scope of the LCRO's power to review, but in practice if parties indicate that they are not prepared to travel down the mediation path, that would immediately discourage a Committee from pursuing that option. Acquiescence to the negotiation process is fundamental, and there is indication that Mr Z did not wish to pursue that option.

[87] However it cannot be the case that a failure to exercise a power or to give a direction is of itself reviewable. This would result in an intolerable situation under which

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<sup>10</sup> AF correspondence (15 April 2014) at 12.

a party could simply point to any number of powers that could be exercised or directions that could have been made and bring an application for review on the sole ground that they ought to have been. In rare cases there may be an argument that the process of a Standards Committee was flawed as a result of such a failure. If that was the case then the proper avenue for the matter to be considered is by an application for a review of the determination of the Committee.

[88] Further, s 194 makes it clear that an application for review may be made only in respect of a “determination, requirement, or order made, or direction given, by a Standards Committee”. There is no suggestion that the absence of such a “determination, requirement, or order made, or direction” might properly form the basis of an application for review.

*Failure to exercise discretion to dismiss complaint*

[89] Ms AF seeks to review the Committee’s decision to fail to exercise its discretion to dismiss the complaint under s 138. This is fundamentally a submission that the complaint is ill founded and is therefore a complaint in substance, about the merits of the complaint.

[90] It should also be noted that it is also a complaint about the failure of the committee to make a particular decision (prior to any final determination) and therefore cannot be considered for the reasons set out in paragraphs [87] and [88] above.

[91] Section 138 of the Act provides that:

**Decision to take no action on complaint**

- (1) A Standards Committee may, in its discretion, decide to take no action or, as the case may require, no further action, on any complaint if, in the opinion of the Standards Committee,—
  - (a) the length of time that has elapsed between the date when the subject matter of the complaint arose and the date when the complaint was made is such that an investigation of the complaint is no longer practicable or desirable; or
  - (b) the subject matter of the complaint is trivial; or
  - (c) the complaint is frivolous or vexatious or is not made in good faith; or
  - (d) the person alleged to be aggrieved does not desire that action be taken or, as the case may be, continued; or
  - (e) the complainant does not have sufficient personal interest in the subject matter of the complaint; or
  - (f) there is in all the circumstances an adequate remedy or right of appeal, other than the right to petition the House of Representatives or to make a complaint to an Ombudsman, that it would be reasonable for the person aggrieved to exercise.
- (2) Despite anything in subsection (1), a Standards Committee may, in its discretion, decide not to take any further action on a complaint if, in the course of the investigation of the complaint, it appears to the Standards Committee

that, having regard to all the circumstances of the case, any further action is unnecessary or inappropriate.

[92] Ms AF emphasises that her challenge is not based on complaint that the Committee failed to exercise its discretion in her favour, but rather based on argument that the Committee in some manner, failed to properly exercise its discretion.

[93] In advancing this submission, Ms AF, in large part, returns to a merits based argument. She suggests the Committee would and should have dismissed the complaint, if it had given closer attention to the High Court judgment and her submissions that the complainant had falsified documents.

[94] A Committee's discretion to take no further action is not unfettered. It may choose to proceed no further if one of the grounds set out in s 138(1)(a)-(f) are established, or if it appears to the Committee, having regard to all the circumstances of the case, that any further action is unnecessary or inappropriate.

[95] In this case, the Committee's decision to proceed with an inquiry at the present time does not present as surprising.

[96] The first complaint relates to fees. When considering a fees complaint it is commonplace for a Committee to appoint a cost assessor. That ensures that both the complainant and the practitioner can be confident that the disputed accounts are subjected to a more rigorous and comprehensive examination by a person with knowledge in the area.

[97] Ms AF emphasised that her particular expertise was in the arena of high-end litigation. She had reservations as to whether there were practitioners in the [town] area who had comparable experience who could bring adequate knowledge and expertise to the process of assessing the account.

[98] The value of the report will ultimately be a matter for the assessment of the Committee and the practitioner. The appointment of a cost assessor does indicate that the Committee was intent on ensuring that the fees complaint would receive comprehensive examination.

[99] Nor is it surprising that the Committee chose to proceed with enquiry into the second complaint (described by Ms AF as the conduct complaint).

[100] Ms AF's criticism of the Committee's decision to proceed with an inquiry is premised on argument that the conduct complaint lacks merit, and the Committee

should have immediately recognised that. The Committee has made no findings on the merits, but has elected to appoint an investigator to assist it.

[101] Ms AF submits that the litigation from which the conduct complaint arose was complex. Appointing an investigator presents as prudent and sensible. A careful and comprehensive enquiry into what Ms AF acknowledges is a complex matter, is desirable.

[102] I do not consider that the Committee erred in electing not to exercise its discretion to not proceed with inquiry into the complaint. I further observe that a failure to exercise a discretion to resolve to proceed no further under s 138 cannot, of itself, be reviewable. Such a decision cannot be a “determination, requirement, or order made, or direction given, by a Standards Committee” under s 194. No right to request a review, or power to undertake a review arises until a Standards Committee makes a determination, imposes a requirement, issues an order, or gives a direction. That has not occurred here.

[103] Ms AF advanced a number of submissions as to the manner in which discretion is to be exercised with reference to the grounds of judicial review. While not strictly necessary to determine this in light of the above, I consider them now.

[104] There is no evidence that the Committee exercised its discretion improperly in electing to proceed with its inquiry, nor is a Committee required to provide reasons for its decision to elect to proceed with an inquiry.

[105] It is important, when considering Ms AF’s challenges to the decisions to not refer the parties to mediation, and to proceed with inquiry, to recognise that Standards Committees, on receipt of a complaint, have the capacity to make some preliminary decisions which assist Committees to meet their statutory obligations to resolve complaints in an expeditious manner.

[106] The Committee’s ability to make initial assessment as to whether a complaint merits further enquiry provides opportunity for the Committee to sift out those complaints which are transparently lacking in merit (such as those which are trivial, frivolous, or vexatious).

[107] It would be expected that Committees would be mindful that the complaints process has been designed primarily for the protection of consumers of legal services. Committees will be reluctant, when giving first consideration to a complaint, to elect to take no further steps to enquire into a complaint unless there are compelling reasons not to do so.

[108] At any stage of its investigation, a Committee may decide, having regard to all the elements of the case, that no further action is necessary or appropriate.

[109] In my view, it is potentially obstructive of the Committee's process and likely frustrative of the requirement to resolve complaints in an expeditious manner, if applications are made to review the Committee's initial steps.

*Procedural failures*

[110] Ms AF submits that the Committee has failed to manage her complaint in an expeditious and procedurally fair manner.

[111] She does not complain that the Committee has acted in bad faith, but rather submits that the manner in which the complaint has been managed has prejudiced her position.

[112] She identifies a number of areas where she believes the process has gone off the rails. She is understandably concerned at the delay in having the complaints resolved.

[113] The first complaint was lodged in May 2012.

[114] It is clear that the Committee had considerable difficulty finding suitable candidates to fill the role of cost assessor, and subsequently, investigator.

- a. The Committee appointed a cost assessor in August 2012. In October, that appointee advised that he was conflicted and unable to take up the appointment.
- b. In November 2012, the Committee was giving consideration to appointing an assessor from outside the [town] area.
- c. In December 2012, Mr D was appointed as cost assessor.
- d. In July 2013, the Committee resolved to appoint an investigator and decided to appoint Mr D to the dual role of assessor and investigator.
- e. Mr D was not prepared to undertake the investigator's role.
- f. In September 2013, Mr S, who had been the convenor of the Committee from its inception was appointed as assessor and investigator.
- g. It is understandable that Ms AF has concerns about the process. The problems with delay are self-evident.

[115] The delay and uncertainty surrounding appointments to the positions of cost assessor and investigator are regrettable and perhaps indicative in part of the difficulties Standards Committees encounter when sourcing practitioners to fill these roles, when the pool of available practitioners is not extensive and the collegiality of a small legal community creates abundant opportunity for potential conflict.

[116] The difficulties that have arisen as a consequence of delay, whilst regrettable, do not persuade me that it is appropriate to interfere in the manner Ms AF suggests. She would support a direction that the file be transferred to a new Committee.

[117] Once a Committee is tasked with enquiry into a complaint, there is limited opportunity for that Committee to refer the complaint to another Standards Committee. The Standards Committees practice note, at paragraph 2.11, records that:

Once the Standards Committee is notified of the complaint and the investigative or analytical processes have started, the complaint cannot be referred to another Standards Committee. The same applies to own motion investigations. The only exception is whether the board may need to direct the referral of a complaint or matter currently in the hands of a local Standards Committee to the National Standards Committee. This is likely to be very rare since it is the responsibility of the Complaints Service to identify matters warranting referral to a National Standards Committee, wherever possible, before they are referred to a local Standards Committee.

[118] Ms AF is critical of the manner in which the Committee has managed the two complaints. She suggests that initially the Committee decided to manage both complaints on the basis that they were fee complaints, but subsequently decided to progress inquiry into the second complaint on the basis that it was a complaint about conduct.

[119] Her concerns about the lack of clarity and focus in managing arrangements for her complaints to be heard are justified, however it was open to the Committee to determine how it would approach the two complaints, and it presents as inevitable if fair consideration was to be given to the complainant, that the scope of the enquiry into the second complaint would expand beyond narrow focus on an issue of fees. When Mr Z raises concerns about the nature of the advice tendered by Ms AF during the course of the proceedings, it is difficult to see how inquiry into a complaint of that nature could tenably proceed on the basis of categorising the complaint as a fees complaint alone.

*Appointment of Mr S as Cost Assessor/Investigator*

[120] Ms AF challenges the Committee's decision to appoint Mr S as assessor and investigator.



[121] It is important to emphasise that she does not challenge Mr S's appointment by way of attack on his professional standing. She submits it is inappropriate for Mr S to assume investigative roles when he has been, from the outset, the convenor of the Committee tasked with the responsibility to enquire into the complaint.

[122] She submits that Mr S's capacity to bring independent judgement to his roles has been fundamentally tainted by his engagement in the process as convenor of the Committee.

[123] She argues that Mr S has inevitably been involved in significant decisions including:

- a. The decision to proceed with the inquiry.
- b. The decision to not refer to mediation.
- c. Appointment decisions.

[124] If Ms AF is to succeed in argument that it is inappropriate for Mr S to take on the role, implicit in that argument must be suggestion that Mr S's previous management of the Committee has in some material way compromised his ability to bring fair and independent judgement to the roles of cost assessor and investigator.

[125] I do not accept that the fact Mr S has had engagement with the process in his capacity as convenor of the Committee prevents him from bringing objective analysis to the investigative roles. Investigators are not decision makers; they are agents for the Standards Committee tasked with carrying out particular roles on behalf of the Standards Committee.

[126] It should be noted that any power of an investigator or a costs assessor may also be exercised by a Standards Committee (see for example s 147(2) of the Act). As such it is difficult to see how the Committee appointing one of its own members as its delegate to exercise those powers can be prejudicial to the practitioner.

[127] Nor is it readily apparent which elements of the decision-making process that Mr S has been engaged in to date could compromise his role as investigator.

[128] In large part, issues addressed by the Committee prior to Mr S's appointment were administrative in nature. It is accepted that the Committee, in reaching decisions on issues such as to whether to refer to mediation or to proceed with enquiry, would be required to consider the general nature of the complaints. But those initial deliberations

are clearly focused on determining how the complaint is to be best managed, and do not amount to findings as to merit.

[129] Nor is the case that membership of a Committee precludes a Committee member from appointment to the role of cost assessor.

[130] A Committee's authority to appoint a cost assessor derives from its power of delegation under s 184(1) of the Act. Section 184(1) provides that:

A Standards Committee may from time to time delegate to any of its members or to any committee appointed under section 183(1)(b) or to any other person any of its functions and powers, including this power of delegation.

[131] The New Zealand Law Society Practice Note, issued for the assistance of Standards Committees (issued under regulation 28 of the Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committee Regulations 2008)) notes at paragraph 10.3 that:

Fees complaints should be delegated by Standards Committees either to a specialist cost assessor appointed for that purpose by the NZLS Complaints Service or to an individual Standards Committee member.

[132] Her argument that Mr S's appointment to the role of cost assessor is contaminated by his previous engagement as a member of the Committee is inconsistent with the Act and the Practice Note which specifically provide for a Committee to appoint "any of its members" to the role of cost assessor.

[133] A delegation under s 184 is different to the delegation of a specific investigator under s 144. To be eligible for appointment as an investigator, a person must be a lawyer, chartered accountant, inspector, or person deemed to have the special skills required for the particular investigation.<sup>11</sup> Mr S's appointment as investigator was confirmed, as required, in writing.

[134] On being appointed, Mr S immediately recused himself from further engagement with the Committee (although I note that this may not strictly have been necessary in any event).

[135] I conclude that there is no statutory impediment to the appointment of a Committee member to the role of investigator.

[136] Any report received by a Standards Committee is no more than advice to the Committee for its consideration which it must take into account in making any

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<sup>11</sup> Lawyers and Conveyancers Act 2006 (Lawyers: Complaints Service and Standards Committees Regulations 2008) regulation 33(2).

determination. It must also be provided to the practitioner who is the subject of the complaint.

[137] It will therefore be the Committee who makes assessment as to the relevance of the reports that Mr S will prepare for the Committee's consideration.

[138] Nor do I consider that challenges can be made to Mr S's appointment on grounds that the appointment offends principles of natural justice. The appointment was made in accordance with the legislation.

[139] The complaint that the Committee offends principles of natural justice can only be sustained by reference to it having an adverse affect on the decision-making of the Committee members (or some reasonable apprehension that this might be the case). I see no basis for reaching such a conclusion.

[140] There is no argument advanced that the Committee has acted in bad faith.

[141] Ms AF challenges Mr S's appointment on grounds of procedural unfairness, but also questions his ability to adequately perform the investigative roles. That criticism is based on argument that Mr S's litigation experience is primarily in the criminal area.

[142] It is not appropriate for the LCRO to conduct enquiry into the credentials of practitioners appointed to investigative roles. If there are manifest deficiencies in the manner in which an investigator has conducted their inquiry it would be expected that those defects would be indentified in their report and certainly Ms AF retains the right to challenge Mr S's reports, both by way of submission to the Committee, and in the event of adverse finding from the Committee, by way of review through this Office.

## **Conclusion**

[143] I accept that Ms AF has genuine concerns regarding the delay in advancing the complaints. The process has been cumbersome.

[144] She is not however on sound ground when she attempts, through the review process, to challenge the substantive merits of the complaint before the Committee has had opportunity to complete its inquiry and deliver its decision.

[145] Challenge to the Committee's failure to refer the parties to mediation, failure to resolve not to proceed with an inquiry, to the composition of the Committee, and to the Committee's appointments to the roles of cost assessor and investigator, fall outside the scope of the LCRO's power to review.

[146] While the requirement of the investigator to provide documents is reviewable, I conclude that there is no basis in fact to challenge the investigator's requirement to provide those files and documents. Whilst that challenge provided the jurisdictional grounds of review, argument that the request to provide records was the result of a procedurally flawed enquiry was not established.

[147] Ms AF's broad brush approach, based on narrow objection raised to the investigator's requirement of her to produce her files, has contributed to the delay.

### **Decision**

The applicant's request to review the Committee's decision, through its investigator, to request production of files, and additional grounds raised on review, is dismissed.

### **Costs**

The Review Officer may, after concluding a review, make such order as to costs and expenses as the Legal Complaints Review Officer thinks fit.<sup>12</sup> Cost decisions are most commonly made against practitioners in circumstances where findings of unsatisfactory conduct are made or upheld against the practitioner.

This review has proceeded on the basis of the practitioner challenging the Committee's management of the complaint prior to a decision being issued.

I consider it appropriate that a costs order be made against the practitioner in favour of the New Zealand Law Society. In reaching that view I place particular weight on the fact that a number of the issues raised by Ms AF could more appropriately have been addressed, if necessary, after the Committee had delivered its decision.

Pursuant to s 210(1) of the Lawyers and Conveyancers Act 2006, Ms AF is ordered to pay the sum of \$1,200.00 to the New Zealand Law Society by way of costs. Such payment to be made no later than 10 November 2014.

**DATED** this 8<sup>th</sup> day of October 2014

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R Maidment  
**Legal Complaints Review Officer**

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<sup>12</sup> Lawyers and Conveyancers Act 2006, s 210(1).

In accordance with s 213 of the Lawyers and Conveyancers Act 2006 copies of this decision are to be provided to:

Ms AF as the Applicant  
X Standards Committee as the Respondent  
The New Zealand Law Society