

CONCERNING

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

AND

CONCERNING

a determination of the Area Standards Committee X

BETWEEN

RB

Applicant

AND

**[AREA] STANDARDS
COMMITTEE X**

Respondent

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

DECISION

Introduction

[1] Mr RB has applied for a review of a determination by [AREA] Committee X (“SCX”) to lay charges against him before the Lawyers and Conveyancers Disciplinary Tribunal.

Background

[2] On the 1st of March 2012 Mr RB represented a defendant at a pre-trial hearing held before a Court Registrar.

[3] The Police Prosecutor made a complaint that Mr RB had, during the course of that hearing, badgered the Prosecutor, alleged that the Prosecutor had misled the Court, and undermined the Registrar.

[4] In a decision delivered on 30 April 2013, the Standards Committee charged with enquiring into the complaint (Standards Committee Y-“SCY”) delivered a decision which upheld the Prosecutor’s complaint. The Committee directed that Mr RB was to provide a written apology to the Prosecutor within 30 days of the date of the decision.

[5] Mr RB did not provide the required apology within the timeframe directed.

[6] The apology was eventually forwarded to the Committee on 19 June 2013.

[7] The Committee did not consider that Mr RB's apology, in the form provided, complied with the Committee's directions, and made request of Mr RB to draft a further apology.

[8] Mr RB failed to comply with that request.

[9] The Committee decided to refer the matter to another Standards Committee (Area Standards Committee X, "SCX") for that Committee to consider whether Mr RB had failed to comply with SCY's directions, and to assess whether such non-compliance, if established, would constitute misconduct.

[10] SCX commenced an own motion investigation. It was the Committee's preliminary view, that Mr RB had failed to comply with SCY's Order, and in particular, that the apology he had provided was inadequate.

[11] Mr RB was invited to provide a response. He failed to do so.

[12] In its decision delivered on 24 February 2014, SCX determined that the own motion complaint and any and all issues involved in the complaint should be considered by the Disciplinary Tribunal. Mr RB seeks to review that decision.

Application for review

[13] Mr RB filed an application to review the Standards Committee decision to refer the matter to the Disciplinary Tribunal on the 8th of April 2014.

[14] In submissions filed with the Office of the Legal Complaints Review Officer (LCRO) on 21 July 2014 he submits that:

- i. SCY had breached his rights to natural justice, by failing to disclose the identity of the complainant.
- ii. This oversight constituted a breach of natural justice sufficient to render invalid the order made by the Committee.
- iii. Two members of SCY had conflicts of interest, by virtue of their involvement in Police prosecution work, and therefore should have recused themselves from participating in the enquiry process.

- iv. The SCY Order did not direct that Mr RB's apology was to be expressed in a particular form.
- v. An apology was provided to SCY.
- vi. Subsequent to making a direction that he was to provide an apology, the Committee had no jurisdiction to demand that he provide a further apology.
- vii. Once the Committee had exercised its powers under s 156 of the Lawyers and Conveyancers Act 2006 (the Act) the finding of unsatisfactory conduct is extinguished to the extent that any finding may be used as a basis of the exercise of the powers available under s 156.
- viii. The Committee had no power to recall a decision or set aside an order and then make fresh orders based on an earlier finding of unsatisfactory conduct.

[15] Mr TD appeared for the SCX. He submitted that:

- i. Mr RB had failed to comply with SCY's direction to provide an apology within 20 days of the decision.
- ii. The apology provided was inadequate.
- iii. Mr RB failed to respond to a request to provide an amended apology.
- iv. Mr RB failed to respond to SCX's numerous requests.
- v. Mr RB failed to cooperate with the disciplinary process.
- vi. His failure to cooperate was inconsistent with the significant case law which has emphasised and reinforced the fundamental obligation of practitioners to cooperate with the process in order to ensure maintenance of public confidence in the provision of legal services, the protection of consumers of legal services, and recognition of the status of the legal profession.
- vii. The focus of the review application was on the decision of the SCX. It was not open to Mr RB to challenge that decision by seeking to review aspects of the SCY determination.

Role of the Legal Complaints Review Officer on review

[16] The role of the LCRO on review is to reach his own view of the evidence before him. Where the review is of an exercise of discretion, it is appropriate for the LCRO to

exercise particular caution before substituting his own judgment for that of the Standards Committee, without good reason.

[17] In *Deliu v Hong* the High Court held that a Review Officer must reach his or her own view of the matter before him or her.¹

[18] The decision by SCX to issue a determination that directed that matters were to be referred to the Disciplinary Tribunal did not include reasons for that decision. It is not required to do so² This Office is however required by s 213(2) of the Act to provide reasons for its decisions.

[19] It falls then to this Office to determine whether there are sufficient grounds to justify the Committee's decision to refer the matter to the Disciplinary Tribunal.

[20] The role of this Office, when considering a review of a decision to lay charges against a practitioner before the Disciplinary Tribunal was the subject of comment by the Court of Appeal in *Orlov*.³ In the first instance, the Court accepted that "[t]here is now oversight of the referral decision by the independent LCRO".⁴

[21] In its judgment the Court also found there was no threshold test to meet before matters could be referred to the Tribunal.⁵

[22] Part of the Court's reasoning was that the threshold test which previously existed under the Lawyers and Practitioners Act 1982 was no longer necessary as it was now met by other means. Part of the "other means" is the role this office plays in reviewing decisions to refer matters to the Disciplinary Tribunal.

[23] The Court noted that:⁶

The protection to the practitioner once afforded by the threshold test [in the Lawyers and Practitioners Act 1982] is thus now met by other means. The oversight of the LCRO should also assist in protecting the resources of the Tribunal and prevent it from being overwhelmed by petty or trivial cases.

[24] Protection of a lawyer from unwanted prosecution before the Disciplinary Tribunal was inherent in the comments of Pankhurst J in *M v Wellington Standards Committee (2)* where he noted that:⁷

¹ *Deliu v Hong* [2012] NZHC 158 at [43].

² Lawyers and Conveyancers Act 2006 s 158.

³ *Orlov v New Zealand Law Society* [2013] NZCA 230.

⁴ Above n 3 at [54(d)].

⁵ Above n 3 at [53].

⁶ Above n 3 at [54(d)].

⁷ *M v Wellington Standards Committee (2)* [2013] NZHC 1037 at [12].

...it must be recognised that the decision to lay charges, as opposed to utilising the internal disciplinary powers of the committee, impacts upon the practitioner concerned in terms of time, expense and the potential outcome.

[25] In fulfilling the role required of it, this Office has proceeded with caution when considering whether or not to interfere with a decision by a Standards Committee to refer a matter to the Disciplinary Tribunal. In *FF v Wellington Standards Committee (2)*,⁸ this Office addressed the principles which Review Officers have regard to when addressing this question:⁹

[previous LCRO cases] have identified the principles set forth in the various Court decisions where a decision to prosecute might be revisited. These include situations in which the decision to prosecute was:

- (a) significantly influenced by irrelevant considerations;
- (b) exercised for collateral purposes unrelated to the objectives of the statute in question (and therefore an abuse of process);
- (c) exercised in a discriminatory manner;
- (d) exercised capriciously, in bad faith, or with malice.

In addition, it was noted in *Rugby* decision that “if the conduct was manifestly acceptable then this might be evidence of some improper motivation in the bringing of the prosecution”.

While I do not necessarily agree that this might constitute evidence of some improper motivation in the bringing of the prosecution, I do agree that the decision to prosecute should be set aside if the conduct was manifestly acceptable.

[26] While it is acknowledged that these principles are not exhaustive, they do identify significant issues to take into account when considering the basis on how a review to the Tribunal will progress.

[27] It is important however that a review of a Committee’s decision to refer a complaint to the Tribunal, is not unduly fettered or constrained by rigid adherence to a set of specific criteria. It is important to keep in mind the nature of the LCRO jurisdiction and in particular the ability of a Review Officer to consider all matters relevant to the complaint, and their capacity to bring independent judgement to each case.

[28] The scope of the review process was considered in the decision of *Deliu v Hong* where the Court commented:¹⁰

...the power of review is much broader than an appeal. It gives the Review Officer discretion as to the approach to be taken on any particular review as to the extent of the investigations necessary to conduct that review, and therefore clearly contemplates the Review Officer reaching his or her own view on the evidence before her.

⁸ *FF v Wellington Standards Committee 2* LCRO 23/2011].

⁹ Above n 8 at [49-51].

¹⁰ *Deliu v Hong* [2012] NZHC 158 at [41].

Analysis

Issues to consider

- i. Mr RB's challenge to jurisdiction – non disclosure of identity of complainant/composition of SCY.
- ii. SCY's requirement to provide an amended apology.
- iii. Did the apology proffered by Mr RB comply with the Committee's order?
- iv. Power of the Standards Committee to refer to the Disciplinary Tribunal
- v. Was Mr RB cooperative with the disciplinary process?

Issue 1 – non-disclosure of identity of complaint/ composition of SC Y

[29] Mr RB contends that the concerns he raised regarding the composition of SCY and that Committee's failure to identify the complainant are procedural breaches of such substance as to render void the order made by the Committee.

[30] It does not fall within the scope of this review to address the complaint identified in the paragraph above.

[31] SCY delivered its decision on the 30th of April 2013.

[32] Any party who is subject to a final determination of a Standards Committee may seek to review that decision through the Office of the LCRO.¹¹

[33] Every application for review must be filed within 30 working days after the determination is delivered.¹² The LCRO has no jurisdiction to accept review applications filed out of time.

[34] The determination which is the subject of this review is the determination of SCX delivered on the 24th of February 2014.

[35] It is not open to Mr RB to address at this review complaints he has concerning the procedures and processes adopted by the first Committee. He had opportunity to do so by filing, within the required timeframe, an application to review the SCY's decision. He elected not to do so.

¹¹ Above n 2 s 193.

¹² Above n 2 s 198.

[36] It is important that the scope of this review be confined to addressing the SCX determination.

Issue 2 - Lack of jurisdiction

[37] I agree with Mr RB's submission that there appears to be no statutory basis for SCY to make demand of Mr RB to provide further apology, in the face of their conclusion that the apology offered was inadequate.

[38] Section 156 of the Act provides the jurisdictional basis for the Standards Committee's powers to make orders including the authority to order a person to make an apology.¹³

[39] The legislation does not appear to contemplate that Standards Committees' have a continuing obligation or authority to monitor the orders that they may make.

[40] But this is not to suggest that parties who are the subject of orders can wilfully disregard those orders without consequence.

[41] Section 132 of the Act provides that any person may complain to the appropriate complaints service concerning the failure of any practitioner to comply, within a specified time or a reasonable time, with any order or final determination made under the Act by a Standards Committee or the LCRO.

[42] Each Standards Committee may:¹⁴

Investigate of its own motion any act, omission, allegation, practice, or other matter that appears to indicate that there may have been misconduct or unsatisfactory conduct on the part of a practitioner or any other person who belongs to any of the classes of persons described in s 121.

[43] Mr RB's challenge to jurisdiction is flawed as it is the decision of SCY to which he mounts his jurisdictional challenge, not the decision of SCX which is the decision subject of this review.

[44] Whilst I accept Mr RB's submission that, for the most part, standards committees do not have jurisdiction to monitor or enforce their orders, which can, in situations of non-compliance, properly be the subject of a separate disciplinary complaint, I do take the view that it would be reasonable and within the powers of a committee to make a direction that a party provide an apology which is subject to the committee's approval, before despatching to the aggrieved party, provided that the practitioner was advised that the form of the apology would be subject to the scrutiny of the committee.

¹³ Above n 2 s 156(1)(c).

¹⁴ Above n 2 s.130(c)

[45] It is not at all uncommon in jurisdictions where orders are made requiring a party to provide apology, for the order to be conditional upon the apology being scrutinised, to ensure that the apology proffered is appropriate in tone and content.

[46] Section 156(3) of the Act provides that any order made by a standards committee can be subject to such terms and conditions as the committee thinks fit.

[47] It would be entirely within the scope of that section for a committee to require an apology to be perused before the committee sanctioned the apology being provided to its recipient.

[48] In this case it could not be reasonably inferred that the decision of the SCY contemplated an opportunity for the Committee to consider the apology, as the Order made directed that the apology was to be forwarded to the Prosecutor, and a copy provided to the Committee contemporaneously.

[49] The commencement point for this review is the decision of the SCX to commence its own motion enquiry into the adequacy of the apology proffered and it was not the decision of SCY to seek an amended apology which was the subject of the SCX enquiry. SCX's enquiry, as clearly evidenced by the initial correspondence and notice of hearing, is two-fold. The Committee embarks on enquiry into the adequacy of the apology and Mr RB's degree of cooperation with the disciplinary process.

[50] There can be no jurisdictional objection to the decision of SCX to pursue enquiry, on its own motion, into the adequacy of the apology provided by Mr RB, and the extent to which Mr RB cooperated with the disciplinary process.

The Apology

[51] Whether the apology provided complied with the Committee's determination is pivotal.

[52] Mr RB's challenge to the Committee's decision to refer him to the Tribunal rests in significant part on the submission that he did comply with the Committee's direction.

[53] Mr RB contends that he was required to provide an apology and did so. He argues that the Committee did not dictate the form the apology was to take. He considers that the apology provided presents as fair and reasonable and that it meets the Committee's requirements. He stressed in submissions advanced at hearing, that the apology was an honest reflection of his views.

[54] It cannot be the case that compliance with a Committee's direction to provide apology is achieved by providing an apology which does not meet the fundamental requirement of an apology.

[55] Apology is defined in the Shorter Oxford dictionary as:¹⁵

A frank acknowledgement of fault or failure, given by way of reparation; an explanation that no offence was intended with regret for any given or taken.

[56] It seems so obvious as to approach the trite to state that for an apology to properly achieve its objective the apology must present as genuine in purpose and intent, and must properly address the grievance which caused offence to be taken.

[57] Mr RB's apology is framed as follows:¹⁶

Pursuant to the order of the Standards Committee and without being able to understand why a lawyer is not permitted to ask a Police Officer to be truthful in Court and also not being able to understand how asking a Police Officer to be truthful is equivalent to the making a positive statement the Police Officer is lying when the two are different, for example if a Police Officer reads out a statement in Court which he or she did not prepare but which contains matters which are not the truth, he or she cannot be lying because he or she did not prepare the statement, but if the temporary Prosecutor was offended by being asked to be truthful in accordance with my client's clear instructions an apology is given.

[58] The apology proffered by Mr RB is in my view inadequate and fails to address the grievance the apology is required to address.

[59] The apology, as framed, presents more as a criticism of the Committee's findings and an affirmation of Mr RB's belief in his position as being 'correct' than it does as a genuine expression of regret.

[60] The apology can fairly be regarded as cynical in that Mr RB is clearly continuing to advance his view as to what transpired in Court, arguments which were, as is manifestly clear from the Committee's decision, considered by the Committee and rejected.

[61] The apology is provocative. There is a confrontational and derisory element to the apology which compounds the insult rather than ameliorates it.

[62] The apology, in my view, falls well short of an appropriate apology. The decision of SCX to commence an own motion enquiry into the adequacy of the apology presents as reasonable.

¹⁵ *Shorter Oxford English Dictionary Volume 1 A-M* (Fifth Edition, Oxford University Press, New York 2002) at p 98.

¹⁶ Apology RB dated 17 June 2013.

Power of the Standards Committee to refer to the Disciplinary Tribunal

[63] Section 152(2)(a) of the Act confers on a Standards Committee, power to determine that a complaint, or any issue involved in a complaint or matter, be referred to the Disciplinary Tribunal.

[64] Heavy demands are made on the resources of the Disciplinary Tribunal. Standards committees generally will only refer a complaint to the Disciplinary Tribunal if the conduct is sufficiently serious to merit consideration being given to orders being made for striking off or suspending a practitioner.

[65] It is not the case however, that committees are restricted to referring only those matters which attract possibility of the most serious sanctions being imposed.

[66] In *Hart*¹⁷ the Court considered the Committee's discretion to refer, and noted:¹⁸

In practice, Standards Committees will in most cases only refer a complaint to the Tribunal if the alleged conduct forming the basis of the complaint is sufficiently serious to warrant consideration of suspension or striking off. It is important to bear in mind, however, that the Tribunal has a significant role to play in maintaining public confidence in the legal profession. It plays an important part in determining national standards, and has a greater ability than a Standards Committee to maintain oversight of the profession at a national level. It therefore plays a vital role in assisting to achieve two of the LCA's purposes, which are to maintain public confidence in the provision of legal services and to protect consumers of those services. For these reasons we consider that some complaints may appropriately be determined by the Tribunal even though the likely sanction will not involve suspension or striking off.

Duty of practitioner to cooperate with the disciplinary process

[67] The second element of the matters enquired into by SCX was an examination of Mr RB's response to the disciplinary process.

[68] The Lawyers and Conveyancers Act 2006 introduced a comprehensive regime for the regulation of the legal profession.

[69] Since the Act's introduction, the High Court has, in a number of decisions, examined the disciplinary process introduced by the Act and considered the obligations imposed on practitioners to cooperate with the disciplinary regime.

[70] Those decisions have strongly emphasised the obligation on practitioners to cooperate with the disciplinary process.

¹⁷ *Hart v Auckland Standards Committee 1 of the New Zealand Law Society* [2013] NZHC 83.

¹⁸ Above n 17 at [103].

[71] In *Parlane v New Zealand Law Society (Waikato Bay of Plenty Standards Committee No. 2)*¹⁹ the Court noted:²⁰

The purposes of the Lawyers and Conveyancers Act include maintenance of public confidence in the provision of legal services, protection of consumers of legal services and recognition of the status of the legal profession. To achieve those purposes the Act provides for what it described as 'a more responsive regulatory regime in relation to lawyers and conveyancers'. The provisions of Part 7 of the Act dealing with complaints and discipline are central to achieving the purposes of the Act. I consider that legal practitioners owe a duty to their fellow practitioners and to the persons involved in administering the Act's disciplinary provisions (whether as members of a Standards Committee or employees of the New Zealand Law Society) to comply with any lawful requirements made under the Act. There must also be a duty to act in a professional, candid and straight-forward way in dealing with the society and its representatives.

[72] In *Hart*, the Court noted at that:²¹

Public confidence in the legal profession depends significantly upon the premise that practitioners will co-operate fully in the investigative phase of the disciplinary process. By co-operation, we mean, as a minimum, that they will comply promptly with lawful requests made by investigating bodies and with timetables imposed.

[73] Nor can a practitioner's conviction that a complaint lacks merit absolve them of their responsibility to cooperate. In *Hart* the Court commented:²²

The purpose of the disciplinary procedures is to protect the public and ensure there is confidence in the standards and probity met by members of the legal profession. It is therefore axiomatic that practitioners must co-operate with those tasked with dealing with complaints made, even if practitioners consider that the complaints are without justification.

[74] An examination of Mr RB's engagement with both Standards Committees indicates that he consistently adopted an indifferent approach to requests to provide responses. His lack of cooperation approached the obdurate.

[75] He failed to provide an apology within the time frame required by the first Committee and initially ignored further requests to comply.

[76] He was invited on 16 September 2013 to provide a response to the advice of SCX that it was proposing to commence an enquiry. Over succeeding months, he was written to on four occasions and invited to provide a response. He was contacted by telephone on two occasions, and gave assurances each time, that he would provide a response to the Committee. He failed to do so.

¹⁹ *Parlane v New Zealand Law Society (Waikato Bay of Plenty Standards Committee No. 2)* HC Hamilton, CIV-2010-419-1209, 20 December 2010.

²⁰ Above n 19 at [108].

²¹ Above n 17 at [224].

²² Above 17 at [108].

[77] Five months after the Committee made its first enquiry, the Committee delivered its decision. Mr RB made no efforts to comply with the Committee's requests during that period of time.

[78] Mr RB provided minimal defence to the complaint that he had failed to cooperate with the disciplinary process. He referred briefly to health issues which may have impacted on his capacity to respond. He did advance, in forthright fashion, argument that he felt deeply disillusioned with the Law Society. He considered that the Society had continually failed to provide appropriate support to its members.

[79] Whilst I accept the genuineness of Mr RB's submission, and appreciate that he has a particular view as to how successful the Law Society is in supporting its members, those views however firmly or genuinely held, do not absolve Mr RB of his obligation to cooperate with the disciplinary process.

Conclusion

[80] I am mindful that standards committees will generally only consider referring a complaint to the Disciplinary Tribunal if the complaint is sufficiently serious to warrant consideration being given to imposition of severe penalty but in my view the Committee had little option but to refer the matter to the Disciplinary Tribunal.

[81] Mr RB had repeatedly failed to comply with requests to provide information. The apology offered in response to the first Committee's direction effectively rendered the decision of the Committee impotent.

[82] Little would be achieved if outcome from this review was to place the resolution of the matter back in the hands of a standards committee. That approach could be met with a continuing indifference on Mr RB's part.

[83] I have considered all matters "afresh" as I am required to do. I see no basis to interfere with the committee's decision.

Costs

[84] In accordance with the Costs Orders Guidelines issued by this Office, I consider it appropriate that costs be awarded against the Practitioner. Accordingly, pursuant to s 210 of the Lawyers and Conveyancers Act 2006, Mr RB is ordered to pay the sum of \$900 to the New Zealand Law Society by way of costs, such sum to be paid by no later than 11 September 2014.

Decision

Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the Area Standards Committee X is confirmed.

DATED this 11th day of August 2014

R Maidment
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 RB as the Applicant
The Area Standards Committee X
The New Zealand Law Society
The Secretary for Justice