LCRO 142/2013

CONCERNING	An application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	A determination of the National Standards Committee
BETWEEN	**UK** Applicant
AND	**VL** Respondent

DECISION

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

Introduction

[1] Mr [UK] has applied for a review of a decision by the National Standards Committee dated 12 April 2013 in which the Committee decided further action on Mr [UK]'s complaints about Ms [VL]'s conduct was unnecessary and inappropriate, and that the complaint was vexatious.

Background

[2] On [day month] the [ABC] published quotes from arguments put forward by Mr [YB] QC.[1] Other lawyers were also quoted in reports that followed, among them Ms [VL], who had written a letter to the [ABC] dated [day month year] in her capacity as [redacted] of the [redacted]. Ms [VL]'s letter said:

> I refer to the article by Mr [DE] in the [ABC's] online publication on [day, month] [Year], [redacted]. Mr [DE]'s article reports [redacted] on comments by [redacted], Dr [YB] QC [redacted] "public of New

[1] [DE] "New Zealanders [redacted] *[ABC]* (New Zealand, [day month Year].

Zealand [redacted]

As Mr [DE]'s article notes, the [redacted] and the [redacted] has, along with others, made submissions to it on this subject. The [redacted] supports [redacted]

[redacted]

[3] The [ABC] published a report on [day month year] headed [redacted]" extracts from Ms [VL]'s letter were reported in the following way:

[redacted]

[4] Several months passed, then on 11 February 2013 Mr [UK] laid a complaint to the New Zealand Law Society (NZLS) about [redacted] of the lawyers whose comments had been published in [ABC] one of whom was Ms [VL].

Complaint Process

[5] Under a subject heading that included Ms [VL]'s name as one of the [redacted] lawyers quoted in the [ABC], the complaint said:

> I write to lodge formal complaints against the above-named practitioners for breach of rule 2.8 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008. Basically, all-of-the-above colleagues in circa early [redacted] As such, they obviously felt Dr [YB] had acted improperly, but instead of reporting him to the New Zealand Law Society Lawyers Complaints Service as they were obliged to do, they instead criticised him publicly, which in my submission hurt the reputation of the justice system and in any event, failed to fulfil their ethical obligation. According to the New Zealand law which senior counsel must be expected to be aware of, there was apparent misconduct on Dr [YB]'s part, thus requiring reporting, see for example the High Court decision of Justice Heath issued less than two weeks earlier in *Orlov v New Zealand Law Society* (No 8) [2012] NZHC 2154:
>
> > [152] I am satisfied that, if the primary facts on which the particulars are based were proved, the allegations of making "scandalous and false" allegations against Harrison J could amount to misconduct that would justify either striking off or suspension. While there is no doubt that Mr Orlov had the right to make a complaint to the Judicial Conduct Commissioner (as he did on the 11th February 2009) about Harrison J, the issue concerns the (allegedly) intemperate and scandalous way in which the complaint was expressed.
> >
> > [153] Scandalous or false allegations against a judge (in his or her capacity as such) strike at the very heart of the judicial system and the rule of law. The Tribunal would be entitled to find that Mr Orlov had expressed views intemperate tones which infringed the basic obligation of lawyers to respect judicial institutions. While Mr Orlov might well regard his conduct as enhancing the rule of law, it is a question for the Tribunal to decide whether he overstepped the mark to such an extent that a finding of misconduct is required.
>
> There are other highly publicised cases where saying naughty words about Judges gets lawyers prosecuted in the New Zealand Lawyers and Conveyancers Disciplinary Tribunal, such as *Comeskey* and *Dorbu* and see also the LCRO decisions in *FT v NSC* LCRO 259/2010 and 260/2010 (see finally [parties names redacted by LCS] LCRO 212/2010 & 012/2011 for a case where a lawyer is being prosecuted in the Tribunal for saying naughty words about another lawyer).
>
> As such [redacted by LCS] Madam [VL] had a positive obligation to privately report Dr [YB] instead of attacking him and thereby de minimis breached rule 2.8 (and possibly 2 in bickering publicly in the media and also possibly 10 in their own use of intemperate language). I look forward to hearing from you.

[6] NZLS made up a separate file, each with its own file number, for each of the [redacted] lawyers to whom the complaint related.

Redaction and Unpublished LCRO decisions

[7] Mr [UK] took issue with NZLS's handling of unpublished Legal Complaints Review Officer (LCRO) decisions, which he says are valid and relevant to this complaint. Mr [UK] also relied on paragraphs [52] and [53] of "the Chief High Court Judge's decision in *Deliu v Hong*" and said that his complaint about Ms [VL]:

> … goes to the issue of both a [redacted] counsel attacking another [redacted] counsel publicly and failing to instead report any misconduct to the appropriate authorities to deal with. It is with due respect unseemly for a [redacted] to publicly lambast a [redacted] when the correct approach (indeed the mandatory one) is to make a confidential reporting to the Law Society.
>
> I look forward to hearing from you.

[8] The NZLS file contains a letter dated 25 February 2013 from NZLS to this Office which refers to a number of complaint files involving Mr [UK] in which he had apparently cited an unpublished decision by this Office, LCRO XX/2010 and XX/2011. A copy of that decision was attached. NZLS sought a view on how it had dealt with the decisions in the complaint process, how it might be addressed in relation to the then current complaints about Ms [VL] and [redacted] others, given an indication from this Office that the discretion not to publish the decision was unlikely to change. At that stage reference to the decision was redacted and it was not placed before the Committee, although it seems Mr [UK] may have disseminated copies.

[9] The NZLS file also contains a letter dated 4 March 2013 from Ms Bouchier, the then LCRO, to NZLS responding to the NZLS letter of 25 February 2013. Ms Bouchier's response included her view that there was no reason to take a different view from the LCRO who had not directed publication of the decision. Mention was made that publication has no bearing on the "validity" of a decision, and that an alternative, [redacted] [2] to which Mr [UK] had referred, was available. NZLS later provided Mr [UK] with a copy of that letter and there was further correspondence regarding that.

Ms [VL]'s reply

[10] On 5 March 2013 Ms [VL] responded to the complaint, enclosing a copy of the letter she had sent to the editor of the [redacted] dated [day month] 2012. Ms [VL] referred to the allegations that she had breached rule 2.8, and possibly also rules 2 and 10, saying:

> As to the relevant factual circumstances, I note as follows:
>
> (a) Dr [UK] has referred to excerpts of a letter I wrote six months ago in my capacity [redacted] of the [XXX [redacted] [redacted] in response to an article by Mr [DE] in the *[ABC]*'s online publication on [day month year]. The excerpts must be read in context, and a copy of my letter dated [day month year] is attached.
>
> (b) As is apparent in that letter, the [redacted] response was directed at Mr [DE]'s article, whether [redacted] comments made by Dr [YB] [redacted], about [redacted]

[2] [redacted]

(c) One of the [redacted] rules [redacted] requires it to:

> "… [redacted]
>
> Accordingly, the [redacted] considered it important to discharge that constitutional responsibility, and respond to the criticisms levelled in the *ABC* article. [redacted]

(d) The [redacted] letter to the [ABC] editor followed other public responses to the article, including the [redacted]

The complaint

[redacted] Rule 2.8 was not breached (even "de minimis", as Dr [UK] suggests). Rule 2.8 is concerned with reporting misconduct. Any [redacted] concerns as to Dr [YB] QC's conduct would not have met the requisite threshold. A complaint to the New Zealand Law Society would only have been justified should the [redacted] have considered Dr [YB] QC to be not a "fit and proper person" or "otherwise unsuited to engage in practice" (s 7(b)(ii)). Dr [YB] [redacted] and nothing in the [redacted] letter to the [ABC] in any way suggested misconduct on his part. Nor is the *Orlov* decision (or any of the LCRO cases referred to by Dr [UK]) relevant. No suggestion was made by the [redacted] that Dr [YB] [redacted] had made "scandalous and false" allegations in the nature of those made against individual judges in the cases cited. From [redacted] perspective, this was not a misconduct issue. Rather, it was one where a [redacted]

[redacted] Rule 2 was not breached. The [redacted] did not engage in "bickering publicly in the media". It's response to Mr [DE]'s article was confined to one letter to the [ABC] editor. Nor could it be said that responding accordingly breached the requirement to uphold the rule of law and facilitate the administration of justice. To the contrary, the [redacted] sought to [redacted] of [redacted]

(c) Rule 10 was not breached. The accusations – particularly those suggesting that judges were '[redacted] such an "intemperate attack" on the courts. The response was moderate and appropriate in its language. Proper standards of professionalism were maintained and a copy of the letter was provided to Dr [YB] QC prior to publication.

[11] On 15 March 2013 Mr [UK] responded to Ms [VL]'s reply, saying in an email to NZLS:[3]

> 1. With due respect Ms [VL] is erroneously involving the [redacted] in this matter. She is an officer of the Court with a duly issued practising certificate and if she becomes aware of misconduct she has an ethical obligation to report it. The capacity of [redacted] and indeed Ms [VL] cannot shield herself

[3] Email [UK to FG(Day Month 2013).

> from liability behind any role she may have had with the [redacted] at material times.
>
> 2. It is not agreed that Dr [YB]t [sic] QCs actions are not misconduct, [redacted by LCS] for such and could [redacted by LCS] face prosecution in the New Zealand Lawyers and Conveyancers Disciplinary Tribunal. That aside, it is not for Ms [VL] to decide if it is misconduct, all the rule requires is for potential misconduct to be reported to the appropriate authorities, which would obviously determine the merits for themselves. Obviously, Ms [VL] felt that Dr [YB] had "no foundation for the extraordinary accusations" made by him and that he had made an unjustified "intemperate attack on the courts" which is very much in line with *Dorbu, Comeskey, Orlov, FT* and *Hong*. Indeed, I would argue that attacking the [redacted] as [redacted] is far worse than complaining about a single judge!
>
> 3. I will say that, having viewed Ms [VL]'s 2 September 2012 letter I accept its terms were temperate. The issues that thus remain for consideration is: (I) why Ms [VL] did not report Dr [YB]'s prima facie misconduct; and (II) why she instead chose to publicly criticise him and are either the omission or action an ethical breach?

Committee Consideration

[12] The Committee met on 26 March 2013, considered the complaint against Ms [VL] and associated materials at a hearing on the papers, and made the decision that is under review.

Decision

[13] The decision sets out the background to the complaint with reference to reports in the [ABC], and identified that Ms [VL] held a current practising certificate as a [redacted] It referred to Mr [UK]'s complaint relating to breaches of rule 2.8, and possibly 2 and 10, Ms [VL]'s response, and Mr [UK]'s further correspondence. The Committee noted procedural matters regarding redaction of unpublished LCRO decisions, and redactions of personal information from correspondence. The decision records that the Committee considered "all the responses of the parties to the complaint", and considered issues including:[4]

(a) What is the purpose of rule 2.8 of the RCCC?

(b) What was the context of Dr [YB]'s remarks?

[4] At [10].

[14] The decision records the Committee's view of the purpose of rule 2.8 and applied that view to the circumstances of the complaint in the following way:[5]

> Rule 2.8 of the RCCC (rule 2.8) reads as follows:
>
> 2.8 Subject to the obligation on a lawyer to protect privileged communications, a lawyer who has reasonable grounds to suspect that another lawyer has been guilty of misconduct must make a confidential report to the Law Society at the earliest opportunity.
>
> 2.8.1 This rule applies despite the lawyer's duty to protect confidential non-privileged information.
>
> 2.8.2 Where a report by a lawyer to the Law Society under rule 2.8 may breach the lawyer's duty to protect confidential non-privileged information, the lawyer should also advise his or her client of the report.
>
> The NSC noted Dr [UK] was of the view that rule 2.8 placed a positive duty on lawyers to report public comments of a lawyer to the New Zealand Law Society by way of a confidential report. The NSC was of the view that such a wide interpretation of the rule would seemingly place an obligation on any lawyer who read the reported comments of Dr [YB] to make a confidential report. Such a wide reaching duty would be a strained interpretation of the rule.
>
> The NSC was also of the view that it was not the intention of rule 2.8 to prevent lawyers from [redacted]. Such an interpretation of the rule would unnecessarily [redacted] although any comments should be made in a reasoned and temperate manner (to be adjudged on the circumstances in each case).
>
> Having considered the above, the NSC was of the view that the underlying purpose of rules 2.8 – 2.8.1 was to address the conduct of a lawyer, such conduct not being in the public domain, which on reasonable grounds might be suspected of constituting misconduct. This is the purpose. That the conduct of a lawyer which is not in the public domain, and which on reasonable grounds might seem to warrant some disciplinary action, is brought to the attention of the Law Society.
>
> Dr [YB]'s comments were reported publicly, accordingly the NSC was of the view rule 2.8 had no application. On the facts presented to it, and the complaint was misconceived.
>
> In any event, the NSC noted that if rule 2.8 were applicable, one of the requirements is that the lawyer must have reasonable grounds to suspect misconduct. Ms [VL] in her letter of [day month] 2013, said of Dr [YB]'s conduct: "from the [redacted] perspective this was not a misconduct issue." The NSC noted Dr [UK]'s response of [day month] 2013. However, the NSC considered this interpretation of Dr [YB]'s conduct was open to Ms [VL] and/or the [redacted]

[15] The Committee then went on to consider the context of Dr [YB]'s remarks and Ms [VL]'s response:

[5] Standards Committee decision at [11]–[16].

The NSC noted that Dr [YB]'s comments were made with vigour and as such arguably required, or at the very least might be expected to result in, a public response from members of the profession.

The NSC considered that Ms [VL]'s response of [day month] 2012 on behalf of the [redacted] was temperate.

Having addressed to the core complaint the NSC was of the view that it was unnecessary to specifically address any other matters raised by Dr [UK]. The NSC considered that none of the other ancillary and/or related matters warranted disciplinary action and/or constituted a breach of rules 2 and 10 of the RCCC.

[16] The Committee resolved in its discretion:

Pursuant to s 138 (2) of the Act, not to take any further action on all aspects of the complaint as it appeared to the NSC that, in the course of its investigation of the complaint, and having regard to all the circumstances of the case, any further action was unnecessary or inappropriate. Those circumstances included the following.

a. The complainant's interpretation of r 2.8 was strained as evidenced by the excessive burden it might place on all members of the profession.

b. The purpose of r 2.8 was to address the conduct of a lawyer not in the public domain and accordingly the rule had no application to the facts. The complaint therefore was misconceived.

c. Rule 2.8 should not be read or interpreted so as to prevent lawyers from [redacted]. Accordingly the fact that comments were made in public of itself did not constitute a breach of the Rules.

d. In any event, if r 2.8 were applicable, one of the aspects of the rule is that the lawyer must have reasonable grounds to suspect a lawyer was guilty of misconduct. The NSC noted the submission of Ms [VL] that the [redacted] was of the view that Dr [YB]'s conduct was not a misconduct issue. The NSC considered this interpretation of Dr [YB]'s conduct was open to Ms [VL].

e. Dr [YB]'s comments were made in the public domain and were made with vigour. Arguably the comments required, or at the very least might be expected to result in, a public response from members of the profession.

f. Ms [VL]'s letter of [day month] 2012 to the [ABC] was measured and temperate.

[17] The Committee also resolved:

… pursuant to 138(1)(c) of the Act, not to take any further action on all aspects of the complaint as in the opinion of the NSC the complaint was vexatious. The NSC reached this decision from the circumstances of the complaint, its misconception and lack of merit, as well as the circumstances which led Ms [VL]

to write her letter of [day month] 2012 to the [ABC] in her capacity as President of the [redacted] The NSC concluded that there had been a misuse of the complaints process.

[18] Mr [UK] objected to the decision and applied for a review on 24 May 2013.

Review application

[19] Mr [UK]'s application for review of the Committee's decision relies on the following grounds:

A. That the standards committee erred in law in deciding that Rule 2.8 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 applied only to non-public activities of a lawyer as under that rationale if a lawyer publicly breached his or her ethics, but nobody reported it because they did not think they had to because it was public then the lawyer would likely escape accountability solely by virtue of having openly committed wrongdoing, which would be perverse;

[redacted]The standards committee failed to take into account the authorities provided, such as *Orlov, Comeskey, Dorbu* and *FT* which all basically send the practitioner in question there to the New Zealand Lawyers and Conveyancers Disciplinary Tribunal for saying naughty words about Court officers, so the rule in New Zealand is to do that will result in extremely serious professional repercussions and so it was wrong for the [redacted] in question to publicly rebuke Dr [YB] QC when instead the proper course was to report him to be held accountable [redacted]

C. The standards committee failed to take into account this Office's decision in *[DD]* which was wrong in principle, because regardless of whether the decision is public or private (and I dispute that it is private, as there is no basis for that in law or fact) it is still valid legal decision binding on all standards committees;

D. The standards committee did not turn its mind to what purpose was being served to criticising Dr [YB] publicly and balancing that against the legitimate interest of reporting him privately to ensure he is appropriately dealt with through the Lawyers and Conveyancers Act 2006 regulatory process;

E. The standards committee erred in fact in labelling the public communications [redacted] when in fact they were clearly attacks on Dr [YB] (who, incidentally, is entitled to due respect from his fellow colleagues and not to be libelled in the media as he was);

F. The standards committee gave no coherent reasons why the complaint was vexatious, much less why there was a misuse of the complaints process.

[20] Mr [UK] sought as an outcome of this review:

A. either that this office exercise its jurisdiction to appropriately sanction the practitioner in question, or

B. alternatively to direct a differently constituted standards committee reconsider the matter in accordance with this body's determination.

Nature and Scope of Review

[21] The nature and scope of review have been discussed on a number of occasions by the High Court. In 2012 Winkelmann J said of the process of review under the Act:[6]

> ... the power of review conferred upon Review Officers is not appropriately equated with a general appeal. The obligations and powers of the Review Officer as described in the Act create a very particular statutory process.
>
> The Review Officer has broad powers to conduct his or her own investigations including the power to exercise for that purpose all the powers of a Standards Committee or an investigator and seek and receive evidence. These powers extend to "any review".
>
> ... 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. Nevertheless, as the Guidelines properly recognise, where the review is of the exercise of a discretion, it is appropriate for the Review Officer to exercise some particular caution before substituting his or her own judgment without good reason.

[22] More recently, the High Court has described review by this Office in the following way:[7]

> A review by the LCRO is neither a judicial review nor an appeal. Those seeking a review of a Committee determination are entitled to a review based on the LCRO's own opinion rather than on deference to the view of the Committee. A review by the LCRO is informal, inquisitorial and robust. It involves the LCRO coming to his or her own view of the fairness of the substance and process of a Committee's determination.

[23] Given those directions, the approach on this review, based on my own view of the fairness of the substance and process of the Committee's determination, has been to:

(a) Consider all of the available material afresh, including the whole of the NZLS file, the decision, and the information provided and referred to in the course of this review; and

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[6] Above n 2, at [39]-[41].
[7] *Deliu v Connell & Others* [2016] NZHC 361, [2016] NZAR 475 at [2].

(b) Provide an independent opinion based on that information.

Review Process

[24] On 5 February 2014 the parties were offered the opportunity to consent to the review being determined on the papers in their absence.

[25] On 10 February 2014 Mr [UK] sent an email saying he was overseas throughout February, and had other "attendance the first few weeks in March", so "could only consider the files and give a proper response by 28 March". He requested confirmation that would be acceptable, and the timeframe for his response was extended accordingly.

[26] On 18 February 2014 Ms [VL] consented to the review proceeding in her absence, and on 29 July 2015, after the review hearing had been scheduled, confirmed her intention not to attend.

[27] On 28 March 2014 Mr [UK] sent an email saying:

> I have considered the files and do not agree that a hearing on the papers is appropriate. This is, in large measure, because I feel the practitioners should be required to answer for their disrespectful conduct towards Dr [YB] QC, and explain why it was proper for them to attack [redacted] in the jurisdiction publicly in the press (as opposed to using proper means to address any concerns they had about his actions).
>
> To try and minimise costs, I am obviously amenable to the matters being consolidated in one. I would submit that I need one hour to argue the matter and that a further one hour per respondent should be allocated as a matter of natural Justice with a final :30 for me to reply. In the circumstances, I think it prudent to allocate a full day.
>
> Accordingly, I urge the LCRO to issue notices requiring them to appear in person and answer. I note the recent decision of *National Standards Committee v Orlov* [2013] NZLCDT 45 (18 October 2013) resulted in findings of misconduct for attacking a fellow Court officer (a judge) without cause.

[28] Mr [UK] was advised that hearings for the [redacted] related reviews would be scheduled as a group,[8] that all matters would proceed as applicant-only hearings although the respondents may attend if they wished to,[9] and all four matters would commence at 9.30 am unless otherwise stated.[10]

[29] On 21 July 2015 a notice of hearing was sent to the parties confirming the applicant-only review hearing in this matter would commence at 9.30am on

[8] Email LCRO to [UK] (22 June 2015).
[9] Email LCRO to [UK] (25 June 2015).
[10] Email LCRO to [UK] (26 June 2015).

3 November 2015 in Auckland. The covering email sent by the Registry indicated that as all [redacted] matters had been scheduled as applicant only matters, they would all be heard at the same time, starting at 9.30 am.

[30] On 30 October 2015 a request for adjournment to a later date was received from Mr [UK]'s office on the basis he had received late notice of a conflicting court commitment. Commencement of the review hearing was delayed to 2.30 pm on 3 November to accommodate Mr [UK]'s conflicting commitment.

Review Hearing

[31] The review hearing proceeded on 3 November 2015 with Mr [UK] as the only party present. Ms [VL] was not required to attend, and the review hearing proceeded in her absence.

Evidence in support of complaint Ms [VL] had contravened rule 2.8

[32] At the start of the review hearing Mr [UK] was asked how he knew any of the [redacted] lawyers about whom he had made complaint had not made confidential reports. He said he did not know. He considered the options were either to respect Mr [YB]'s privacy and make a confidential report pursuant to rule 2.8, or to go public as each of the four lawyers had.

Rule 10

[33] Mr [UK] considered that in relation to each of the [redacted] lawyers, the speech had gone too far, saying there were two strands to that:

(1) the words used go too far but,

(2) the personal attacks go too far. He says that goes to the notion of defending the judges, or whatever purpose the lawyer was furthering.

[34] Mr [UK] referred again to the circumstances of *Deliu v Hong* to support his point.[11]

[35] Mr [UK]'s submission of broad principle was that lawyers "don't make derogatory comments about officers of the court in the media" in reliance on

[11] For completeness, bearing in mind the requirement that an LCRO is to come "to his or her own view of the fairness of the substance and process of a Committee's determination", I have considered the unpublished decisions Mr UK refers to in the course of the [redacted] reviews that arise from the [ABC] articles (LCRO XX/2013, XX/2013, XX/2013, XX/2013 and XX/2013).

Comeskey.[12] He said the other cases he was aware of related to comments being made of a private nature, or at least not in the media.

[36] Mr [UK] said he was not aware of Mr [YB] expressing any concern over any of the comments that had appeared in the media, but rather that he welcomed the debate.

[redacted]Mr [UK] did not consider that the label [redacted] could properly be applied to the lawyers' comments in the media. He says they should properly be described as "attacks on Mr [YB]", noting a lack of substance in relation to the underlying problem, or the lack of problem, with [redacted]

[38] Mr [UK] relies on the timing of Ms [VL]'s comments to support the submission that the seriousness of her conduct is increased by her "piling on" to comments made by others.

[39] Mr [UK] says Ms [VL] said "Mr [YB] had made extraordinary accusations" and [redacted], which was not justified". He compares her conduct with that of others, saying hers is less venomous, but nonetheless directly results in the [redacted] Mr [UK] also considered the seriousness of Ms [VL]'s conduct may be reduced, or at least that she may have some justification for not making a confidential report under rule 2.8, because after reading comments made publicly by other lawyers, she would have had reason to believe another lawyer would be likely to have made a confidential report.

[40] Mr [UK] submits that whether Ms [VL]'s comments fall below a proper professional standard calls for a subjective evaluation of "what [I] believe to be the case, or not".

Vexatious – s 137(1)(c)

[41] Mr [UK] says the Committee gave no reasons for its finding that the complaint was vexatious, saying the Committee did not define what it meant by "vexatious", provide any analysis or say whether it was a legal term with a legal definition. Mr [UK] relied on the definition of "vexatious" in the ninth edition of Blacks Law Dictionary[13] and provided a copy of that definition after the hearing. He considers the word "vexatious" must have a meaning and cannot just be arbitrarily placed. Mr [UK] considers that as

[12] *Auckland Standards Committee v Comeskey* [2010] NZLCDT 19.
[13] Bryan A Garner *Black's Law Dictionary* (9th ed, Thomson Reuters, St Paul, 2009).

the Committee's decision contains no reasoning process, he does not know how the Committee has come to the conclusion that his complaint was vexatious.

[42] Mr [UK] says that it is open to this Office to decide the complaint is vexatious, but if it did, that would have to be undertaken consistent with some sort of definition, and that there has to be a "framework as to what vexatious means". Mr [UK] says the explanation of how the Committee came to that conclusion would be one way of approaching the question, and that it would be a problem if the Committee did not approach the question through an analytical reasoning process.

[43] Mr [UK] submitted that the starting point is to consider the complaint. If, for example, the complaint has no probable cause or excuse then it could meet the definition of vexatious matters on which he relies. He says it is necessary to analyse the factual basis for the complaint to see whether it has reasonable or probable cause or excuse. He says that the factual foundation was undisputed, namely that the lawyer in question had made comments about Mr [YB].

[44] In response to concern about a lack of a proper basis for his complaint that the lawyer had contravened rule 2.8, Mr [UK] says his complaint was not limited to that at the outset, and incorporated reference to possible breaches of rules 2 and 10.

[45] With respect to the Committee's decision, Mr [UK] said that it either would, or would not, accept his point about a contravention of rule 2.8, and the decision went on to consider his points about rules 2 and 10 at [20]. By that point, Mr [UK] said he considered the Committee "had determined vexatiousness, and could not have determined the complaint was vexatious only in respect to the contravention of rule 2.8". Mr [UK] says, on the basis of the decision, it would be possible to make a complaint that has probable cause, and for the Committee to simply say ""we don't think so", therefore your complaint is vexatious", depriving the word of any meaning.

[46] Mr [UK] also says that it was gratuitous for the Committee to say the complaint was a misuse of the complaints process, because there was some factual basis to say that Mr [YB] had been insulted, and there was a legal basis on which to say that lawyers should not insult their colleagues. He says that conclusion can only be accommodated within the framework of a complaint being vexatious, pursuant to s 138(1)(c), of the Lawyers and Conveyancers Act 2006 (the Act) or as a general ground under section 138(2).

Analysis of Review Grounds

First Review Ground

[47] The first ground of review is that the Committee erred in law in deciding that rule 2.8 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 applied only to non-public activities of a lawyer. He may or may not be correct. The functions of this Office do not extend to determining questions of law, so I have no jurisdiction to determine this point on review. I observe, however, that rule 2.8 is not constrained to non-public conduct on its face.

Second and Fourth Review Grounds

[48] The second and fourth review grounds rely on a two stage argument and resulting conclusion that Ms [VL] was under an obligation to make a confidential report pursuant to rule 2.8. The first limb of the argument is that the cases Mr [UK] relies on must result in the practitioner in question, in this case Mr [YB], facing charges before the New Zealand Lawyers and Conveyancers Disciplinary Tribunal. The second limb is that Ms [VL] must have known those cases have that effect. The conclusion is that she was therefore under a duty to make a confidential report.

[49] There are a number of difficulties with these grounds arising from the assumptions implicit in the arguments. The first premise assumes the conduct addressed in the cases cited is analogous with Mr [YB]'s. If that assumption is incorrect, the second premise must fail because it relies on the validity of the first, and the conclusion cannot safely be drawn.

[50] I have serious reservations about the validity of a comparison between Mr [YB]'s conduct and that addressed in the decisions Mr [UK] relies on. In simple terms, Mr [YB]'s conduct is so dissimilar in so many ways that few if any reliable parallels can be drawn between his conduct and that of the other lawyers to which Mr [UK] also refers.

[51] It is not possible to generate the conclusion argued for from the premises provided. Neither premise is well supported. The conclusion does not logically follow.

[52] Mr [UK] also says it was wrong for the [redacted] in question to publicly rebuke Mr [YB] when instead the proper course was to report him to be held accountable the same [redacted]

[53] The implicit assumption is that the only proper course available to Ms [VL] was to make a confidential report. That relies on the same flawed logic that formed the basis for the complaint, including that one course of action precludes the other. Following discussion at the review hearing Mr [UK] appeared to acknowledge the logical difficulties this argument faces, and suggested a shift in emphasis away from the alleged contravention of rule 2.8 to consideration of whether rules 2 and 10 had been contravened.

[54] There is no reliable factual or logical basis from which the second or fourth review ground, that Ms [VL] was under an obligation to make a confidential report, can proceed.

Third Review Ground

[55] The third review ground is that it was wrong in principle for the Committee not to take one or more unreported decisions by this Office into account because those are "valid legal decisions binding on all standards committees". While there is no difficulty with the proposition that LCRO decisions are valid legal decisions, Mr [UK] has not explained the basis of the proposition that all LCRO decisions are "binding on all standards committees".

[56] Although NZLS receives copies of all LCRO decisions, it is difficult to see how any decision could be binding on anyone other than the lawyer concerned. In almost all cases, the facts are unique, and the outcome turns on those. Discretion is an essential part of the decision-making process. There is no one size fits all.

[57] As noted above, few if any reliable parallels can be drawn between Mr [YB]'s or Ms [VL]'s conduct, and the conduct of the lawyers considered in the cases Mr [UK] relies on. Any relevant analogies are taken into account implicitly or explicitly in the analysis that follows, noting that Review Officers are not bound to follow published and unpublished decisions of this Office, but have access to them.

[58] In the decision under review, the Committee notes procedural matters regarding redaction and the use of unpublished LCRO decisions, and redactions from correspondence. Mr [UK] has reservations about that method, and its possible implications. I have addressed this concern on the basis that it is a procedural objection, and if a redaction or failure to consider an unpublished decision by this Office resulted in any unfairness, that could be cured on review, noting that I have considered those decisions in the course of this review.

Fifth Review Ground

[59] The fifth review ground relates to the Standards Committee having erred in fact. The basis of this argument lies in the Committee having characterised the media reports as [redacted] about the [redacted] Mr [UK] argues that Ms [VL]'s correspondence was clearly an attack on Mr [YB]. He describes the media reports as libellous and says Mr [YB] is entitled to due respect from his colleagues.

[60] This Office is not equipped to make determinations over claims of libel, although the proposition that Mr [YB] is entitled to due respect from his colleagues is unassailable.

[61] The inference that Mr [YB] did not receive due respect from Ms [VL] is not well supported. In her letter, Ms [VL] refers to the article the [ABC] had published on [day month year]. She is careful to say that the article [redacted] comments the [ABC] attributes to Mr [YB]. She refers to the issue [redacted] and expresses the [redacted] s support [redacted]. Ms [VL] describes accusations set out in the article as "extraordinary", and cites the report of Mr [YB]'s comments as one example.

[62] It is apparent from Ms [VL]'s letter that she was being cautious about whether or not the [ABC] was an accurate report, and cautious about where any criticism might lie. Reading and re-reading Ms [VL]'s letter, I am left with the impression that her letter was more of a general suggestion about the way the [redacted] would like to see [redacted] framed, than an attack of any kind on anyone, including Mr [YB]. The parenthesis in Ms [VL]'s letter suggests her observations on the comments the [ABC] had attributed to Mr [YB] was an example to highlight the general pattern [redacted] should, or should not, follow. The part of Ms [VL]'s reply to the complaint that says "the [redacted] response was directed at Mr [DE]'s article", [redacted] comments made by Mr [YB] QC, about the [redacted] is consistent with her letter.

[63] That Ms [VL] may have intended her letter to have a normative effect is consistent with the le[redacted] role played by [redacted] such as [redacted]

[64] That view is also supported by the [ABC]'s selection of the excerpts of her letter that it reported. For whatever reason, the report omits reference to the first paragraph of Ms [VL]'s letter. There is no reason to believe Ms [VL] exercised any

control over how her letter was reported. She may have preferred it to be published in its entirety, but that was not her decision to make.

[redacted] I therefore disagree with the proposition that Ms [VL]'s letter is not part of a [redacted] It suggests a normative framework for such [redacted]

[66] At the review hearing Mr [UK] elaborated on the suggestion that Ms [VL]'s letter should be seen as an attack in its own right, and that it can be inferred from the timing of her letter that she was "piling on" attacks by other lawyers. The "piling on" suggestion is entirely speculative. Ms [VL]'s letter could equally be seen as taking prompt measures to show some leadership in the framing of public debate. The "piling on" argument lacks any apparent merit.

[67] Mr [UK]'s observation was that Ms [VL] had gone too far both in the words she used, and by subjecting Mr [YB] to personal attacks, whatever her purpose. As discussed, Ms [VL]'s letter does not sit comfortably with the notion of a personal attack on Mr [YB] in the language she deploys and the circumspect way in which the letter is written. Although Ms [VL] says she provided a copy of her letter to Mr [YB], it is not apparent that her comments are primarily directed at him. Mr [UK] says he is not aware of Mr [YB] having expressed any concern over any of the comments that had appeared in the media, but rather that he appeared to welcome the [redacted]. The arguments around personal attack are not well supported.

[68] Nonetheless, Mr [UK] appears to rely on Ms [VL]'s conduct being analogous to the conduct that was the subject of charges to the Tribunal in *Hong*,[14] a case involving one practitioner directing threats and insults towards others.

[69] I have serious reservations about whether any meaningful comparison can be made between Ms [VL]'s letter to the editor of the [ABC], and the conduct that brought Mr Hong before the Tribunal on misconduct charges. The charges against Mr Hong arose from the manner of his expression "which included a number of threats and insults" in an exchange of heated correspondence between 5 May and 15 September 2010, and a submission to this Office dated 24 May 2012.

[70] Mr Hong's statements arose in connection with the provision of legal services and covered a range, including making personal threats against opposing barristers in civil litigation; accusing a fellow practitioner of character assassination, making a thinly veiled threat about how he would deal with that later, and making allegations of

[14] Legal Complaints Review Officer v Hong [2015] NZLCDT 27.

incompetence and inappropriate comments carrying a threatening tone. Mr Hong then accused the junior barristers of "blatant errors, incompetence in the field of law, improper motivation in complaining about him, using such derogatory terms as "half fledged lawyers" and "amateurs"".[15] He threatened to approach the junior barristers' client directly to "advise them of their rights to have another senior counsel look into addressing" concerns with NZLS.[16] He then offered to assist the junior barristers and declined to "deal with Mr Deliu who he described as "a pure waste of [his] time".[17]

[71] Mr Hong's suggestions then escalated as described at [47] of the decision, including inviting Mr Deliu to enter into a wager over fees, Mr Deliu having made "provocative comments". Mr Hong's correspondence in response is described as having "thoroughly demonstrated his discourtesy and disrespect" for Mr Deliu,[18] including "referring to him as holding racist inclinations", and being "mentally unstable". The Tribunal noted that "legal practice is stressful and personal attacks are difficult to cope with but cannot justify a practitioner departing so far from the professional standards to which he has agreed, and must be held to".[19] The expectation of lawyers, "in the face of such provocation, to act with dignified restraint"[20] was mentioned.

[72] No sensible analogy can be drawn between Mr Hong's conduct and Ms [VL]'s.

[73] Mr [UK] also argues that the timing of Ms [VL]'s letter shows a direct causal link to publication of the article, or to put it another way, the article was caused by her letter. The article also includes reference to comments and articles by others in addition to Ms [VL]. No more can be taken from the timing than that Ms [VL]'s comments were promptly made. The argument that there is a causal link lacks evidential support and logical force.

[74] Mr [UK] also argues that Ms [VL]'s conduct may be viewed as less serious, or at least that she may have some justification for not making a confidential report under rule 2.8, because after reading comments made publicly by other lawyers, she would have had reason to believe another lawyer would be likely to have made a confidential report. This argument relies on the proposition that Ms [VL] was under an obligation to make a confidential report. If it were relevant at all, as Mr [UK] says, it could be relevant only to penalty. As this decision concludes that Ms [VL] was under no such obligation, no further comment on this line of argument is necessary at this point,

[15] At [41].
[16] At [42].
[17] At [44].
[18] At [52].
[19] At [59].
[20] At [52].

although the question of whether Ms [VL]'s conduct contravened rule 2.8 is addressed in the Analysis section below.

Sixth Review Ground

[75] Mr [UK] says the Committee gave no coherent reasons why the complaint was vexatious. He says it can be inferred from a lack of explicit reasoning, definition or analysis that the conclusion is arbitrary.

[76] Mr [UK] produced a definition of the word "vexatious" from Black's Law Dictionary and says that it is open to this Office to revisit that aspect of the decision.

[77] Mr [UK] also says the Committee did not explain how it reached the conclusion that he had misused the complaints process. He considers that comment was gratuitous.

[78] Mr [UK] bases his objection on there having been a factual basis to say that Mr [YB] had been insulted, and a legal basis on which to say that lawyers should not insult their colleagues.

[79] Mr [UK] considers the Committee's conclusion can only be proper if it can be accommodated within the framework of a complaint being vexatious, pursuant to s 138(1)(c), or as a general ground under s 138(2).

[80] The Committee generally set out the circumstances it considered relevant to determining the complaint. It can be readily inferred from [21] that the Committee was unable to identify anything in the complaint and other information that could merit a finding adverse to Ms [VL]. The Committee's explanation of how it reached the view that the complaint was misconceived is set out at [11] to [15] of the decision. Those circumstances extended to the fact that she was the [redacted] of the [redacted] that appears to have been the only reason that she wrote to the editor, and that, in turn, appears to be the only reason she was exposed to the risk of complaint.

[81] This review ground is addressed in greater detail in the Analysis section below.

Outcome sought on review

[82] Mr [UK] seeks one of two possible outcomes from this review: either a proper sanction be imposed on Ms [VL] or to have the matter considered by a differently constituted Standards Committee.

[83] The second alternative is a request that I exercise my discretion to direct a Standards Committee to reconsider and determine the whole or part of the complaint pursuant to s 209 of the Act. After considering all of the material available on review, there are no grounds on which a finding could be made that Ms [VL]'s conduct was misconduct or unsatisfactory conduct. No purpose could properly be served by the making of a direction pursuant to s 209, so no such direction can properly be made.

[84] As to the first option, consequential orders can only be imposed after a determination of misconduct or unsatisfactory conduct is made. For the reasons discussed in the Analysis section below, this review does not result in any such determination.

[85] Mr [UK] submits that whether Ms [VL]'s comments fall below a proper professional standard calls for a subjective evaluation of "what [I] believe to be the case, or not". If there were some reason to believe that Ms [VL]'s conduct was borderline unsatisfactory conduct, or could be misconduct, there may be some merit to that submission. As there is no such reason, and Ms [VL]'s conduct does not fall anywhere close to borderline, the argument fails.

Review issues

[86] The primary question that arises from complaint being made is whether Ms [VL]'s conduct falls within the definitions of misconduct or unsatisfactory conduct contained in ss 7 and 12 of the Act. As s 5 of the Interpretation Act 1999 says, if there is uncertainty, the matters that may be considered in ascertaining the meaning of the Act include the indications provided in the enactment. The meaning of the definitions in the Act must be ascertained from the Act's text and in the light of its purpose.

[87] The balance of the review grounds are disposed of in considering the two review issues:

(1) Whether Ms [VL]'s conduct could fall within the definition of misconduct or unsatisfactory conduct under ss 7 or 12 of the Act; and

(2) Whether the complaint is vexatious, in the context of a decision to take no further action on it under s 138(1)(c) of the Act.

[88] Those exercises having been undertaken, the Committee's decision to take no further action under ss 138(2)and 138(1)(c) is confirmed on review.

Analysis

Could Ms [VL]'s conduct fall within the definition of misconduct or unsatisfactory conduct under ss 7 or 12 of the Act?

[89] As mentioned above, this review considers alleged contraventions of three practice rules made under the Act. Contravention of practice rules falls within the definitions of misconduct and unsatisfactory conduct by a lawyer under the Act. As mentioned above, consideration of those definitions is to be undertaken in light of the Act's purposes, which are:

> (a) to maintain public confidence in the provision of legal services and conveyancing services:
>
> (b) to protect the consumers of legal services and conveyancing services:
>
> (c) to recognise the status of the legal profession and to establish the new profession of conveyancing practitioner.

Professional obligations

[90] Ms [VL] relies on her comments having been made in her role as the [redacted] of the [redacted] If Ms [VL] had not been [redacted] of the [redacted] at the relevant time, she might not have written to the [ABC]. However, she was, she did, and every lawyer is personally responsible for complying with the rules. I do not discount the prospect that a lawyer [redacted] could well be a relevant factor to consider in relation to the context within which this conduct occurred, and therefore to a determination of whether particular conduct falls within the definitions of misconduct and unsatisfactory conduct under the Act.

[91] As Ms [VL] is a lawyer, her conduct is regulated pursuant to the Act and the regulations and rules made under it. There is no gap between personal and professional conduct by lawyers.[21] Although it is part of the context within which the letter was written, the fact that Ms [VL] wrote in her role as [redacted] of the [redacted] does not exclude the operation of the Act and rules made under it where those apply to her conduct.

[92] It is relevant to note that the emphasis of the original complaint was firmly on the alleged contravention of rule 2.8 and then possibly on contraventions of rules 2 and 10. That emphasis shifted in the complaint process with Mr [UK]'s email of 15 March 2013. This is where Mr [UK] said that, having seen Ms [VL]'s letter of 2 September 2013 he accepted "its terms were temperate", and, in relation to his complaint, that he

[21] *Orlov v New Zealand Lawyers and Conveyancers Disciplinary Tribunal* [2014] NZHC 1987, [2015] 2 NZLR 606 at [102].

considered the issues that remained for the Committee to consider were "why Ms [VL] did not report Dr [YB]'s prima facie misconduct?", and "why she instead chose to publicly criticise him and are either the omission or action an ethical breach?".

[93] Given the early emphasis on the alleged contravention of rule 2.8 and the apparent shift away from complaint about possible contraventions of rules 2 and 10, it is not difficult to understand why the Committee focussed on rule 2.8, and gave lesser consideration to the suggestion that rules 2 or 10 might possibly have been contravened.

[94] The application for review also began with a firm emphasis on rule 2.8, which continued until part way through the review hearing. After discussing logical and evidential difficulties with that aspect of the complaint, Mr [UK] shifted his emphasis back to alleged contraventions of rules 2 and 10.

[95] Given no other conduct issues have emerged, and the shifting sands beneath the complaint and review grounds, I have considered the conduct in the context of the three rules mentioned in the complaint: rules 2, 2.8 and 10. The review is determined with reference to the definitions of misconduct and unsatisfactory conduct set out in ss 7 and 12, the meaning of which is ascertained in light of the purposes of the Act.

Misconduct or unsatisfactory conduct – ss 7 and 12

[96] The Act provides for determinations to be made in relation to lawyers' conduct. The analysis to be undertaken in determining whether conduct may be misconduct or unsatisfactory conduct as the complaint alleges involves a series of interrogations under ss 7 and 12, which relevantly say:

> **7 Misconduct defined in relation to lawyer and incorporated law firm**
>
> (1) In this Act, **misconduct**, in relation to a lawyer or an incorporated law firm,—
>
> (a) means conduct of the lawyer ... that occurs at a time when ... she ... is providing regulated services ...
>
> (b) includes—
>
> (i) ...
>
> (ii) conduct of the lawyer ... which is unconnected with the provision of regulated services by the lawyer ... but which would justify a finding that the lawyer ... is not a fit and proper person or is otherwise unsuited to engage in practice as a lawyer ...

> **12 Unsatisfactory conduct defined in relation to lawyers and incorporated law firms**
>
> In this Act, **unsatisfactory conduct**, in relation to a lawyer or an incorporated law firm, means—
>
> (a) conduct of the lawyer ... that occurs at a time when ... he or she ... is providing regulated services ...
>
> (b) conduct of the lawyer ... that occurs at a time when ... he or she ... is providing regulated services ...
>
> (c) conduct consisting of a contravention of this Act, or of any ... practice rules made under this Act that apply to the lawyer ...

[97] In the present circumstances, the first question is whether Ms [VL] was providing regulated services as defined by the Act at the time of the conduct.

[98] If the answer to the first question were to be yes, ss 7(1)(a), (b)(i), 12(a) and (b) may apply. With the exception of s 7(b)(ii), the balance of s 7 is not relevant to the present exercise.

[99] If the answer to the first question is no, ss 7(1)(b)(ii) and 12(c) may apply.

Was Ms [VL] providing "regulated services"?

[100] Ascertaining whether Ms [VL] was providing regulated services involves consideration of a series of definitions in the Act, relevantly, whether she was providing legal services, which in turn are defined as meaning "services that a person provides by carrying out legal work for any other person".

[101] On a common sense basis, Ms [VL] was not carrying out legal work for any other person. She was carrying out her functions in her role as [redacted] However, as the Act also defines legal work, that interim conclusion can be checked against the definition of legal work:

> **legal work** includes—
>
> (a) the reserved areas of work:
>
> (b) advice in relation to any legal or equitable rights or obligations:
>
> (c) the preparation or review of any document that—
>
> (i) creates, or provides evidence of, legal or equitable rights or obligations; or
>
> (ii) creates, varies, transfers, extinguishes, mortgages, or charges any legal or equitable title in any property:
>
> (d) mediation, conciliation, or arbitration services:

> (e) any work that is incidental to any of the work described in paragraphs (a) to (d).

[102] None of the elements of the definition of legal work apply to Ms [VL]'s letter to the editor of the [ABC] as [redacted]

[103] I therefore conclude Ms [VL] was not providing regulated services as defined under the Act.

[104] As the answer to the first question is no, the operation of ss 7(1)(a), (b)(i), 12(a) and (b) is excluded. The next step is to consider whether ss 7(1)(b)(ii) or 12(c) may apply.

Section 7(1)(b)(ii)

[105] Section 7(1)(b)(ii) contains two distinct criteria. One, the conduct in question is unconnected with the provision of regulated services by the lawyer. Two, the conduct would justify a finding that the lawyer is not a fit and proper person or is otherwise unsuited to engage in practice as a lawyer. The first criterion incorporates into the regulatory regime conduct by lawyers outside their professional lives, so that, as mentioned earlier, there is no gap between professional and personal conduct.[22] However, to fall within the regulatory regime of s 7(1)(b)(ii), both criteria must be capable of being met.

[106] The second criterion involves consideration of whether the conduct would justify a finding that the lawyer is not a fit and proper person or is otherwise unsuited to engage in practice as a lawyer. The use of the word "would", rather than, for example, could or may, signals a high level of certainty is called for when carrying out the second part of the assessment in relation to conduct unconnected with the provision of regulated services by the lawyer.

[107] With respect to personal misconduct under s 7(1)(b)(ii), the High Court said in *Orlov* it:[23]

> … involves moral obloquy. It is conduct unconnected to being a lawyer which nevertheless by its nature, despite being unrelated to the practitioner's job is so inconsistent with the standards required of membership of the profession that it requires a conclusion that the practitioner is no longer a fit and proper person to practice law.

[22] Above n 21 at [102].
[23] At [106].

[108] There is no evidence to support conclusion that Ms [VL]'s conduct could justify a finding that she is not a fit and proper person or is otherwise unsuited to engage in practice as a lawyer. The conduct does not begin to approach the level of certainty required for a finding that her conduct would fall within the definition in s 7. There is no basis on which Ms [VL]'s conduct could, let alone would, engage the second criterion. Consequently, the operation of s 7(1)(b)(ii) can be excluded without engaging in debate over the first criterion, which leaves only s 12(c).

Section 12(c)

[109] Having excluded the operation of ss 7, 12(a) and (b), the only remaining question is whether Ms [VL]'s conduct falls within the provisions of s 12(c) of the Act. That analysis is also carried out with the Act's purposes in mind.

[110] The complaint alleged that Ms [VL]'s conduct contravened rule 2.8, and possibly rules 2 and 10, all of which are practice rules made under the Act. Those alleged contraventions are addressed below in the order in which the rules appear.

Rule 2

[111] Rule 2 says:

> 2 A lawyer is obliged to uphold the rule of law and to facilitate the administration of justice.

[112] The basis of this aspect of the complaint was that Ms [VL] had possibly contravened rule 2 by "bickering publicly in the media". On review, Mr [UK] suggested that Ms [VL] (and the [redacted] were "piling on" with others who were publicly criticising Mr [YB].[24] Mr [UK] said it could be inferred from the timing of Ms [VL]'s letter that she (and [redacted]), were joining an improper attack on Mr [YB], and that her "letter does result in the [redacted]

[113] As discussed above, the piling on and causation arguments are unsupported. No improper inference can be drawn from the timing of Ms [VL]'s letter.

[114] Definitions of "bickering" include to "argue over petty matters; squabble",[25] "argue over things that are not important", "argue over unimportant matters",[26] or "petulant quarrelling".[27]

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[24] [UK], review hearing.
[25] http://www.collinsdictionary.com/dictionary/english/bicker.
[26] http://dictionary.cambridge.org/dictionary/english/bicker.

[115] There is no basis on which to suggest the single letter, written to the editor, in circumstances [redacted] in the circumspect terms Ms [VL] used, could be described as "bickering".

[116] There is no basis on which further action in relation to the possibility that Ms [VL] may have contravened rule 2 is necessary or appropriate.

[117] Pursuant to s 211(1)(a), the decision that further action in relation to the part of the complaint that alleges a contravention of rule 2 is not necessary or appropriate pursuant to s 138(2) of the Act is confirmed.

Rule 2.8

[118] This aspect of the complaint relies on the proposition that Ms [VL] was under an obligation to make a confidential report pursuant to rule 2.8.

[119] There is a process to be gone through before a lawyer makes confidential report under rules 2.8 or 2.9. The first step rule 2.8 calls for is for the reporting lawyer, by whatever means, to acquire some knowledge. In some cases, that lawyer may acquire knowledge as a result of a duty to be informed,[28] but not in others. Step two: does the knowledge acquired raise a suspicion of misconduct? At this point, a prudent lawyer may well check the Act to see what ss 7 and 12 say, look to the rules for guidance, consider legal authorities, perhaps seek advice and perhaps consider making further inquiry. Step three would involve varying levels of analysis and decision-making depending on what was known or could be found out about the conduct, so that the reporting lawyer can be satisfied that the suspicion raised is based on reasonable grounds.

[120] There may or may not be an easy answer. However, a structured process has a number of advantages. By thinking it through, a reporting lawyer may recognise a range of potential issues and consequences; other lawyers may be spared the inconvenience of having to address groundless complaints; the resources of the regulatory processes may not be diverted into addressing complaints and reports made on the basis of suspicions for which no reasonable ground exists. Some other good reason for making or not making a confidential report might become apparent.

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[27] http://www.merriam-webster.com/dictionary/bicker.

[28] For example, partners in a firm with shared responsibility for the proper operation of a trust account.

[121] In thinking it through, whether a report is made should be guided by the purposes of the Act. A careful thought process is consistent with the fact that complaints and mandatory reports form part of a lawyer's professional record, whatever the outcome. Complaints and confidential reports should not be lightly made, and call for a careful exercise of professional judgement when made by lawyers.

[122] Ms [VL]'s response is based on her being responsible for conveying the views, rather than her personal views. In a sense that is skirting the issue: [redacted] is an [redacted] not a lawyer bound by rule 2.8 as Ms [VL] is. It has no role in the reporting processes envisaged by rules 2.8 and 2.9. Those are for lawyers. However, Ms [VL]'s response is consistent with her conduct, and to a great extent reflects the evidential and logical weaknesses inherent in the complaint. No cogent reason has been put forward for pursuing further enquiry of Ms [VL]. There is no comparison to be made between Ms [VL]'s conduct and that of the practitioner in *Hart*.[29]

[123] There is no good reason to support the view that further action is necessary or appropriate in relation to the complaint that Ms [VL]'s conduct contravened rule 2.8.

[124] Pursuant to s 211(1)(a), the decision that further action in relation to the part of the complaint that alleges a contravention of rule 2.8 is not necessary or appropriate pursuant to s 138(2) of the Act is confirmed.

Rule 10

[125] The complaint alleges a possible contravention of r 10, which says:

> 10 A lawyer must promote and maintain proper standards of professionalism in the lawyer's dealings.

[126] The Committee did not consider Ms [VL]'s conduct fell below a proper standard. While I am aware that the Committee is comprised of a lay person and lawyers, and therefore well placed to form a balanced collective view on whether standards of professionalism in a lawyer's dealings are proper or not, the Committee's collective view is one of many factors in an independent review by this Office. I note, however, that it is appropriate for me to exercise "some particular caution" before substituting my own judgment for the collective judgment of the Committee, without good reason.[30]

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[29] *Hart v Auckland Standards Committee 1 of New Zealand Law Society* [2013] NZHC 83, [2013] 3 NZLR 103.
[30] Above n 2.

[127] At the review hearing Mr [UK] submitted this aspect of the complaint could be determined by a comparison being made between Ms [VL]'s conduct and that of one or more of the other [redacted] lawyers subject of the complaint.

[128] Mr [UK] says Ms [VL]'s comments are more temperate than one of those lawyer's, and supports the argument with reference to the argument that Ms [VL] was "piling on" in an improper attack on Mr [YB]. I have disposed of the "piling on" submission above.

[129] It is also appropriate to note that Mr [UK] has provided no good reason to adopt a different view from that formed by the Committee. In the course of the Standards Committee process, he described Ms [VL]'s letter as "temperate". At the review hearing he said Ms [VL]'s language was "less harsh" and did "not go as far in terms of the venomous approach as" one of the other lawyers did.

[130] The approach adopted by the High Court in *Orlov*, which was not available to the Committee, was to attempt to identify whether Mr Orlov could point to any objective foundation, had made any attempt to provide a foundation or would be willing to explain his foundation to the Court. When weighing considerations around freedom of speech, context was important, "regard needs to be had to where it was said and what was said …".[31]

[131] Looked at in its context, the language of Ms [VL]'s letter to the editor, ie. what she said and where she said it, her language was unremarkable. The suggestion her letter was an attack is poorly founded. It is difficult to see how the word "venomous" might apply. There is nothing about the language of Ms [VL]'s letter, or the circumstances in which she wrote, that supports a finding that Ms [VL] failed to promote or maintain proper standards of professionalism in her dealings. There is nothing about Ms [VL]'s letter that is inconsistent with rule 10 or the purposes of the Act.

[132] There are no reliable grounds for a finding that Ms [VL] contravened rule 10. There is no basis on which further action in relation to the possibility that Ms [VL] may have contravened rule 10 is necessary or appropriate now, or was at the date of the decision.

[133] Pursuant to s 211(1)(a), the decision that further action in relation to the part of the complaint that alleges a contravention of rule 10 is not necessary or appropriate pursuant to s 138(2) of the Act is confirmed.

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[31] Above n 22, at [84].

Summary – could Ms [VL]'s conduct fall within the definition of misconduct or unsatisfactory conduct under ss 7 or 12 of the Act?

[134] In summary, in light of the purposes of the Act, with reference to the definitions of misconduct and unsatisfactory conduct, rules 2, 2.8 and 10, Ms [VL]'s conduct could not fall within the definition of misconduct under s 7 and does not fall within the definition of unsatisfactory conduct in s 12 of the Act. Further action on the complaint is not necessary or appropriate.

Is the complaint vexatious?

[135] The second review issue relates to the Committee's finding that the complaint is vexatious. That issue arises from the review ground that asserts "the standards committee gave no coherent reasons why the complaint was vexatious, much less why there was a misuse of the complaints process" in the context of the Committee's decision to take no further action on the complaint under s 138(1)(c) of the Act. Section 138(1)(c) says:

> (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, -
>
> …
>
> (c) the complaint is frivolous or vexatious or is not made in good faith;
> …

[136] The review ground refers to a lack of coherent reasons why the complaint was vexatious.

[137] The Committee identified four elements of the complaint that fed into its opinion that the complaint was vexatious:

(1) its circumstances;

(2) its misconception;

(3) its lack of merit; and

(4) Ms [VL]'s involvement with [redacted].

[138] Viewed in isolation from the rest of the decision, that is a concise explanation.

[139] The submission on review is that it can be inferred from a lack of explicit reasoning, definition or analysis that the conclusion is arbitrary.

[140] That premise could be correct if the Committee's reasoning could not be readily inferred from the decision.

[141] The decision that further action on the alleged contraventions of rules 2, 2.8 and 10 is not necessary or appropriate pursuant to s 138(2) of the Act has been confirmed on review. However, s 138(1)(c) specifically requires the Committee or this Office on review to form an opinion as a prerequisite to the exercise of the discretion to take no action, or no further action, pursuant to s 138(1)(c).

[142] The complaint against Ms [VL] is defended on the basis that there was:

(1) A factual basis on which to say Mr [YB] had been insulted; and

(2) A legal basis on which to say that lawyers should not insult their colleagues.

[143] The latter is correct. As to the former, the only factual basis for the assertion was fragile.

[144] A complex analysis of the merits of the complaint is not necessary. Putting to one side the logical difficulties involved in a complaint that alleges a failure to make a complaint based on an obligation that may or may not have been engaged, it is not necessary to proceed far down the path towards consideration of the evidential merits of the complaint under review to identify a significant evidential deficit.

[145] When the complaint was made, there was no direct evidence that Ms [VL] (or any of the other [redacted] lawyers about whom complaint was made) had contravened rule 2.8. The suggestion that rules 2 or 10 might perhaps also have been contravened was based on the same fragile foundation.

[146] At the review hearing, Mr [UK] gave evidence that he made no attempt to obtain any other evidence before laying complaint.

[147] The nub of Mr [UK]'s objection is his view that the Committee's decision does not set out its reasoning process, so he does not know how the Committee has come to the conclusion that the complaint was vexatious.

[148] As mentioned above, the general thrust of the Committee's reasoning can be discerned from the decision, although as Mr [UK] correctly points out, the Committee

did not define what it meant by "vexatious". He also says that the Committee did not provide any analysis and did not say whether it was considering "a legal term".

[149] Mr [UK] referred to, and subsequently provided, the following definition from Black's Law Dictionary to facilitate the formation of an opinion on s 138(1)(c):

> **vexatious**… adj. (16c) (Of conduct) without reasonable or probable cause or excuse; harassing; annoying.

[150] In his submissions at the review hearing Mr [UK] referred to, without identifying, a previous decision by this Office on the issue of vexatiousness. There have been a number of decisions in which this Office has considered, and in some circumstances confirmed, a Committee's decision to take no further action pursuant to s 138(1)(c).

[151] Consideration is being given to a word that appears in s 138(1)(c) of the Act. If there were uncertainty over its meaning, the usual principles of statutory interpretation, some of which are mentioned earlier, would apply. Looking at the words in their immediate statutory context is another approach to interpretation. Section 138(1)(c) also enables a Committee to take no further action where a Committee forms an opinion that a complaint is "frivolous" or "not made in good faith". Those concepts are rooted in protecting legal processes and the parties to them from abuse.

[152] Some words cannot, and should not, have their meaning constrained by intricate or exhaustive definition. The seemingly limitless ways in which abuses can occur appears to be an obvious reason to treat the word "vexatious" in the context of s 138(1)(c) as such a word.

[153] Mr [UK] says the meaning of "vexatious" cannot be arbitrarily placed. I agree that meaning should not be placed in an unrestrained, unreasoned or autocratic way. However, it is not apparent that is what the Committee has done. The decision says the Committee formed the view the complaint was vexatious based on its circumstances, it being misconceived, lacking merit, and because of Ms [VL]'s involvement with [redacted] In the context of the decision, those bases for the finding suggest it is not arbitrary.

[154] However, Mr [UK] says, this Office could decide on the basis of some sort of definition, within a "framework as to what vexatious means", that a complaint is vexatious. An explanation of how the conclusion is reached, he says, would be one way of approaching the question. He adds that if the Committee did not approach the question through an analytical reasoning process, that would be a problem.

[155] Committees are not expected to set out the minutiae of their reasoning process. Such an expectation would not sit well with the legislative thrust for the expeditious resolution of complaints. As with the process of review, the statutory framework for Committee processes, including decisions reporting their outcomes is informal, inquisitorial and robust. There is no expectation that Committee decisions should be composed with the degree of analysis and explicit reasoning that might be expected elsewhere. However, reference to other LCRO decisions addressing s 138(2)(c) is helpful.

LP v VS

[156] In *LP v VS* 170/2011[32] the LCRO referred to the "generally understood meaning" of "vexatious" that he presumed the Committee was applying in determining the complaint under review in that matter pursuant to s 138(1)(c). The LCRO mentioned a definition from the Shorter Oxford English Dictionary:[33]

> 1. Causing or tending to cause vexatious, annoyance or distress; annoying, troublesome. 2. (Law) Of an action: instituted without sufficient grounds for winning purely to cause trouble or annoyance to the defendant.

[157] The LCRO referred to "the complaints lack of merit" which was "shown by the Committee's specific findings", with which the LCRO agreed, was satisfied that the complaints were vexatious as defined, and that the Committee's decision to take no further action was justified on that basis.[34]

JK v OC

[158] In *JK v OC*[35] a lay complainant was ordered to pay costs on review because he had not explained the basis for his application, and had perpetuated substantially the same complaint against the same lawyer repeatedly over a lengthy period, in circumstances where the substance had previously been addressed. The complainant's conduct in that complaint and review process was considered to be at a level that warranted the unusual step of a costs order being made against him.

Summary

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[32] *LP v VS* LCRO 170/2011.
[33] *LP v VS* LCRO 170/2011 at [30].
[34] At [36].
[35] *JK v OC* LCRO 185/2013.

[159] Taking the comments in the decisions referred to above into account, when considering whether a complaint is "vexatious" in the context of s 138(1)(c), it is helpful to consider whether the complaint:

(1) Causes or tends to cause vexation, annoyance or distress.

(2) Is annoying or troublesome.

(3) Is made without sufficient grounds for an adverse outcome to be made against the respondent lawyer, purely to cause trouble or annoyance.

(4) Lacks merit.

[160] It has been observed that: [36]

> … a vexatious complaint may be made by a person who mistakenly thinks that it has a good prospect of being upheld and it may be brought for a proper, if misplaced, motive.

[161] Whether a complainant intends a complaint to be vexatious is irrelevant. It is an assessment to be objectively made.

[162] The starting point is the complaint and evidence provided in support of it. Mr [UK] says it is necessary to analyse the factual basis for the complaint to see whether it has reasonable or probable cause or excuse. On the framework Mr [UK] relies on, no evidence would equate to no possible cause. Some evidence could reach the tipping point of probable cause. However, framed, that calls for an assessment of possibilities and probabilities.

[163] The only evidence provided in support of the complaint about all [redacted] lawyers was [redacted] report that was approaching [redacted]. There was no first hand evidence of any conduct by Ms [VL]. Everything else was reportage or conjecture. On any objective assessment, the [redacted] report does not reach the tipping point between no possible cause and probable cause. The complaint had a fragile foundation.

[164] It is difficult to see how an ageing [redacted] report and an assumption based on a logical shortfall could properly be described as a reasonable basis for a complaint about a failure to make a complaint.

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[36] *XX v UW* LCRO 185/2014 at [18].

[165] The fall back position, that the complaint was not limited to rule 2.8 at the outset, suffers from the same evidential difficulties. The complaint cannot be saved by its ambulatory scattergun approach.

[166] Mr [UK] says that the factual foundation was undisputed, namely that the lawyer in question had made comments about Mr [YB]. While Ms [VL] does not dispute that she wrote to the [redacted] or that some of her comments were published, Mr [UK] did not know that at the time he made the complaint. As he says, he made no enquiry. In the circumstances, the fact that those aspects of the factual foundation are undisputed is irrelevant to whether the complaint as made was vexatious.

[167] Mr [UK] had nothing else beyond the [redacted] report to tender as evidence. He said he assumed that as Ms [VL] had gone public, she would not also have made a confidential report. There is no sound logic to that assumption.

[168] The part of the article that mentioned Ms [VL] also mentioned that her comments were made in her [redacted]. Any obligation she felt she may have had to make a confidential report would have rested on her personally. The complaint overlooks the [redacted] that was apparent on the face of the [redacted] report. The invocation of the complaint process, which calls for the exchange of information between parties, also lacks consistency with whatever confidentiality rule 2.8 may provide.

[169] Moving to Mr [UK]'s email of 15 March 2013, he accepted that Ms [VL]'s letter of [day month year] was written in temperate terms. At that point the focus shifted to questioning Ms [VL]'s motivations for not reporting Mr [YB] for "prima facie misconduct" and publicly criticising him instead, to whether either omission or action was an ethical breach. That line of enquiry was unrelated to any of the complaints alleged pursuant to rules 2.8, 2 or 10. Those relate to conduct. They do not require speculation about, or inquiry into, motivation.

[170] On balance, it is more likely than not that the fragile evidential basis, unjustifiable allegations and drawing Ms [VL] into a complaint process only because her comments had been reported [redacted] earlier would cause or tend to cause vexation, annoyance or distress to her as the recipient of complaint. Having to respond to allegations of unsatisfactory conduct or misconduct made on such a fragile evidential basis is likely to be annoying or troublesome. The evidential grounds were, on any objective assessment, insufficient to support an adverse outcome for Ms [VL]. Only Mr [UK] knows for sure whether his complaint was made purely to cause Ms [VL] trouble or annoyance or for some other reason, but objectively it is difficult to see merit in it.

[171] Mr [UK] also says the Committee did not explain how it reached the conclusion that he had misused the complaints process. He considers that comment was gratuitous. I am not convinced he is correct. A vexatious complaint is a misuse of the complaints process.

[172] Having independently reached the same conclusion as the Committee, that the complaint is vexatious, the decision to take no further action on the complaint pursuant to s 138(1)(c) is also confirmed.

Costs

[173] The LCRO has a wide discretion to make orders for costs pursuant to s 210 of the Act, and the LCRO's Costs Orders Guidelines. Consideration has yet to be given to the full range of costs orders available.

[174] Mr [UK] has previously been notified that he is at risk of costs orders being made against him where he is responsible for unmeritorious complaints coming before this Office.[37]

[175] The parties are invited to provide submissions on costs by 16 September 2016

Outcome

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

DATED this 2nd day of September 2016

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 [UK] as the Applicant
Ms [VL] QC as the Respondent
The XX Standards Committee

[37] LCRO112/2013.

The New Zealand Law Society