LCRO 165/2013

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the [XX] Standards Committee
BETWEEN	**UC** Applicant
AND	**YW** Respondent

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

DECISION

Introduction and background

[1] This is an application by Mr UC for a review of a decision of the [XX] Standards Committee dated 3 May 2013. In that decision the Standards Committee resolved to take no further action against Mr YW in connection with a complaint that Mr UC had made against him. The Standards Committee had also raised additional matters with Mr YW during the course of its investigation, and it resolved to take no further action on those matters as well.

[2] The Standards Committee based its decision upon s 138(2) of the Lawyers and Conveyancers Act 2006 (the Act), in that it considered that further action on any of the matters was unnecessary or inappropriate.

Facts

[3] The relevant facts are set out in the Standards Committee's decision.[1] In short, a former employee of Mr YW's successfully sued him in the [X] Court. Mr YW judicially reviewed that decision in the Court of Appeal, and that Court dismissed his review.[2] Following that Mr YW was interviewed by a reporter from the New Zealand Herald (Herald) and is reported to have said the following:[3]

- [Quotation]

Complaint and response

[4] Shortly after the online article appeared on the Herald's website, Mr UC emailed his complaint against Mr YW to the New Zealand Lawyers Complaints Service. Although he referred to other matters in his email, Mr UC said that his complaint was limited to the "possible scandalous comments made about our learned Judges because as an officer of the court [Mr UC has] an obligation to report possible misconduct".

[5] Mr UC indicated that the Standards Committee could consider raising an "own motion"[4] inquiry into the other matters he referred to in his emailed complaint.

[6] Mr YW's initial response to the complaint is set out in his correspondence to the Complaints Service dated 14 November 2012. He began by listing other cases in which he had been involved and which had left him feeling frustrated with the administration of justice in New Zealand, and then commented:

> If I was to complete a list of my experience of failings of the judicial and court process it would require a further 300 pages and include examples of blatant judicial dishonesty, … serious conflicts of interest, bullying of counsel, the covering up of serious misconduct and corruption of lawyers in the pay of the Crown, as well as crass judicial incompetence.

[7] Mr YW provided these examples, he said, to demonstrate that he does have "genuine opinions, beliefs and concerns of conscience about the conduct of the New Zealand courts and judiciary that has resulted in considerable disillusionment". He further said that he was "entitled to be disillusioned with an outmoded, dysfunctional and archaic justice system and culture to which only the very rich and very poor have access".

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[1] Standards Committee determination at [3]–[6].
[2] [Citation].
[3] [Citation].
[4] Lawyers and Conveyancers Act, s 130(c).

[8] Mr YW submitted that he was entitled to hold and express these opinions and beliefs and would continue to do so. He also said that he acknowledges "the outstanding contribution made to the administration of justice throughout New Zealand on a day to day basis by lawyers, judges, courts and tribunals". He further acknowledged the privileged position he enjoys as a lawyer to participate in the administration of justice, and that he was "cognisant of the need to maintain public confidence in the administration of justice".

[9] In a further email to the Complaints Service dated 16 November Mr UC forwarded a copy of the Court of Appeal judgment that Mr YW had criticised in the Herald interview, and indicated that the Standards Committee "may wish to consider" passages of it in which Mr YW's criticisms of the lower Court are set out.

[10] Mr UC was provided with a copy of Mr YW's 14 November response, and in an email dated 20 November he added to his initial complaint by identifying passages from Mr YW's response as amounting to "very serious misconduct". The particular passages complained about are set out at [6] and [7] above; a further comment by Mr YW that he no longer believed that the current justice system is appropriate or relevant, was also seen by Mr UC as warranting investigation by the Standards Committee.

[XX] Standards Committee - Wider scope of investigation

[11] The Standards Committee met on 12 December 2012 to consider Mr UC's complaint and resolved to inquire into it.[5] In addition, the Committee invited comment from Mr YW on the following three further issues:

- The [X] Court's comments about Mr YW's accounting practices, receipting of fees and his employment agreement with his former employee.
- Remuneration arrangements of his employee which involved a share of net fees, when the employee was not otherwise entitled to practise on her own account.
- The comments in his 14 November 2012 response to the complaint, when he made allegations of judicial dishonesty, and incompetence and

[5] Confined to Mr YW's criticism of the courts and judges in the Herald article, and his additional criticisms and comments in his 14 November response to the complaint.

corruption amongst lawyers, and how those comments relate to his duties as an officer of the Court pursuant to s 4 of the Act.

Mr YW's response to the Standards Committee

[12] In correspondence dated 8 February 2013 Mr YW responded in detail to the additional matters raised by the Standards Committee. As part of that response he provided a copy of his judicial review application to the Court of Appeal and a substantial supporting affidavit.

[13] Mr YW said that his legal practice "maintained full and accurate accounts of its income and expenditure". Evidence presented to the [X] Court by the firm's accountant corroborated this, said Mr YW.

[14] In relation to the question of remuneration arrangements with his employee, Mr YW explained that he had viewed her as an independent contractor (something that the [X] Court rejected); thus she was paid on the basis of GST invoices that she issued. He asserted that he was not aware that the employee was not at the time qualified to practise on her own account.

[15] In the course of this response Mr YW levelled further criticism at the [X] Court Judge,[6] as well as other judges in cases he had been involved in ("dishonest" in the case of one Judge and "bullying and intimidating" in the case of another). Mr YW indicated however that complaints against those judges to the Judicial Conduct Commissioner had been dismissed; for this the Commissioner was criticised by Mr YW as being "ineffective".

[16] Two counsel in another case were also singled out for criticism.

[17] Mr YW indicated that he intended to publish these examples and views in a book he was writing.

[6] [Quotation].

Mr UC's response

[18] Mr UC was provided with a copy of Mr YW's letter to the Standards Committee, and he responded by pointing out the serious allegations that had been made against three judges, and noted that this "may very well amount to serious misconduct".[7]

[19] Armed with this substantial body of material the Standards Committee considered the complaint, the response, the matters it had raised in its 12 December 2012 letter to Mr YW and the responses to that received, when it met in March 2013.

[20] The Standards Committee conducted its hearing on the papers, and decided to take no further action on the various issues of complaint (including the matters it had raised) pursuant to s 138(2) of the Act. Section 137 of the Act allows a Standards Committee to take no further action on a complaint pursuant to s 138 of the Act, as an alternative to inquiring into a complaint. A Standards Committee may dismiss a complaint at the early pre-inquiry stage if having regard to all the circumstances of the case, it considers that further action is unnecessary or inappropriate.

Issues considered by the [XX] Standards Committee

[21] The Standards Committee identified and addressed the following issues in its decision:

- Does making public comments concerning judges and/or the administration of justice, warrant disciplinary consideration?
- When might such comments warrant disciplinary consideration?
- Did Mr YW's public comments warrant disciplinary consideration?
- Did Mr YW's comments in his correspondence with the Complaints Service warrant inquiry?[8]
- Administration issues – being accounting practices, receipt of fees and employment agreement and method of remunerating his employee.[9]

[7] Email UC to Complaints Service (20 February 2013).
[8] Letters from Mr YW to the Complaints Service (14 November 2012) and (8 February 2013).
[9] At [23].

Public comments

[22] Addressing the question whether public comments by lawyers about judges or the administration of justice warranted, in and of themselves, disciplinary action, the Committee held that they did not.

[23] The Committee went on to say that "unreasoned and/or intemperate comments may breach a lawyer's obligations" under the Act and the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (rules).[10] It gave as examples s 4(a) of the Act and rule 2 – both being concerned with upholding the rule of law and facilitating the administration of justice. The Committee held that whether comments were reasoned and temperate was to be adjudged "on the individual circumstances of each case".[11]

[24] The Committee expressed its concern at Mr YW's reported comments in the Herald article and indicated that it was "unwise" of him to have used expressions such as [quote]…".[12]

[25] However the Committee concluded that the "comments as a whole or in part did not reach the threshold that required further disciplinary consideration".[13]

Comments by Mr YW in correspondence with the Complaints Service

[26] Because Mr YW made these comments in the course of responding to a complaint against him, and were thus not "in the public domain", the Standards Committee determined that no disciplinary action should follow from them.[14]

[27] The Committee did however counsel Mr YW to carefully consider the language of the book he indicated he would be writing, setting out his experiences of the New Zealand justice and legal system.[15]

[10] At [16].
[11] At [16].
[12] At [18].
[13] At [19].
[14] At [20].
[15] At [21].

Administration issues

[28] The Standards Committee identified four points to support its view that no further action was necessary or appropriate in relation to the administration issues about which it had invited comment from Mr YW. Those points were:[16]

- The conduct had been considered and resolved "in the main" in the employment litigation.
- Neither the [X] Court nor the Court of Appeal had referred conduct issues to the Complaints Service; nor had the employee.
- The administration issues had all occurred between 2004 and 2006.
- Mr YW had been adequately admonished by the Court of Appeal.

[29] For those reasons the Committee determined that any further action was neither necessary nor appropriate.

[XX] Standards Committee's conclusions

[30] On all matters therefore the Standards Committee elected to take no further action, pursuant to s 138(2) of the Act.

Application for Review

[31] Mr UC filed an application to review the Committee's decision on 14 June 2013. Mr UC submits that:

- The Standards Committee failed to consider cases he had provided in which lawyers had been disciplined for "saying naughty words about Judges".
- The Committee failed to consider or even attach any weight to the inflammatory nature of Mr YW's responses to the complaint and the Committee's own queries.
- The Committee's reasons were inadequate.

[16] At [24].

- The distinction between public and private "utterances" begs the question of whether "naughty words" *per se* justified a disciplinary response.

- The [XX] Standards Committee is "biased and handpicked (by the NZLS)" and this is "contrary to random allocation".

[32] Mr YW provided a four-page response to the application for review, dated 15 August 2013. He included a substantial body of documents (pleadings and affidavits) that had been filed as part of both the judicial review and some collateral interlocutory proceedings.

[33] At the heart of Mr YW's response was his concern that the [X] Court was not subject to supervisory oversight by the High Court, and that because of limited appeal/review rights directly to the Court of Appeal, the opportunity to correct what he perceived to be gross errors in the [X] Court was severely restricted. Mr YW said that he made "no apology for [his] comments about the conduct of the [Judge] of the [X] Court" (referred to in an affidavit he provided to the Legal Complaints Review Officer (LCRO)) and said that he regarded that conduct "as a disgrace to the administration of justice". He went further and described findings made by the [X] Court as being "based upon a litany of dishonest fabrications by, and inventions, of the [Judge]".

[34] Mr YW also referred to the delays he had both experienced and noted in the [X] Court.

[35] Finally Mr YW referred to the comments he had made about the Court of Appeal and noted his "disappointment by the repeated failure of [that Court] to take a proactive role in ensuring that miscarriages of justice do not occur".

[36] Mr UC provided a response to Mr YW's application. He identified what he regarded as the core issue namely, whether Mr YW had used intemperate language and/or made improper allegations against the Bench. Mr UC's opinion was that the matters justified referral to the Lawyers and Conveyancers Disciplinary Tribunal. He cautioned against re-litigating the employment litigation.

[37] In a further email to the LCRO on 29 October 2013, Mr UC argued that Mr YW's culpability was far greater than that of the practitioner in *Orlov*[17] as he (Mr YW) had criticised more than one judge as well as an entire bench.

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

[38] Mr UC also referred to what he described as "racism" on the part of the Standards Committee in deciding to take no further action against Mr YW (whom he described as "an aboriginal Kiwi"), when it had done so in *Orlov* – that practitioner being, according to Mr UC, "a foreign immigrant". He urged the LCRO to reverse the Committee's finding in Mr YW's case and refer the matter to the Tribunal "to ensure there is no selective prosecution".

[39] Mr YW responded and described this as a "contrived allegation of racism against the [Standards Committee]".

Nature and Scope of Review

[40] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:[18]

> … 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.

[41] More recently, the High Court has described a review by this Office in the following way:[19]

> 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.

[42] 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:

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[18] *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]-[41].
[19] *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

(a) Consider all of the available material afresh, including the Committee's decision; and

(b) Provide an independent opinion based on those materials.

Review Hearing

[43] A review hearing was held on 13 October 2015. Mr UC attended in person and Mr YW by telephone.

Analysis

[44] The issues to be considered are:

(a) Do any conduct issues arise from the administration issues considered by the Committee?

(b) Did the public comments made by Mr YW concerning the judiciary and the administration of justice merit a disciplinary response?

(c) Do the comments made by Mr YW in responding to Mr UC's complaint merit a disciplinary response?

Administration Issues

[45] I note that Mr UC's review is restricted to the complaints that he made to the Complaints Service, all of which concerned comments made at various times by Mr YW about judges and courts. The issues that were raised by the Standards Committee – the so-called administration issues, and on which the Committee took no further action – are not the subject of review.

[46] Nevertheless I record that I considered the administration issues that were raised by the Committee, Mr YW's responses to those issues and the Committee's reasons for deciding to take those matters no further. Having done so I record that I agree with the Committee's reasoning in relation to those issues and do not propose to consider them any further.

Did the public comments made by Mr YW concerning the judiciary and the administration of justice merit a disciplinary sanction?

[47] I have had the benefit of hearing from both Mr UC and Mr YW in person, and of considering the submissions each made. I have also considered all of the material that was provided to the Standards Committee by both lawyers.

[48] What this case does raise is the tension between, on the one hand, freedom of expression and on the other hand statutory and rule-bound duties placed upon lawyers as officers of the court. Implicit in those provisions is an understanding that lawyers will conduct themselves with dignity and act with courtesy towards others.

[49] This review engages a consideration of the extent to which a practitioner can engage in public criticism of the courts, the justice system, and members of the judiciary, and the extent to which, if at all, a practitioner's right to freedom of expression may be fettered by the significant privilege which attracts to membership of the legal profession and the professional obligations which flow from that membership.

[50] Section 4 of the Act provides that every lawyer has an obligation to uphold the rule of law and to facilitate the administration of justice in New Zealand. The obligation is expressed as "fundamental".

[51] That obligation is reinforced by rule 2 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules), which provide that:

> (a) A lawyer is obliged to uphold the rule of law and to facilitate the administration of justice.
>
> (b) The overriding duty of a lawyer is as an officer of the court.

[52] Further, rule 13.2 provides that a lawyer must not act in a way that undermines the processes of the court or the dignity of the judiciary.

[53] Rule 10 provides that a lawyer must promote and maintain proper standards of professionalism in the lawyer's dealings.

[54] I agree with the Standards Committee that the fact that Mr YW made his initial comments in public does not in itself constitute a breach of the Act or the Rules. A blanket sanction on a practitioner's ability to comment on matters relating to the courts, the judiciary, or the justice system in general, would present as an oppressive intrusion into a practitioner's rights of freedom of speech.

[55] Mr YW's position can be succinctly summarised. He considers the comments made were accurate, and he had a right to say them. Whilst he has been long disgruntled with many aspects of the justice system, he acknowledges that a lawyer

occupies a privileged position, and says that he has a high regard for the New Zealand judiciary and an appreciation of the difficult work that courts do.

[56] In *Orlov v the New Zealand Lawyers and Conveyancers Disciplinary Tribunal*[20] the High Court, in considering an appeal which directly engaged discussion as to the extent to which a practitioner's right to freedom of expression may be tempered by professional obligations, noted that the right to freedom of expression, considered in the context of a lawyer facing allegation of having made disrespectful comments about a member of the judiciary, is a relevant consideration both in considering whether a conduct complaint is established, and in determining penalty.

[57] *Orlov* stands as authority for the proposition that where the breach of conduct consists only of speech, a reasonably robust approach is required, and that an unduly precious approach should not be adopted to a consideration as to whether critical comments made of a particular judge, may have undermined the dignity of the judiciary.[21]

[58] That being said, the Court observed that "there is absolutely no doubt that the protection afforded by freedom of expression is not absolute".[22] The Court noted that in *Orlov v New Zealand Law Society*, the Court of Appeal held:[23]

> … while complaints may be made against judicial officers, it is clear that disrespectful or scandalous allegations against a judge exercising judicial authority is an affront to the court and poses a risk to public confidence in the judicial system. Such excessive conduct does not qualify for protection under the right to freedom of expression. To hold otherwise would be to inhibit both the court's own disciplinary jurisdiction over lawyers appearing before it and its contempt jurisdiction.

[59] Of final assistance is the observation in *Orlov*, that a consideration as to whether a practitioner's comments have crossed the line or are simply reflective of a reasonable degree of robustness accorded all practitioners under the umbrella of a right to freedom of expression, is not a matter to be determined by reference to the articulation of a particular formula, but by applying the proposition to the facts.[24]

[60] Those obligations, described in s 4 of the Act as "fundamental", include the obligation to uphold the law and to facilitate the administration of justice. Those obligations are reinforced in the rules of professional conduct, where it is emphasised by specific conduct rules that lawyers must not act in a way that undermines the

[20] Above n 17.
[21] At [82].
[22] At [85].
[23] *Orlov v New Zealand Law Society* [2013] NZCA 230, [2013] 3 NZLR 562 at [122].
[24] At [82].

process of the court or the dignity of the judiciary (rule 13.1), and the obligation in rule 2 that has been previously referred to.

[61] The event that prompted Mr YW's comments to the newspaper, was the Court of Appeal's rejection of his application to judicially review a decision of the [X] Court which was adverse to Mr YW. It is fair to describe the [X] Court decision as very critical of Mr YW.

[62] The comments made (as reported) present as strongly critical of the Judge, particularly Mr YW's allegation that he had been discriminated against by the particular Judge, of whom he also makes complaint of manifest bias.

[63] What, however, persuades me that the Committee was correct in its decision to take no further steps on this aspect of the complaint, is the useful guidance provided by *Orlov*, where it was emphasised that a consideration as to whether a practitioner's comments are seen to be inappropriate, is not to be determined by reference to a particular formula, but by applying the proposition to the facts.

[64] Mr YW's comments, as reported in the Herald article, are provided from the context of him being invited to provide response to news of his unsuccessful appeal against a decision of the [X] Court which was critical of him.

[65] The comments he made to the reporter were, in essence, a summary of part of the submissions he had made to the Appeal Court. His allegation that he had been discriminated against on the grounds of age was at this point a matter of public record.

[66] Importantly, the article provides account of the Court of Appeal's consideration of Mr YW's argument that he had been unfairly treated, and provides explanation of the Court's reasoning in reaching conclusion that he had not been a victim of discrimination.

[67] The article reports elements of the [X] Court decision which were critical of Mr YW.

[68] Read in its totality, the article references matters of public record, and Mr YW's views of proceedings in which he was engaged, not simply in the role of a lawyer, but as the defendant in proceedings before the [X] Court, and as the applicant in proceedings before the Court of Appeal.

[69] Mr YW's engagement in his personal capacity in those proceedings does not absolve him of the responsibilities that attached to his position as a lawyer, but the

important and pivotal concern in cases such as these, being concern as to whether public confidence in judges or the courts has been potentially undermined by comments made by a practitioner, is addressed to a degree by the reporting of the circumstances in which the comments were made, and the explanation provided as to how the Court dealt with Mr YW's allegations.

[70] In my view, members of the public would, having read the reported comments of Mr YW, be well positioned to understand the context in which those comments arose, to form a view as to the degree of self interest engaged by the comments, and well placed to form a reasonable view as to the extent to which the comments had potential to undermine public confidence in the judiciary. I consider it unlikely that members of the public would reasonably jump to conclusion that the integrity of the courts and the judiciary was compromised as a result of the reporting of Mr YW's views.

[71] I agree with the Committee that Mr YW's comments were unfortunate, but I do not, on balance, consider that the comments in themselves merit a disciplinary response. Somewhat perversely, the "sting" of the comments is to some considerable extent diminished by the transparent degree of self interest that the comments reflect.

Do the comments made by Mr YW in responding to Mr UC's complaint merit a disciplinary response?

[72] It is important to note at the outset that complaint that Mr YW had made inappropriate comments in the course of responding to Mr UC's initial complaint, was treated as a separate complaint by the Committee, and Mr YW was given opportunity to respond to the separate complaint that he had engaged inappropriately with the Committee.

[73] Mr YW provided two responses to the Committee before it met to consider the complaints. The Committee confirms in its decision that it had considered all of the responses provided by the parties.

[74] In his first response, Mr YW:[25]

(a) Advised that he would require three hundred pages to adequately chronicle the examples he was able to provide of blatant judicial dishonesty.

[25] Letter YW to Complaints Service (14 November 2012).

(b) That account, if provided, would illustrate examples of serious conflicts of interest, concealment of instances of serious misconduct and corruption of lawyers in the pay of the Crown, and confirm instances of crass judicial incompetence.

[75] In his second response, Mr YW advised that:[26]

(a) A District Court Judge had been dishonest and had deliberately made a false file note on a court file.

(b) A High Court Judge had conducted a hearing in a belligerent and intimidating manner, with deliberate intent of obstructing counsel's ability to advance his client's case.

(c) Complaints to the office of the Judicial Conduct Commissioner had fallen on deaf ears, as the Commissioner considered his position to be focused solely on protecting the judiciary from complaints and criticism.

(d) An [X] Court Judge's conduct had fallen well below the standard to be expected of a Judge.

[76] The Committee concluded that it was unnecessary to take action on the comments made by Mr YW in the course of his correspondence with the Complaints Service, as the comments were made in a private domain. The Committee, in recording its decision to take no further action on the matter, records that it did not consider further action was necessary "for the present".[27] I do not propose to speculate on what the Committee's intention was in qualifying its decision in that fashion.

[77] The Committee addressed the appropriateness of Mr YW's responses, by considering whether, in responding in the manner he had, Mr YW had offended against his obligations to uphold the rule of law and to facilitate the administration of justice. That inquiry closely focused on examining whether the comments made had potential to undermine the judiciary.

[78] It is well established that lawyers have a duty to cooperate in the disciplinary process. In *Parlane v New Zealand Law Society*, it was noted that practitioners have

[26] Letter YW to Complaints Service (8 February 2013).
[27] Above n 1, at [20].

"a duty to act in a professional, candid and straightforward way in dealing with the Society and its representatives".[28]

[79] Adoption of an obstructive attitude to the complaint process may have consequences at the penalty stage.

[80] Cases which have directly addressed complaint that a practitioner has failed to sufficiently cooperate with the complaint process, have frequently arisen in a context where the practitioner's engagement with the conduct inquiry has been seen to be deliberately unhelpful or uncooperative, or characterised by a degree of discourteous truculence.

[81] In my view the issue is not whether the disciplinary reach can extend to things said by a practitioner when responding to the complaints process. In *LCRO v Hong*, the Tribunal held that correspondence sent by a practitioner to the Complaints Service and the LCRO as part of their response to a complaint, can amount to "disgraceful and dishonourable conduct".[29]

[82] I note that in *Hong* the Tribunal was dealing with nine separate pieces of correspondence, of which five were sent by the practitioner as part of and during the course of the complaints investigation and review processes. The remaining four pieces of correspondence were lawyer to lawyer, or not complaints related.

[83] The Tribunal held that:[30]

> Taken cumulatively the fact that there are nine pieces of what can be described as scurrilous communications, aggravates those individual instances. We find misconduct established, as defined in s 7(1)(a)(i).

[84] I do not agree with the Committee that the privacy of the complaints process provides adequate defence to complaint that Mr YW breached his professional obligations in responding to the complaint in the manner he did.

[85] In my view Mr YW's comments, referred to by me at [74] – [75] above, squarely raise the spectre of misconduct.

[86] The complaints process has an important role to play in the administration of justice. Regulation of the legal profession is a matter of significant importance to the public. Public confidence in the maintenance of a robust process for the conducting of

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[28] *Parlane v New Zealand Law Society* HC Hamilton CIV-2010-419-1209, 20 December 2010 at [108].
[29] *Legal Complaints Review Officer v Hong* [2015] NZLCDT 27 at [43], [50] and [56].
[30] At [63].

inquiry into complaint of professional lapse cannot be enhanced by acquiescence to argument that comments of the nature advanced by Mr YW, allegation of judicial fraud and conduct amounting to criminal conduct, are sanctioned simply because they are made in the course of a conduct inquiry.

[87] Practitioners have an obligation, when responding to complaints, to engage in the process in a manner which is consistent with their obligations to facilitate the administration of justice.

[88] It cannot be the case that the confidentiality of the complaints process immunises a practitioner from consequence of responding to the complaint in a manner which both aggravates the complaint, and in a manner which reflects an indifference to the need to engage with the Committee in a professional and appropriate way.

[89] Mr YW answers allegation of discourtesy towards the judiciary by providing, in part, a response which expands the scope of the initial complaint, and draws into the fray criticisms of members of the judiciary who had no engagement in the events which provided the background to the initial Herald article.

[90] In circumstances where a practitioner has been invited to provide response to criticism that comments he has made about a member of the judiciary were disrespectful, to use the opportunity of that right of reply to engage in further comments which exceed by some margin, the gravity of the initial statements complained of is to engage with the Complaints Service in an improper manner.

[91] In making that criticism, I am not at all oblivious to the critical requirement that Mr YW be given full opportunity to respond to the complaints, and the importance when issues of reputation are engaged, for practitioners to have opportunity to respond to allegation of professional failing in a vigorous and robust manner.

[92] Allegations of dishonesty (at a criminal level) by reference to named judges, complaint of bullying and intimidating behaviour, and allegation that the body charged with investigation of complaints against judicial officers is a supplicant of the judiciary, constitute comments of the type contemplated by the Court in *Orlov* as being sufficiently affronting to erode the protection accorded by principles of freedom of expression.

[93] The comments are scandalous.

[94] Vigorously advanced by Mr YW, both in his submissions and at hearing, was argument that he had encountered in his lengthy career, numerous examples of serious judicial failing.

[95] Pivotal to Mr YW's position, is the firmly held conviction that when he has had occasion to be critical of the judiciary or the judicial system, argument that his comments were unduly forthright is fully answered by response that the assertions he has made are factually correct. An unshakeable belief in the correctness of his position, provides, he argues, a reasonable and proper basis for the advancement of his criticisms, irrespective of how discomforted the recipients of the criticism may be.

[96] That argument, taken to its logical conclusion, is argument which allows for unfettered criticism of the judiciary and the justice system, if the critic has unwavering belief in the justness of their cause. But, as Mr YW himself acknowledges, privilege of membership of the legal profession carries with it professional obligations which may, in relatively rare circumstances, restrict a practitioner's ability to speak his or her mind.

[97] A practitioner's primary obligations arise as a consequence of their position as an officer of the court.

[98] I am not persuaded by Mr YW's argument that a firm conviction in the justness of one's cause provides a total immunity to imposition of any disciplinary response. It is argument that allows for the restraints imposed by both professional judgement and professional obligation to be completely eroded by an overwhelming conviction in the justness of one's cause.

[99] I agree with the Committee however that the capacity for such ill-advised comments to materially compromise confidence in the judicial system and members of the judiciary, is substantially diminished (if not totally removed) by virtue of the fact that the comments are made to a Standards Committee alone. A Standards Committee conducts its business in private. Confidentiality is pivotal to a Committee inquiry. To the extent that a lawyer's breach of the fundamental obligations expressed in s 4 of the Act has potential to impact on members of the public, the public cannot have their view of the integrity of the judicial system and its confidence in the judiciary shaken by allegations of which they remain ignorant.

[100] It is not open to this Office to make findings of misconduct, but in exercising the jurisdiction available to it, this Office could return the matter to the Committee for further consideration, or direct that the matters be considered by the Disciplinary Tribunal.

[101] But having brought, as I am required to do, an independent and robust judgement to the matter before me, I do not consider that the conduct, considered in context, is of sufficient gravity to merit a referral to the Tribunal.

[102] In taking that view, I note that the offending comments were not, as in *Hong*, personally menacing, or characterised by a degree of persistent and personal attack.

[103] Nor was there a sustained pattern of correspondence, both complaint and non-complaint related, as there was in *Hong*. The Tribunal there noted that the cumulative effect of that correspondence brought it within the definition of misconduct.

[104] Mr YW's allegations were excessive and are unsupported by shred of evidence. They have carried however no consequence for the individuals who have been the subject of his intemperate and unfounded criticisms, being that the subjects of the allegations have no knowledge of those allegations being made.

[105] Mr YW advanced argument at hearing that he had, in the course of his career, been motivated by a desire to achieve fair and proper outcome for his clients, and a passion for the pursuit of justice. That may well be the case, but the sense I had from the manner in which Mr YW advanced his positions, was that his commitment to his causes may have led to his sense of judgement and perspective becoming compromised.

[106] As will become clear, I consider that the conduct may be adequately addressed by a lesser conduct finding. I stress that I have reached that view after careful consideration of the particular facts of this case.

[107] As I have noted, the confidentiality of the process does not provide complete defence to complaint that Mr YW has breached his professional obligations.

[108] A lawyer must promote and maintain proper standards of professionalism in their dealings.[31]

[109] It is unnecessary to engage in a comprehensive analysis as to the definition to be ascribed to the phrase "proper standards of professionalism". An assessment of what is, or is not, professional conduct, is arrived at by considering the practitioner's conduct in its context, and by reference to the ethical standards maintained by the profession.

[31] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 10.

[110] Practitioners have a responsibility to engage constructively with parties engaged in conducting a disciplinary inquiry. Mr YW's provocative response to the opportunity provided by the Committee to explain his conduct fell well short of him meeting his obligations to promote and maintain proper standards of professionalism in his dealings.

[111] That response was intemperate and self serving, and presents as a cynical exploitation of an opportunity to respond to complaints, by using that opportunity to propagate more serious allegation of judicial misconduct. A breach of rule 10 is established.

[112] Section 12(c) of the Act, defines as unsatisfactory conduct:

> conduct consisting of a contravention of this Act, or of any regulations or practice rules made under this Act that apply to the lawyer or incorporated law firm, or of any other Act relating to the provision of regulated services (not being a contravention that amounts to misconduct under section 7.

[113] Mr YW's failure to engage with the Standards Committee in a professional manner constituted, in my view, conduct that in breaching the conduct rule which imposes obligation on a practitioner to maintain a proper standard of professionalism in their dealings, meets the threshold of s 12(c).

[114] A finding of unsatisfactory conduct is established. In light of this I must consider the appropriate penalty. By s 211(1)(b) of the Act, I am able to make any orders that could have been made by a Standards Committee.

[115] In considering appropriate penalty, I conclude that a finding of unsatisfactory conduct together with an order for censure is appropriate.

[116] In reaching that view, I have carefully considered the purpose of a penalty in the disciplinary jurisdiction. The function of a penalty in a professional context was recognised in *Wislang v Medical Council of New Zealand*[32] as being to punish a practitioner, to act as a deterrent to other practitioners, and to reflect the public's and the profession's condemnation or disapproval of a practitioner's conduct. It is important to mark out the conduct as unacceptable and to deter other practitioners from failing to pay due regard to their professional obligations.

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[32] *Wislang v Medical Council of New Zealand* [2002] NZCA 39; [2002] NZAR 573.

[117] Mr YW has, after having had a lengthy career in the law, formed some very emphatic views on the justice system. It is unlikely that this disciplinary finding, or any penalty imposed will prompt any reassessment of those views by him.

[118] It is unfortunate that a conduct finding is imposed on a practitioner towards the end of a lengthy career, however that finding is necessary to both mark the unsatisfactory nature of the conduct, and to reinforce the obligation on practitioners to behave professionally when engaging with Committees charged with conducting an inquiry into a practitioner's conduct.

Costs

[119] Where a finding has been made against a practitioner it is appropriate that a costs order in respect of the expenses of conducting a review be made. In making this costs order I take into account the Costs Orders Guidelines published by this Office. The practitioner is ordered to pay costs in the sum of $1,200.

Decision

The application for review is upheld, pursuant to s 211(1)(a). The Standards Committee decision is reversed in accordance with the terms of this decision. The practitioner is found to be guilty of unsatisfactory conduct, pursuant to s 12(c) of the Lawyers and Conveyancers Act 2006.

Orders

Pursuant to ss 156(1)(b) and 210 of the Lawyers and Conveyancers Act 2006 Mr YW is:

(a) Censured; and

(b) Ordered to pay $1,200 in respect of the costs incurred in conducting this review. Those costs are to be paid to the New Zealand Law Society within 30 days of the date of this decision.

DATED this 30th day of November 2016

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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 UC as the Applicant
Mr YW as the Respondent
[XX] Standards Committee
The New Zealand Law Society