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IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2022-485-000002
[2022] NZHC 2090

BETWEEN	PETER MICHAEL HARDIE AND GILES HERBERT JOHN BRANT Plaintiffs
AND	THE NATIONAL STANDARDS COMMITTEE NUMBER 2 First Defendant
AND	THE NEW ZEALAND LAW SOCIETY Second Defendant

Hearing: 9 August 2022

Appearances: M J Fisher and J Yoon for the Plaintiffs
P Collins for the First and Second Defendants

Judgment: 22 August 2022

JUDGMENT OF GENDALL J

Table of contents

Introduction and background **[1]**

Judicial review principles **[11]**

Error of law **[13]**

Unreasonableness **[16]**

Natural justice **[18]**

The plaintiffs' contentions **[21]**

The defendants' response **[25]**

Further background regarding the publication of decisions **[29]**

Analysis **[30]**

Jurisdiction issues **[32]**

Early procedures — receipt of the anonymous report — referral to Standards Committee — decision to investigate on own motion **[32]**

Regulated services issue — use of work email facilities to send private emails **[47]**

Correctness of the "decision" to take no further action — obligation on the NSC to hold a hearing **[72]**

Delegation — legitimacy of the exercise of Standards Committees' functions by an employee of the NZLS **[84]**

Allegedly adverse comment **[92]**

Publication and the refusal by the NSC to authorise distribution of a redacted decision **[102]**

Alleged failure by the NSC to provide particulars and an alleged improper exercise of power by the NSC to compel provision of information **[114]**

Conclusion **[121]**

Result **[130]**

Costs **[132]**

Confidentiality **[134]**

Introduction and background

[1] The plaintiffs are barristers and solicitors. The first named plaintiff, Peter Hardie (Mr Hardie), practises in partnership in Matamata. The second named plaintiff, Giles Brant (Mr Brant), practises in partnership in Hamilton.

[2] On 6 December 2019, the second defendant, the New Zealand Law Society Te Kāhui Ture o Aotearoa (the NZLS) received an anonymous report submitted through a publicly available facility on its website, in which the submitter reported an apparently verbatim exchange of emails between the plaintiffs. The submitter described this exchange as:

> … distastefully sarcastic, extremely discriminatory, unprofessional, and unbecoming of lawyers and the parties' respective law firms.

[3] As to the email exchange itself, the anonymous reporter was unable to provide a screenshot of the correspondence, but provided the following reproduction of the email exchange:

(a) email from Peter Hardie at 10.22am on 27 November 2019:

> Dear Gentlemen,
>
> Just a note to remind you that each of you should now be deep into your preparations for the coming summer of cricket. We have a trophy to defend. The selectors have had a re-shuffle, Mr M Swap of Peria Hills now takes on the responsibility for selections. He has many new and exciting ideas for the club. His priority is to make cricket great again.
>
> Meantime, the Newstead Nancy Boys CC have been working hard transitioning their losing side and have dedicated themselves to becoming more diverse and better more inclusive people. Mr Wright and John Gubbard of Newstead have launched an initiative to make cricket available to Transgender persons. He has been inspired by Kent CC who have recently named a fully and entire man as its "Woman Player of the Year". I set out extracts from the news on the topic below:
>
>> *Maxine Blythin, a cricket player born as a man who now self-identifies as a woman, has been named the 2019 Kent Woman Cricketer of the Year in the UK despite making no apparent moves to permanently transition to a woman.*

According to Kent Online:

> *Maxine Blythin was recognised as the 2019 Kent Women Player of the Year following her role in the team's County Championship triumph. She had produced 340 runs and a best of 51 not out in 13 games across all formats, with 165 of those coming in Division 1 and 175 in T20 matches. But Blythin participation on the Kent woman's cricket team has raised controversy since the player's debut because Blythin has not met the lower testosterone levels required for the British national cricket team."*

There are of course always knockers (though apparently not on "Maxine"):

> *"But Critics say that the six-foot-tall Blythin is just a man playing on the women's team, and it isn't fair. Women's sports advocacy group Fair Play for Women excoriated the Kent league for picking Blythin as the "woman" of the year. In a tweet, the group pointed out that Blythin has "No 'transition'. Just self-ID and new pronouns. Sports women must speak up NOW."*

Please support Gubbard and Giles as they transition. In other news the Test Rankings have just been announced and surprisingly not an Idler in sight. Wisden and the ICC can not have missed the sensational form of, Idler All Rounder Shannon Crawford during last seasons series. Here he is claiming a wicket.

Finally, there is little to add other than it was good to see Idlers at the Cricket world Cup Final. Not a Nancy Boy in sight,

Yours in the embers of an ever glowing victory,

Peter Hardie
Partner Jones Howden Solicitors
120 Broadway, Matamata 3400 PO Box 1, Matamata 3440

(b) Email from Giles Brant at 11.52 am on 27 November 2019:

The very woke Newstead XI is well ahead of all this….which is now very passé… we are fully inclusive and aware and will be selecting a cauliflower in our team as opening bat to represent the oppressed plant life of our planet…oppressive fast bowlers will be protested and cancelled if they try and humiliate the cauliflower…

We will also be selecting a koala as opening bowler as representing all non-human animal life which has have been oppressed by Man… the recent Man made climate change caused NSW fires have only served to victimize Koalas…any attempt to score runs off the Koala will be protested and cancelled as to humiliate this victim will not be tolerated…

> To build their self-esteem the cauliflower and Koala will each be credited with a century, a 5 wicket bag and a spectacular catch in the slips…
>
> Finally all WASPs in our team will be obliged to apologise to everybody for everything before the game (which will be non-competitive of course)…
>
> Yours in inclusiveness and hugs
>
> GILES BRANT PARTNER | STACE HAMMOND | LAWYERS

[4] The full text of the actual emails, it appears, has never been disclosed to the first defendant, the National Standards Committee Number 2 (the NSC) nor the NZLS (despite requests made of Mr Hardie and Mr Brant by these bodies) either in the investigation, which they now challenge, or in this proceeding.

[5] The anonymous report complained that the email exchange between Mr Hardie and Mr Brant, a discussion between them obviously about a social cricketing competition, included inappropriate references to and criticism of transgender persons in sporting contests. Mr Brant in response, however, described the email exchange as "simply lampooning fashionable thinking".

[6] That anonymous report/complaint was received by a regulatory manager of the Lawyers Complaints Service of the NZLS. It was discussed with other regulatory employees and then referred to the NSC. After its consideration at a meeting on 25 February 2020, the NSC resolved to commence an own motion investigation under s 130(c) of the Lawyers and Conveyancers Act 2006 (the Act).

[7] Following what seemed to be a significant inquiry, which the NCS and the NZLS say met with resistance from Mr Hardie and Mr Brant (who contend amongst other things that the NSC entirely lacked jurisdiction), at a meeting on 30 July 2020 the NSC decided to take no further action.

[8] That decision was the subject of a written Notice of Decision, not delivered until some 11 months later on 29 June 2021 (the Decision). The Decision contained a confidentiality direction.

[9] Subsequent requests from the plaintiffs, and in particular from Mr Hardie, to publish a redacted version of the Decision, which Mr Hardie said was required to be "shared with other lawyers for educational purposes", were declined.

[10] Following a without notice application for directions as to service filed in this Court, Mr Hardie and Mr Brant commenced the present proceeding for judicial review in this Court in December 2021.

Judicial review principles

[11] On judicial review, the Court's role is to ensure that the decision under challenge was made in accordance with the law. Importantly, as Cooke J noted in *Patterson v District Court, Hutt Valley*, "[i]n all cases it does so in the same dispassionate way".[1] The purpose of judicial review, as Simon France J observed in *Coromandel Watchdog of Hauraki (Inc) v Minister of Finance*, is to test that "public powers have been exercised after a fair process, and in a manner, which is both lawful and reasonable."[2] Those powers, as well as their limitations and the extent of latitude in terms of the decision-making freedom provided, are then to be ascertained from the statute or other regulation which confers them.[3]

[12] It is well-established that the focus in judicial review is the process by which the conclusion was reached, rather than the merits of the conclusion itself.[4] As Richardson P emphasised in *Waitakere City Council v Lovelock*, a judicial review "is not an appeal on the merits."[5] Rather, the courts in New Zealand have, as Grice J has recently observed, approached judicial review "bearing in mind that it is a supervisory jurisdiction to ensure that powers are exercised in accordance with law."[6]

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1 *Patterson v District Court, Hutt Valley* [2020] NZHC 259 at [16].

2 *Coromandel Watchdog of Hauraki (Inc) v Minister of Finance* [2020] NZHC 1012 at [13], citing *BNZ Investments Ltd v Commissioner of Inland Revenue* HC Te Whanganui-a-Tara | Wellington CIV-2006-485-697, 7 December 2006 at [15].

3 *Patterson v District Court, Hutt Valley*, above n 1, at [14]–[15].

4 See *Waitakere City Council v Lovelock* [1997] 2 NZLR 385 at 397 and 419; and *Wellington City Council v Woolworths New Zealand (No 2)* [1996] 2 NZLR 537 at 552.

5 *Waitakere City Council v Lovelock*, above n 4, at 397.

6 *New Zealand Forest Owners Association Inc v Wairoa District Council* [2022] NZHC 761 at [19].

Error of law

[13] The Supreme Court has described an error of law in the following way:[7]

> [26] An ultimate conclusion of a fact-finding body can sometimes be so insupportable — so clearly untenable — as to amount to an error of law: proper application of the law requires a different answer. That will be the position only in the rare case in which there has been, in the well-known words of Lord Radcliffe in *Edwards v Bairstow*, a state of affairs "in which there is no evidence to support the determination" or "one in which the evidence is inconsistent with and contradictory of the determination" or "one in which the true and only reasonable conclusion contradicts the determination".[8]

[14] In *Vodafone New Zealand Ltd v Telecom New Zealand Ltd*, the Supreme Court accepted that if a decision-maker has misunderstood the meaning of a term, "and has thereby misdirected itself, it will have committed an error of law which can be corrected on appeal."[9] However, the Court went on to note, if the decision-maker has correctly understood the term for the purposes in question "and has then proceeded to apply that understanding to the facts before it, its conclusion is a matter for the [decision-maker] weighing up the relevant facts."[10] The decision-maker's conclusion could not be disturbed on appeal, provided it had not overlooked any relevant matter or taken account of an irrelevant matter, unless it was "insupportable even on a correct understanding" of the term.[11]

[15] Case law also describes the test of an error of law as whether the finding was one which was "open" to the authority,[12] or otherwise in terms of unreasonableness. Palmer J in *Hu v Immigration and Protection Tribunal*, highlighting the linkage between error of law and unreasonableness, endorsed in a judicial review context the Supreme Court's reformulation of the *Edwards v Bairstow* test as a "better account of unreasonableness in judicial review than the tautologous words used in *Wednesbury*."[13] There, his Honour stated:[14]

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7 *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721.
8 *Edwards v Bairstow* [1956] AC 14 at 36.
9 *Vodafone New Zealand Ltd v Telecom New Zealand Ltd* [2011] NZSC 138, [2012] 3 NZLR 153 at [51].
10 At [51].
11 At [51].
12 *Lewis v Wilson and Horton Ltd* [2000] 3 NZLR 546 (CA).
13 *Hu v Immigration and Protection Tribunal* [2017] NZHC 41, [2017] NZAR 508 at [2].
14 At [2].

> Where a decision is so insupportable or untenable that proper application of the law requires a different answer, it is unlawful because it is unreasonable. That may involve the adequacy of the evidential foundation of a decision or the chain of logical reasoning in the application of the law to the facts. Unremarkably, unreasonableness, also termed irrationality, is to be found in the reasoning supporting a public decision.

Unreasonableness

[16] Unreasonableness arises only where a decision maker comes to a decision that no reasonable decision-maker could have reached, a decision which lies "outside the limits of reason".[15] As has been noted elsewhere, it is a high threshold to meet.[16]

[17] In *Aorangi School Board of Trustees v Ministry of Education*, French J reiterated the well-known test for unreasonableness in public law terms in the following way:[17]

> [100] In considering the reasonableness of a decision, the orthodox test is that the applicant must show the decision was so unreasonable no rational decision maker could have come to it …

Natural justice

[18] In exercising a statutory power, a decision-maker must act fairly in its decision-making process in relation to any person directly affected.[18] The principle of natural justice is now included in s 27(1) of the New Zealand Bill of Rights Act 1990, the scope of which the Court of Appeal has stated is co-extensive with common law natural justice.[19] As Cooke J noted in *Daganayasi v Minister of Immigration*, "[t]he requirements of natural justice vary with the power which is exercised and the circumstances."[20]

[19] In acting fairly, a decision-maker is required to afford a person affected by a decision an opportunity that is fair in all the circumstances to put information, as well

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15 *Criminal Bar Association of NZ Inc v Attorney-General* [2013] NZCA 176 at [136].

16 *The Ink Patch Money Transfer Ltd v Reserve Bank of New Zealand* [2022] NZHC 1340 at [38].

17 *Aorangi School Board of Trustees v Ministry of Education* [2010] NZAR 132 (HC).

18 See generally Graham Taylor *Judicial Review: A New Zealand Perspective* (4th ed, LexisNexis, Wellington, 2018) at [13.16].

19 *Combined Beneficiaries Union Inc v Auckland COGS Committee* [2008] NZCA 423, [2009] 2 NZLR 56.

20 *Daganayasi v Minister of Immigration* [1980] 2 NZLR 130 (CA) at 141.

as their views and arguments, to the decision-maker. A person must be given “a real opportunity” to put their case to the decision-maker.[21] All relevant information must also be disclosed to interested parties to allow them an opportunity to respond to potentially prejudicial material or material inconsistent with their interests.[22] The key elements in this respect are surprise and potential prejudice.[23] Without either, there is no unfairness present.

[20] The basis for whether natural justice applies is whether there was a “legitimate expectation” of such.[24] There are three factors to be weighed: the interests involved; the issues involved, including the degree to which the issues are fact-oriented; and the consequences of exercising the power. The determination is then made on a global view of the factors.[25] What level of hearing is required is dependent on the strength of the factors.[26]

The plaintiffs’ contentions

[21] Mr Hardie and Mr Brant in their pleadings are critical of the NSC and the NZLS at every level of this process. They assert that reviewable errors occurred throughout. I note here at the outset that the NZLS accepts that aspects of the processes undertaken here may have been less than perfect, particularly in the 11-month delay in the delivery of the Decision, but it denies any material error occurred in those procedures warranting a judicial remedy.

[22] Mr Hardie and Mr Brant, as members of the NZLS, adopt a consistent theme throughout that their case raises issues of considerable public and constitutional importance concerning freedom of expression and the maintenance of the rule of law. This is strongly disputed by the NZLS in particular.

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21 *Mohu v Attorney-General* (1983) 4 NZAR 168 (HC).
22 *Daganayasi*, above n 20, at 143; and Taylor, above n 18, at [13.16].
23 *Khalon v Attorney-General* [1996] 1 NZLR 458 (HC), adopted in *Ali v Deportation Review Tribunal* [1997] NZAR 208 (HC).
24 *Schmidt v Home Secretary* [1969] 2 Ch 149 at 171, [1969] 1 All ER 904 at 909 (CA) per Lord Denning; and see Taylor, above n 18, at [13.13] and [13.18].
25 *Coal Producers’ Federation of New Zealand Inc v Canterbury Regional Council* [1999] NZRMA 257 (HC); and *Porter v Magill* [2002] 2 AC 357 (HL).
26 *Durayappah v Fernando* [1967] 2 AC 337 (PC); and *Ali v Deportation Review Tribunal*, above n 23.

[23] Overall, as best I can tell from the submissions advanced before me, it appears the real objectives that Mr Hardie and Mr Brant wish to achieve in bringing this proceeding are:

(a) first, to obtain a publication of the Decision (in a redacted form) to lawyers as members of the NZLS to show details of the handling of both the complaint and the publication request by the NSC and the NZLS; and

(b) second, to obtain a direction that all the material outlined at (a) above is provided to Professor Ron Paterson to enable him to take the Decision into account in an independent review of the regulation of lawyers and the legal profession he is presently undertaking.

[24] Notwithstanding this, the plaintiffs' allegations of reviewable error here seem broadly to involve the following:

(a) that there was no jurisdiction for the NSC to investigate the report on its own motion because the emails were personal (although they were sent from their respective professional office email addresses);

(b) the correctness of the NSC's decision to take no further action, including declining to hold a hearing;

(c) the legitimacy of the delegation of certain functions of the NSC to an employed in-house lawyer;

(d) allegedly adverse comments made in the Decision about the plaintiffs;

(e) declining to publish the Decision and the refusal to authorise distribution of Mr Hardie's redacted material, the status of NSC as *functus officio* and the appropriate handling of the publication request by the NZLS;

(f) issues over compliance by the NSC with the obligation to provide particulars to the plaintiffs; and

(g) the lawfulness of the direction by the NSC to require Mr Hardie and Mr Brant to produce the emails under s 147(2)(a)(iii) of the Act.

The defendants' response

[25] In all these matters, the NZLS acknowledges that it is accustomed to receiving unsolicited reports about lawyers' conduct, either from lawyers themselves or from the public. At the time these events occurred, reports in either category could be submitted anonymously.[27]

[26] The NSC and the NZLS say that the receipt of the anonymous report in this case and its subsequent handling was entirely orthodox. After proper inquiry, they say it resulted in a reasonably prompt decision by the NSC to take no further action. This occurred at the meeting of the NSC on 30 July 2020.

[27] The NSC and the NZLS also contend that the decision not to publish the Decision was entirely orthodox.

[28] Mr Collins, counsel for NSC and the NZLS, contended that the attempt by Mr Hardie and Mr Brant here, in his words, "to elevate their case to a level of constitutional importance, involving issues of freedom of speech and expression, 'post-modern/neo-Marxist ideologies, and threats to the rule of law'" was entirely misplaced and was not accepted as being relevant or valid in a judicial review of the procedures adopted in this case. Mr Collins confirmed, and I agree, that principally what matters in a case such as this is the requirement that proper procedures were followed in compliance with the applicable statutory regime, including the general principles of natural justice.

[27] In an amendment to the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 applying to the profession from 1 July 2021, any reports submitted by a lawyer under r 2.8 must now identify the person making the report.

Further background regarding the publication of decisions

[29] Mr Alan Dodd, a team leader at the Lawyer Complaints Service, provided an affidavit to the Court in respect of this proceeding. In his affidavit, he spoke to the general process followed when making decisions relating to the publication of decisions, with specific reference to the present situation. As he explained:

> 5. **Publication issues – Privacy Act request**
>
> 5.1 The notice of decision included the following reference to confidentiality, at paragraph 34:
>
> > Decisions of the Committee must remain confidential between the parties unless the Standards Committee directs otherwise. The Committee has made no such direction in relation to this complaint.
>
> 5.2 Before referring to Mr Hardie's request to publish the decision himself, I will explain the practices and principles of Standards Committees, including NSC2, concerning publication of decisions. Those practices and principles are determined by Part 7 LCA and the *Lawyers and Conveyancers Act (Lawyers: Complaints Services and Standards Committees) Regulations 2008*. The latter includes Regulation 31 which reads:
>
> > **Confidentiality of Decisions**
> >
> > Decisions of Standards Committee must remain confidential, unless Committees make a direction under section 14(2) of the Act or Regulation 30(1).
>
> 5.3 Regulation 30(1) is concerned with named publications ('Publication by identity') which is not relevant to this case. Section 142(2) reads:
>
> > A Standards Committee may, subject to subsection (1) [which concerns the obligation to comply with the rules of natural justice] [sic], direct such publication of its decisions under sections 138, 152, 156, and 157 as it considers necessary or desirable in the public interest.
>
> 5.4 The key factors influencing a decision to direct publication (assuming anonymised publication since name publication raises difference issues) are professional education and the maintenance of public confidence in the legal profession. Publication in any form, anonymous or named, is relatively rare. In the practising year ended 30 June 2021, 1280 complaint and own motion files were closed by Standards Committees. Three of those resulted in directions for name publication and 36 for anonymous publication. The usual medium of publication is through the Law Society's website and its LawTalk publication (paper and electronic). While it is true that Standards Committees may direct tailored publication, for example authorising publication to an individual or to a defined group of persons, that

rarely happens. Most publication directions arise in cases involving findings of unsatisfactory conduct against the lawyer, since those are more likely to have educational value. Few cases disposed of by a decision to take no action, or no further action (like this one), are published in any form.

5.5 I turn now to Mr Hardie's requests to publish the decision in this case. As I explained earlier, the Standards Committee did not make any publication directions concerning the decision to take no further action on 29 June 2021. On 14 July 2021 Mr Hardie sent an email to NSC2, acknowledging the notice of decision and saying:

> I should like to share with other lawyers for educational purposes a redacted version of the above decision, hereby preserving the Standards Committee's objective of keeping the Notice of Decision confidential.
>
> I have redacted from the Notice of Decision dated 29 June 2021 references to the National Standards Committee (NO. 2) and to any other person identified in the Decision.
>
> Would you please confirm that I may share with other lawyers a copy of the attached redacted version of the Notice of Decision.
>
> Although I am presently out of the office I shall have access to my e-mail account. I look forward to hearing from you.

…

5.6 On 23 July 2021 a response was sent to Mr Hardie on behalf of NSC2, by Wayne Anderson, Senior Professional Standards Administrator, acknowledging the request to this redacted version of the decision and saying:

> However, in this case the Standards Committee has <u>not</u> ordered publication of its decision in any form. Therefore, it is unable to be shared with your colleagues as you have requested.

…

Analysis

[30] Having traversed the relevant background, I now turn to consider the thrust of the arguments advanced before me.

[31] In doing so, I will broadly follow the various allegations of reviewable error which Mr Hardie and Mr Brant advance as outlined above.

Jurisdiction issues

Early procedures — receipt of the anonymous report — referral to Standards Committee — decision to investigate on own motion

[32] I first note the process required to be adopted when an anonymous report or complaint against a lawyer is received.

[33] At the outset I accept that only a Standards Committee, such as the NSC here, and not the NZLS or its management staff, have the jurisdiction to consider and adjudicate upon conduct-related reports about lawyers. In a situation like the present involving an anonymous report, that can only be done by commencing an own motion investigation under s 130(c) of the Act. That section relevantly provides:

> **130 Functions of Standards Committees**
>
> The functions of each Standards Committee are (subject to any limitations imposed on the committee by or under this Act or the rules that govern the operation of the committee)—
>
> …
>
> (c) To investigate of its own motion any act, omission, allegation, practice, or other matter that appears to indicate that there may have been misconduct or unsatisfactory conduct on the part of a practitioner or any other person who belongs to any of the classes of persons described in s 121.
>
> ….

[34] When an own motion investigation is commenced, it has much the same status as a general complaint investigation, including procedural safeguards to the lawyers subject to such an investigation. The Court of Appeal has observed in respect of such:[28]

> … Own motion investigations are subject to the same procedural safeguards as investigations into complaints. For example, the requirement to observe the rules of natural justice still applies, as does the requirement to send particulars …

[35] Here, the NSC and the NZLS maintain there was no reviewable error in the way in which the anonymous report was received by the NZLS and referred to the

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[28] *Orlov v New Zealand Law Society* [2013] NZCA 230, [2013] 3 NZLR 562 at [89].

NSC. The decision to commence an own motion investigation in this case was made by the NSC at its first available meeting on 25 February 2020. The minutes recording that decision, as I see it, are clear and unobjectionable:

> This was the first time the Committee has considered this report which concerns email correspondence sent by solicitors Peter Hardie and Giles Brant.
>
> The Committee resolved to commence an own motion investigation into the authoring and sending of the correspondence under s 130(c) of the Act. The Committee acknowledged that issues would arise concerning whether or not the conduct was connected to the regulated services.
>
> The Committee considered responses from the practitioners would help it decide the matter.

[36] Following that meeting of the NSC, on 13 March 2020 Mr Hardie and Mr Brant were notified of the decision to commence an own motion investigation and were given full particulars. Lengthy exchanges then followed between the NZLS Lawyers Complaints Service, and the NSC and Mr Hardie and Mr Brant which, some four months later, resulted in the decision of the NSC under s 138 of the Act to take no further action.

[37] Section 138 usefully provides:

> **138 Decision to take no action on complaint**
>
> (1) A Standards Committee may, in its discretion, decide to take no action or, as the case may require, no further action, on any complaint if, in the opinion of the Standards Committee,—
>
> (a) the length of time that has elapsed between the date when the subject matter of the complaint arose and the date when the complaint was made is such that an investigation of the complaint is no longer practicable or desirable; or
>
> (b) the subject matter of the complaint is trivial; or
>
> (c) the complaint is frivolous or vexatious or is not made in good faith; or
>
> (d) the person alleged to be aggrieved does not desire that action be taken or, as the case may be, continued; or
>
> (e) the complainant does not have sufficient personal interest in the subject matter of the complaint; or

> (f) there is in all the circumstances an adequate remedy or right of appeal, other than the right to petition the House of Representatives or to make a complaint to an Ombudsman, that it would be reasonable for the person aggrieved to exercise.
>
> (2) Despite anything in subsection (1), a Standards Committee may, in its discretion, decide not to take any further action on a complaint if, in the course of the investigation of the complaint, it appears to the Standards Committee that, having regard to all the circumstances of the case, any further action is unnecessary or inappropriate.

[38] In my view, no grounds here exist for impugning the procedures followed either by the NZLS, in the way it dealt with the anonymous report at the time it was received, or by the NSC once the report was passed on to it. The integrity of the complaints system under the Act requires that proper complaints are considered by the Standards Committee and not by employees or the executive of the NZLS. Membership of the Standards Committee comprises lay members as well as the "volunteer" lawyers. That non-lawyer perspective on how to treat reports or complaints such as the present is important. With this in mind, as I see it, the initial discussions which occurred at a management level of NZLS as to the low threshold for complaints to be referred to the Standards Committee, in particular relating to possible media reporting, were not inappropriate here.

[39] What occurred at the outset in this case in my view gives rise to an obvious question — what else were the NZLS staff and officials to do with the complaint when it was received? Although the NZLS on occasions clearly does exercise a gatekeeper role, especially when vexatious, repetitive, or unjustified complaints are made, a fair assumption can be made here that the complaint report against Mr Hardie and Mr Brant, although being advanced anonymously, may well have come from another lawyer. It did not appear to be a complaint from a vexatious litigant or a repeat complainant without substance of any kind, such that it could have been addressed at the NZLS management level and not referred for a decision by the Standards Committee.

[40] It is clear a low threshold exists in relation to the function of a Standards Committee to, in the words of s 130(c) of the Act, "investigate of its own motion any act, omission, allegation, practice, or other matter *that appears to indicate*

that there may have been misconduct or unsatisfactory conduct on the part of a practitioner”.[29]

[41] Before me, Mr Fisher for the plaintiffs contended that an own motion investigation like the present "requires an evidential threshold to be met." As I see the position, that clearly overstates the criterion for an investigation in s 130(c) noted above. This requires only that any act, omission, allegation, practice or other matter *appears to indicate* that there *may have been* misconduct or unsatisfactory conduct. The safeguards under the Act for a lawyer under investigation include the right to be notified of the particulars of an investigation and to respond,[30] and the power of the Standards Committee to terminate an investigation at any time if it is satisfied the threshold of professional culpability is not met.[31] As I address separately below, that is precisely what happened in this case. I am satisfied the decision to investigate here was properly made and Mr Hardie and Mr Brant were advised accordingly. And, on all this, it is clear from the early minutes of the NSC that throughout the entire process, it accepted as relevant to the inquiry the question it needed to ask as to whether the conduct in issue here was connected with regulated services undertaken by Mr Hardie and Mr Brant in terms of the Act.

[42] The decision of the NSC to investigate on its own motion was recorded in minutes of a meeting of the NSC dated 1 May 2020, where the Committee said:

> Having assessed the responses from the parties, the Committee:
>
> (a) formed the preliminary view that Mr Hardie and Mr Brant's conduct in authoring and sending their respective emails was sufficiently connected to the provision of regulated services for the purposes of s 12(b) of the Act;
>
> (b) resolved to require, under s 147 of the Act, both Mr Hardie and Mr Brant to provide it with copies of their respective emails and the related "email chain"; and
>
> (c) noted Mr Hardie's and Mr Brant's requests to be heard in person and decided that there was insufficient reason to depart from the default position that matters are considered on the papers.

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[29] Emphasis added.
[30] Pursuant to rights of natural justice noted above.
[31] Lawyers and Conveyancers Act 2006, s 138(2).

[43] Following this meeting of the NSC, the Lawyers Complaints Service of the NZLS advised both Mr Hardie and Mr Brant of the decision on 8 May 2020, and requested that, by 5 pm on Friday 22 May 2020:

> In order to progress its investigation, the Committee requires, pursuant to s 147(2)(a)(i) of the Lawyers and Conveyancers Act 2006 (**Act**), that you furnish it with a copy of the email chain the subject of its investigation. For the avoidance of doubt, this request includes your email of 27 November 2019, any emails received in response to that email and any further responses from you.

[44] The 1 May 2020 minutes of the NSC simply recorded its "preliminary view" on jurisdiction matters. With the subsequent 8 May 2020 correspondence, the Committee then sought more information so it was able to fully consider matters. Clearly, the NSC was acting within its broad powers of investigation under s 147 of the Act to seek information, documents, and records for its inspection, material which was seen as reasonably necessary for the purposes of its investigation. However, neither Mr Hardie nor Mr Brant provided any documents in response to this request.

[45] Again, it is useful to note that in both the 1 May 2020 NSC minutes and in the 8 May 2020 correspondence, the issue whether the conduct of Mr Hardie and Mr Brant here was sufficiently connected to the provision of regulated services under the Act remained at the forefront.

[46] As I note above, I repeat my finding that there are no grounds here for impugning the procedures followed by either the NZLS, in passing on the anonymous report to the NSC, or in the initial NSC decision to investigate on its own motion.

Regulated services issue — use of work email facilities to send private emails

[47] Here, Mr Hardie and Mr Brant roundly criticise the decision to investigate them about the content of what they describe as a private email exchange. As a result, they assert the own motion investigation by the NSC was improperly commenced, the Committee lacked jurisdiction, and matters here should not even have reached an inquiry stage. This is because, they say, the anonymous report related simply to private emails.

[48] In a letter from Mr Hardie to the NSC, dated 20 April 2020, he says:

> The e-mail was private correspondence between friends. It was not correspondence sent in a professional capacity, any more than correspondence with my daughter's French teacher on her failure to complete homework, or with my bankers to extend an overdraft facility, or to renew my membership of a society might be. That much ought to be obvious.
>
> As the e-mail correspondence was not entered into at a time that I was providing regulated services, that should be an end to the matter.

[49] In an email from Mr Brant to Mr Anderson, dated 2 July 2020, he says:

> My e-mail was demonstrably and on its face, lampooning fashionable thinking. There was no "legal work" for another person.
>
> The own motion investigation for this reason alone is therefore unlawful.

[50] Subsequently, in a letter to the NSC dated 2 July 2020, Mr Hardie refused to provide copies of the emails or other material requested in terms of s 147 of the Act.

[51] By way of an initial response to these contentions, it might be said that because the NSC had not seen the full email exchange it had requested, the NSC received only limited information to reach any informed view about any professional connection that arose from the emails between Mr Hardie and Mr Brant. The NSC clearly was limited only to those parts of the emails that had been provided by the anonymous submitter. Mr Hardie and Mr Brant could have remedied this deficiency but chose to refuse this, arguing a lack of jurisdiction.

[52] Adopting what I see as a "big picture" approach, the NSC from the outset acted properly in identifying this issue surrounding the claimed personal status of the emails in question. In the initial letters from the NZLS Lawyers Complaints Service to Mr Hardie and Mr Brant, dated 13 March 2020, this was raised and a response called for with respect to the question:

> … whether the comments made by you were made at a time when providing regulated services for the purposes of s 12(b) of the Act. In this regard the Committee notes that the email correspondence appears to have been sent to and from your work email account …

[53] This can only be seen as a cautious approach to the issue. It reflects also what the NSC stated in its minutes of the 25 February 2020 meeting which first considered the issue. Those minutes noted an acknowledgement from the NSC that:

> … issues would arise concerning whether or not the conduct was connected to the provision of regulated services.

[54] In the event, ultimately as I see the position, the NSC properly expressed itself as being unable to reach a conclusive view about any connection with the provision of regulated services.

[55] In this respect, two matters are important here. The first is that in the 30 July 2020 minutes of the meeting of the NSC, at which the Committee decided to take no further action in this matter, the Committee recorded that in reaching its decision:

> (a) it is required to conduct its investigations with proportionality to the seriousness of the conduct alleged. Given that Mr Hardie and Mr Brant's conduct in authoring and sending the email correspondence was at the lower end of conduct that might be considered to be unsatisfactory as defined by s 12 of the Act, on reflection the Committee considered that proceeding with its investigation was not proportionate to the severity of the conduct alleged; and
>
> (b) in the absence of the emails sought, there was not enough information before it to conclude that Mr Hardie and Mr Brants' [sic] drafting of the email correspondence was connected to the provision of regulated services.

[56] Secondly, in the 29 June 2021 decision of the NSC, similarly the Committee referred to this issue in inconclusive terms and stated:

> [29] The Committee considers that all email correspondence sent from a lawyer's professional email account could potentially be considered to be connected to the provision of regulated services, particularly where their professional email signature is included … When sending emails from a professional account containing a professional sign-off, a lawyer is holding themselves out as a member of the legal profession. As such the Committee does not consider it unreasonable to expect a lawyer, when doing so, to conduct themselves in a manner that maintains the reputation of the profession.

[57] Ultimately, however, the NSC decided it did not need to resolve the issue of whether Mr Hardie and Mr Brant had been providing regulated services and commented:

> [32] In these circumstances the Committee considers that further investigation would be disproportionate to the public interest in pursuing the investigation further …

[58] Clearly the NSC has taken a cautious approach here and in my view there can be no doubt it has conducted its inquiry with clear regard to proportionality issues. This is important. In a sense, what has happened in this case is that, only some five months after this matter was referred to the NSC, and after much correspondence with Mr Hardie and Mr Brant on matters put to them for a response, the complaint process took its course, with the NSC finally deciding to close the matter and take no further action.

[59] I find the approach taken by the NSC here was unobjectionable. It was unfortunate however that, following the decision of the NSC to take no further action in its meeting on 30 July 2020, a long delay of some 11 months occurred before the full formal Notice of Decision was issued on 29 June 2021.

[60] Mr Collins for the defendants accepted this delay was simply too long. He acknowledged it was regrettable but he did note that in his affidavit Mr Dodds had endeavoured to explain the reasons for the delay. Mr Collins also suggested, however, that, even accepting this was an inordinate delay, it did not result in wrongdoing, any prejudice to Mr Hardie or Mr Brant, or indeed any breach of natural justice here. I agree.

[61] This is sufficient to dismiss arguments Mr Hardie and Mr Brant have endeavoured to advance as to their complaint over the regulated services issue. Notwithstanding this, for completeness I will add several brief comments regarding the thrust of other arguments related to this issue.

[62] To make findings against a lawyer, a Standards Committee, such as the present, needs to be satisfied that conduct, even if personal, reaches a level of culpability in relation to "regulated services" as either misconduct or unsatisfactory conduct.

[63] "Misconduct", in terms of the appropriate category here, is defined in s 7(1)(b) of the Act to include:

…

(ii) conduct of the lawyer or incorporated law firm which is unconnected with the provision of regulated services by the lawyer or incorporated law firm but which would justify a finding that the lawyer or incorporated law firm is not a fit and proper person or is otherwise unsuited to engage in practice as a lawyer or an incorporated law firm.

[64] "Unsatisfactory conduct", in terms of the appropriate category here, is defined in s 12(c) of the Act such that, in a case such as the present, it means:

…

(c) 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) …

[65] This has proved to be a difficult area in the regulation of the legal profession. A leading authority concerning the distinction between the regulated and unregulated (personal) categories of misconduct is *Orlov v New Zealand Lawyers and Conveyancers Disciplinary Tribunal*.[32] In that case, a full High Court held that conduct will only be in the personal category s 7(1)(b)(ii) if it does not involve the provision of regulated services *and* if it is "unconnected with the provision of legal services."[33] Categories of professional misconduct may include circumstances where the lawyer is not providing regulated services if the conduct is nevertheless "*connected with the provision of such services*".[34]

[66] This distinction between regulated and unregulated (personal) misconduct has remained controversial in the legal disciplinary jurisdiction from the 2015 decision in *Orlov* through to the more recent 2021 decision in *National Standards Committee No 1 v Gardner-Hopkins*.[35] In that later case, the Disciplinary Tribunal found that a lawyer's conduct occurring at firm-sponsored team building events was not unconnected with the provision of legal services and was therefore "professional conduct".[36]

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

[33] At [112].

[34] At [112] (emphasis added).

[35] *National Standards Committee No 1 v Gardner-Hopkins* [2021] NZLCDT 21

[36] At [98].

[67] As I have noted above, the inquiry in this area is not limited to the possibility of "misconduct". The professional dealings of a lawyer may amount to "unsatisfactory conduct" if they involve a breach of any professional rule or provision, notwithstanding that the conduct occurred in the lawyer's personal life.

[68] The Legal Complaints Review Officer (LCRO) has issued a number of decisions which have guided Standards Committees such as the NSC on the question whether a lawyer can engage in unsatisfactory conduct in that lawyer's personal dealings. In one such decision, *EA v ABO*, the Officer stated:[37]

> [30] It would be wrong to incorporate into section 12(c) a requirement that a lawyer must be providing regulated services before that subsection applies. There can be no suggestion that the difference between ss12(a) and (b), and s12(c) has arisen through oversight or that it is necessary to read these words in to provide meaning to the subsection. The wording of the subsection is clear and it differs from the wording of the previous subsection.
>
> [31] On that basis, a lawyer may be exposed to a finding of unsatisfactory conduct if his or her conduct is in breach of the Act, or any of the Rules or Regulations, even if he or she is not providing regulated services. Each of the Rules are clear as to the circumstances in which it applies. In some cases there cannot be a requirement that the conduct in question take place while providing regulated services. For example, Rule 2.8 requires a lawyer to report instances of misconduct. The application of this Rule cannot be restricted to circumstances where a lawyer is providing regulated services. Other Rules are specifically prefaced with the words indicating that the lawyer must be providing regulated services before the Rule is to apply – see for example Rule 3 which commences with the words "in providing regulated services to a client…". It is important therefore to examine each Rule to determine the circumstances in which it is to apply.

[69] In the present case, the question whether the conduct of Mr Hardie and Mr Brant was connected with the provision of regulated services, or was personal, was legitimately in issue.

[70] On this, there are a number of other important points relevant here:

(a) The NSC did not have full information about the content or context of the emails because it did not have the actual email chain. Mr Hardie and Mr Brant refused to provide it, they claimed, for jurisdiction reasons.

[37] *EA v ABO* LCRO 237/2010, 29 September 2011.

(b) If here there was no connection with the provision of regulated services, the NSC was obliged to turn its mind to the possibility of misconduct in the personal/unregulated category in s 7(1)(b)(ii) of the Act.

(c) The NSC was also obliged to consider whether the conduct involved a breach of the rule constituting unsatisfactory conduct under s 12(c) of the Act. An obvious rule that might have applied here was r 10, which provides:

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

[71] What appears from other cases to have been a difficulty in this area for some time is that ability to make the distinction between regulated and personal conduct. As I see the position, in the present case the NSC appropriately canvassed this issue and was entitled to decide, as it did, that it was unnecessary for it to be determined conclusively. In considering the issue in the way it did, I am satisfied the NSC made no reviewable error here.

Correctness of the "decision" to take no further action — obligation on the NSC to hold a hearing

[72] In submissions advanced before me, Mr Hardie and Mr Brant contended that the NSC should have conducted a hearing in this case under s 152(1)(b) of the Act, and that it was a reviewable error here not to have done so.

[73] On this aspect, I leave to one side issues as to whether Mr Hardie and Mr Brant have been inconsistent when they assert earlier there was no jurisdiction to investigate this matter at all, but at the same time they contend the NSC had a duty to continue its processes through to the conduct of a formal hearing.

[74] As noted, under s 138(2) of the Act a Standards Committee may decide, in its discretion, to take no action on a complaint.

[75] It is true that s 138, which I have reproduced above, refers in its terms only to "complaints". By way of comparison, this differs, for example, from s 152, which is

concerned with the power of a Standards Committee to "determine complaint or matter".

[76] The use of the term "matter" appears to be a reference to a matter under investigation on a Standards Committee's own motion.

[77] Despite arguments which Mr Fisher endeavoured to advance on behalf of Mr Hardie and Mr Brant, I do not accept that the absence of any reference to "matters" or own motion investigations in s 138 must mean that a Standards Committee, once it has decided to start such an own motion investigation under s 130(c), is constrained from terminating the investigation until it has conducted a hearing. To hold otherwise, in my view, would be an absurdity.

[78] As I see the position, there is no reason in principle why the power of a Standards Committee (such as the NSC here) to cease investigating the matter at any time should apply to complaints but not to own motion investigations. A Standards Committee must be able to bring an end to an own motion investigation once it determines that it does not warrant further inquiry (for example because it does not disclose anything requiring a disciplinary response). It would be entirely burdensome and oppressive of lawyers under investigation, and not in any way in the public interest, if a Standards Committee was obliged to proceed to a hearing in every case, not to mention the fact that it would be wasteful of the resources of Standards Committees and the Lawyers Complaints Service.

[79] In addition, s 142(3) of the Act makes clear that a Standards Committee "may regulate its procedures in such manner as it thinks fit", subject to the Act and any rules made under the Act. In my view that must include an entitlement to bring an end to an own motion investigation if no further inquiry is seen as warranted.

[80] It follows too, as I see it, that the grounds on which a Standards Committee may decide to take no further action in an own motion investigation, being entirely analogous to the grounds available in the investigation of a complaint, should be treated similarly. One safeguard applying to lawyers facing a complaint is the

possibility of dismissal of the investigation at any time without the need to conduct a hearing.

[81] In my view the absence in s 138 of any specific reference to "own motion investigations" or "matters" provides an example of a situation where judicial "gap-filling" is warranted, in the *Northern Milk* sense, in which case the Court of Appeal said:[38]

> … the Courts must try to make the Act work while taking care not themselves to usurp the policy-making function, which rightly belongs to Parliament.

[82] I conclude here, therefore, that the NSC acted properly and within its powers by ending this investigation when it did so at its meeting on 30 July 2020. This occurred, in my view, either pursuant to s 138, interpreted as including own motion investigations, or otherwise pursuant to its power under s 142(3) to regulate its own procedures, such that these must apply equally to own motion investigations.

[83] Mr Hardie and Mr Brant also appear to criticise the NSC here for suggesting that if there was to be a hearing at all it could be done on the papers. I dismiss this criticism. Section 153 of the Act provides specifically as a default position for a hearing on the papers. In any event, this issue did not arise in the present case because the NSC made its decision on 30 July 2020 to take no further action.

Delegation — legitimacy of the exercise of Standards Committees' functions by an employee of the NZLS

[84] The plaintiffs also assert here that a reviewable error has occurred because some of the functions of the NSC were usurped in this case by an employee of the NZLS, Mr Jonathan Sutton (Mr Sutton). Mr Sutton is a Legal Standards Solicitor, employed by NZLS.

[85] The allegations in this respect seem to be that:

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[38] *Northern Milk Vendors Association Inc v Northern Milk Ltd* [1988] 1 NZLR 530 (CA) at 537–538.

(a) notes for the agenda of meetings, provided (it is claimed) to the NSC by Mr Sutton, are submissions which Mr Hardie and Mr Brant were entitled to see in advance of any response they might have made on the issues before the Committee; and

(b) the final decision of the NSC, dated 30 June 2021, was not drafted by the NSC but was in fact drafted by Mr Sutton, and this was improper.

[86] As I see the position, these allegations are quickly disposed of.

[87] Under s 184 of the Act, a Standards Committee may in writing delegate to any of its members, or to any appointed sub-committee, or to *any other person*, any of its functions and powers, except powers relating to final decisions or determinations, the appointment of investigators, and making certain orders.

[88] Here, Mr Sutton was given a specific written delegated authority to exercise functions of the NSC by a formal notice of delegation dated 12 June 2019. The delegated authority included the authority to:

(a) report to the NSC at its meetings concerning the current status of any complaints or investigations he was handling on behalf of the NSC and to provide "recommendations concerning any particular steps you consider necessary to advance the complaint to a final determination, whether by means of a hearing or otherwise";[39] and

(b) draft Notices of Decision for approval and sign off by the Convenor or other member of the NSC.

[89] I am satisfied that no reviewable error of any kind occurred here in the context of Mr Sutton's role for the NSC. First, I do not accept that his agenda notes could be considered as submissions or were in any other way improper given his delegated authority.

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39 Emphasis added.

[90] The note dated 9 December 2019 headed "Potential own motion investigation" was simply an explanation of the anonymous report including guidance for the NSC of the sort that could be expected from an employed lawyer working under delegated authority concerning the issues warranting consideration. The second note (erroneously dated 9 December 2019 it seems) was a more detailed analysis of the issues for consideration by the NSC after the responses from Mr Hardie and Mr Brant had been received. The third note, dated 23 July 2020 and prepared for the meeting scheduled 30 July 2020, again explained the issues as they appeared at the time, and it was following this that one week later the NSC decided to take no further action.

[91] Secondly, as to the 29 June 2021 Notice of Decision of the NSC, again in my view there was nothing erroneous about the assistance Mr Sutton provided to the NSC on this aspect, given the clear delegated authority he possessed. No administrative law requirement specifies that in a situation like this the drafting of a decision must itself be written personally and directly by members of a decision-making body such as the NSC. In any event, the decision issued was ultimately that of the NSC in all respects, and it was signed personally by the Convenor of the NSC.

Allegedly adverse comment

[92] A further ground of reviewable error advanced by Mr Hardie and Mr Brant here relates to what Mr Fisher has described as:[40]

> … adverse findings or comments affecting the reputation of the plaintiffs without complying with the essential statutory prerequisites relating to the rules of natural justice and the rule of law, including affording them a hearing.

[93] The particular references in the Decision complained about appear to be the following:

(a) "… viewed in its entirety, Mr Hardie's email could be seen to be derisive of inclusivity and discriminatory towards, and offensive to, transgender or gay persons";[41]

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[40] Synopsis of submissions on behalf of the plaintiffs, 26 July 2022, at [115].

[41] *Notice of Decision by the National Standards Committee (No 2), No 20361-62* New Zealand Law Society Lawyers Complaints Service, 29 June 2021 at [19(a)(i)].

(b) "When acting in a professional capacity as lawyers, Mr Hardie and Mr Brant must conduct themselves in a manner that befits members of the legal profession";[42] and

(c) "… on the material provided, the Committee is satisfied that Mr Hardie and Mr Brant's conduct was at the lower end of the type of conduct by lawyers that could attract a disciplinary response."[43]

[94] Mr Fisher endeavours to argue here that, with the finding that the conduct of Mr Hardie and Mr Brant was "at the lower end of the type of conduct by lawyers that could attract a disciplinary response", first, implicitly the NSC was providing gratuitous support for the anonymous complainant's views and secondly, the NSC was holding against the plaintiffs what was a perfectly reasonable critique of those philosophical views. Further, Mr Hardie and Mr Brant object to what they say are adverse comments from the NSC relating to the tone and content of the private correspondence between them, including the implication that they may lack appropriate judgement. Finally, Mr Hardie and Mr Brant strongly resist what they say are suggestions that they are "derisive of inclusivity" here.

[95] Relevantly, paragraph [32] of the Decision, which sets out the NSC's final conclusions in this matter, states:

> [32] In these circumstances the Committee considers that further investigation would be disproportionate to the public interest in pursuing the investigation further. However, Mr Hardie and Mr Brant are advised to consider the tone and content of correspondence sent from their professional email accounts, particularly where their lawyer sign-off is included, as the way in which they hold themselves out when sending it will in turn determine whether it is conduct by them as lawyers which might be able to be considered as a disciplinary matter.

[96] This paragraph [32] also follows the earlier paragraph [31] which, as I see it, provides relevant context to these matters and the decision of the NSC to take no further action. That paragraph states:

> [31] Ultimately, the Committee does not consider that it is necessary to resolve the issue in the current circumstances. On the material provided, the

42 At [25].
43 At [31].

> Committee is satisfied that Mr Hardie and Mr Brant's conduct was at the lower end of the type of conduct by lawyers that could attract a disciplinary response. In this regard it is noted that the emails appear to have been authored as deliberate banter and were not intended to be distributed beyond a finite member of persons known to Mr Hardie and/or Mr Brant. Further, Mr Hardie and Mr Brant clearly considered the correspondence to be personal and intended it to be private to its intended recipients.

[97] These paragraphs in my view also include important context in discussions first, about the threshold for the own motion investigation which occurred here, and secondly, about the absence of any need for further investigation beyond what had already taken place. Those statements and others in the NSC decision in my view must be seen as legitimate observations in all the circumstances prevailing in this case. The ultimate decision here was one to close the file, because on the limited material that had been provided to it, the NSC found the investigation did not disclose anything in the way of professional culpability here.

[98] In this regard, the following paragraph of the Decision also has some relevance:

> [20] For the avoidance of doubt, the Committee's investigation did not relate to the propriety of the opinions expressed in Mr Hardie and Mr Brant's email correspondence. Rather the investigation concerned whether the way in which those opinions were expressed in correspondence from professional email accounts were professionally inappropriate for lawyers and, if so, whether that correspondence is capable of, and warrants, disciplinary action.

[99] Throughout the hearing of this matter before me, Mr Collins accepted that natural justice may require persons who are likely to be significantly criticised in a decision such as this to be given an opportunity to respond before a final decision is made and published.[44]

[100] I am satisfied, however, that the references here to which Mr Hardie and Mr Brant object did not reach the level of "adverse comment" or "significant criticism" such that they were entitled to an opportunity to respond before the NSC communicated its decision to them in its final form. I reach this conclusion for the following reasons:

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44 *Re Erebus Royal Commission*; *Air New Zealand Ltd v Mahon* [1983] NZLR 662 (PC) at 671; and *Hampton v The District Court at Christchurch* [2014] NZHC 1750, [2014] NZAR 953.

(a) In the Decision there is no real assertion of professional culpability against either of these lawyers. That Decision, as I see it, would have been interpreted by any reasonably informed person as devoid of criticism detracting from Mr Hardie's or Mr Brant's professional standing or reputation.

(b) The Decision itself was not published to anyone other than the lawyers themselves and the NZLS. It also specifically contained a confidentiality requirement.

(c) By the measure of Mr Hardie's own redacted version of the Decision that he wanted to disclose to legal colleagues (that is, people who would be expected to associate him with the Decision), it does not appear that Mr Hardie regarded the references to him in the Decision as being prejudicial to him. They were simply not redacted.

(d) In any event, insofar as paragraphs [19(a)] and [19(b)] of the Decision are concerned, in my view these are not specific findings of impropriety against Mr Hardie or Mr Brant but simply record one possible reasonable interpretation of the comments made in their email exchange when viewed in context. I note too that both Mr Hardie and Mr Brant put in issue from the outset here the fact that their comments related to their views about transgender sportspeople and issues of culture, belief, and what is described as the nature of truth.

[101] For all these reasons I accept the arguments advanced by Mr Collins for the defendants here first, that no reviewable error has occurred in this area, and secondly, that the references to which the plaintiffs object did not reach the level of adverse comment in this case.

Publication and the refusal by the NSC to authorise distribution of a redacted decision

[102] The NSC referred to "confidentiality" in the Decision, stating:

> [34] Decisions of the Committee must remain confidential between the parties unless the Standards Committee directs otherwise. The Committee has made no such direction in relation to this complaint.

[103] This reference to decisions remaining confidential "… unless the Standards Committee directs otherwise" arises from reg 31 of the Lawyers and Conveyancers Act (Lawyers: Complaints Services and Standards Committees) Regulations 2008, which makes this statement, and also from s 142(2) of the Act, which provides:

> **142 Procedure of Standards Committee**
>
> …
>
> (2) A Standards Committee may, subject to subsection (1), direct such publication of its decisions under sections 138, 152, 156, and 157 as it considers necessary or desirable in the public interest.
>
> …

[104] Clearly the Decision in its concluding paragraphs included an explanation of the right Mr Hardie and Mr Brant had to apply for review of any aspect of the decision by the LCRO. That review application was required to be lodged within 30 working days of the decision being received. An objection to the publication decision (or indeed an application to review the decision itself) could have been referred to the LCRO, but that step was not taken by either lawyer here.

[105] Instead, Mr Hardie and Mr Brant, having received the decision on 29 June 2021, proceeded to take a range of other steps.

[106] On 14 July 2021, Mr Hardie began an exchange of correspondence with the NSC, in which he sought approval to disclose to others a redacted version he had prepared of the Decision. As noted above, by a letter to the NSC dated 14 July 2021, Mr Hardie advanced the following request:

> I should like to share with other lawyers for educational purposes a redacted version of the above decision, thereby preserving the Standard Committee's objective of keeping the Notice of Decision confidential.
>
> I have redacted the Notice of Decision dated 29 June 2021 references to the National Standards Committee (No. 2) and to any other person identified in the Decision.

> Would you please confirm that I may share with other lawyers a copy of the attached redacted version of the Notice of Decision.

[107] That publication request was repeatedly declined in correspondence on behalf of the NSC and the NZLS. The initial NZLS correspondence was from Mr Anderson, a Senior Standards Administrator at the Lawyers Complaints Service, and comprised of responses on 23 July 2021 and again on 2 August 2021. Again, it referred to the right specified in the Decision to seek a review by the LCRO within 30 working days of 29 June 2021. One further similar response also came from Mr Dodd, a Team Leader of the Lawyers Complaints Service, on 9 August 2021.

[108] The consistent position taken by NZLS and its staff was effectively that the NSC had delivered its final decision and was now *functus officio*. Under this principle, once an authority makes a final decision it has exhausted its jurisdiction and has no power to act further in the matter. It becomes *functus*, and the decision is perfected by communication in a final form to those affected, in this case with the NSC's Decision of 29 June 2021.[45]

[109] The decision of the NSC to take no further action, notified to Mr Hardie and Mr Brant on 29 June 2021, was a final decision of the NSC and conclusive of their investigation. Mr Hardie and Mr Brant were no longer subject to an investigation, and that decision, as I understand it, could not be reopened.

[110] In any event, and notwithstanding my view that the NSC was *functus officio* here, even considering the substance of Mr Hardie's request for authorisation to distribute the redacted decision for the purpose, in his words "to share with other lawyers for educational purposes", it is my view that the NSC was also substantively justified in concluding that publication in any form was not warranted here.

[111] First, the educational value of any decision the NSC makes is a matter for the NSC in this case to determine. It is not a matter for the lawyers who have been under investigation to drive in any way.

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45 *Goulding v Chief Executive, Ministry of Fisheries* [2004] 3 NZLR 173 (CA) at [43]; and *K v The Complaints Assessment Committee of the Teaching Council of Aotearoa New Zealand* [2022] NZHC 307 at [72].

[112] Secondly, though I make no definitive conclusions on this point, I am concerned here that, as Mr Collins suggests, a reasonable argument exists that the request for publication of the Decision comes not from a bona fide desire to educate the legal profession, but rather largely as an attempt to advance an ideological platform. The plaintiffs have noted from the outset that their comments related to their views about transgender people. Indeed, this has been something that has featured prominently in the present litigation and involved a significant amount of correspondence and material both before the NSC and this Court. Though I refrain from making any finding in this regard, particularly in light of the absence of evidence the Court has heard on the point, I nevertheless note a possible argument exists that such an impression is reasonably available here. I note in particular the descriptions used by Mr Hardie and Mr Brant on the moral and cultural issues relating to freedom of speech and expression in this case and their references to "post-modern neo-Marxist ideologies". The NZLS and the NSC appear to have taken the view that advancing a particular platform is not a legitimate function of the lawyers complaints process, nor of the NSC's own motion regime contained in Part 7 of the Act. I accept, as Mr Collins contends, that generally is not a legitimate reason for publication. Consequently, whether or not such a situation is truly at play here, I am satisfied the NSC was justified in taking an arguably cautious approach in these circumstances in declining to publish the Decision.

[113] Overall, I conclude that the NSC was justified in reaching the view that publication of its 29 June 2021 decision in any form was not warranted here. No reviewable error has therefore occurred.

Alleged failure by the NSC to provide particulars and an alleged improper exercise of power by the NSC to compel provision of information

[114] There are two final allegations of reviewable error advanced here which require some consideration. In my view they are quickly disposed of.

[115] The first allegation, concerning a failure to supply particulars, relates to letters from Mr Sutton to Mr Hardy and Mr Brant, dated 13 March 2020, to an extract from

Lawyers' Professional Responsibility by GE Dal Pont,[46] and a purported failure to respond to a request from Mr Brant to provide supporting authority for this. At the outset, I note that natural justice requires a decision-maker to provide particulars of the matter under investigation in such a way as to ensure the person complained against has an opportunity to answer in a fully-informed manner. A real opportunity must be made available to a person against whom allegations have been made to enable them to put their case to a decision-maker.[47] This represents part of the long-established public law principle that all relevant information must be disclosed to allow interested parties an opportunity to respond to potentially prejudicial material.[48]

[116] Accepting those principles, I am satisfied here that in the context of the matters alleged against Mr Hardie and Mr Brant, the NSC complied with their obligations. I refer in particular to the following correspondence with the plaintiffs:

(a) initial letters to them on 13 March 2020, notifying details of the investigation and the provision of the anonymous report and identifying the issues on which the NSC sought a response;

(b) letters on 8 May 2020 which explained their own motion investigation that was to be underway and again set out the issues to be addressed;

(c) the letter to Mr Hardie on 16 June 2020, which itself included disclosure of material responding to his Privacy Act 2020 request; and

(d) the email and attached PDF file provided by Mr Sutton to Mr Brant on 9 July 2020.

[117] There is no doubt, as I see it, that throughout the entire course of events, much material passed between the NSC, the complaints service, and Mr Hardie and Mr Brant. Overall, I am satisfied that full and responsible disclosure was provided

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46 GE Dal Pont *Lawyers' Professional Responsibility* (5th ed, Thomson Reuters, Pyrmont (NSW), 2013) at [21.185].
47 *Mohu v Attorney-General*, above n 21.
48 *Daganayasi v Minister of Immigration*, above n 20, at 143.

here to both plaintiffs and no reviewable error by way of a failure to provide adequate particulars occurred. Both Mr Hardie and Mr Brant were able to respond fully to the anonymous report against them and did so at length and on multiple occasions.

[118] The final matter for consideration under this head concerns submissions advanced for Mr Hardie and Mr Brant that the power of the NSC to require production of documents under s 147(2)(a)(iii) of the Act was not properly exercised. That allegation seems to be based on the fact that the 8 May 2020 letters notifying the requirement to provide "a copy of the email chain the subject of the investigation" was sent by Mr Sutton and it is alleged that "Mr Brant's request for particulars had again been ignored". Again, I note here Mr Sutton was clearly acting within his delegated authority to notify both Mr Hardie and Mr Brant of the direction to provide documents and further that in any event considering all the correspondence that had passed from the NSC to the plaintiffs, considering a properly proportionate response here, Mr Brant's request for particulars had been met.

[119] It is clear too that the purpose of the s 147 notice was to ensure that the NSC was able to proceed with its investigation of the complaint with this full information. Mr Hardie and Mr Brant, in refusing to provide "a copy of the email chain", prevented this. In any event, too, the NSC made the decision that it was unnecessary here to press on with the matter against the plaintiffs' resistance, but that did not make the inquiry in any way illegitimate.

[120] I conclude there is no basis here for any objection to the reliance by the NSC on the power available to it under s 147 to request the total email chain in its original form, nor by the manner in which the request was notified. That email chain has never been provided but, as I note, the fact that the NSC ultimately did not pursue this request but formed the view the matter did not warrant further investigation does not in any way detract from the propriety of the s 147 notice. For all these reasons I find that no reviewable error has occurred in this area as well.

Conclusion

[121] The function of the NSC overall, established as it is under Part 7 of the Complaints and Discipline section of the Act, is clear. Its function is firmly set out

under s 130(a) as "to inquire into and investigate complaints" about lawyers, their firms and employees. The NSC here was obliged to consider Mr Hardie and Mr Brant's professional responsibility as lawyers and whether the line of irresponsibility had been crossed in this case. The NSC's conclusion was that it had not and no further action should be taken. Unusually, it might seem, Mr Hardie and Mr Brant, with their present proceeding, have taken the somewhat unusual position of applying for judicial review of that decision which was one to take no further action against them. It seems they see this matter in their words as one of "high constitutional and public interest importance". To a significant extent I disagree.

[122] The decision under review was extensive and carefully prepared. On any reasonable interpretation, and given all the circumstances here, the cautionary words it included could only be considered as moderate, balanced, and largely justified. It is indeed unfortunate that the Notice of Decision was delayed for some 11 months after the actual ruling by the NSC was made. This is regrettable, although as I have noted some attempt to explain the reasons for the delay were outlined in Mr Dodd's affidavit. I do not consider, however, that this delay resulted in any wrongdoing or breach of natural justice in this case.

[123] Significantly, in this instance no application for a review of the NSC decision by the LCRO was made, despite several specific invitations to Mr Hardie and Mr Brant to do so.

[124] In this case there was no requirement for an in-person hearing, in terms of s 152 of the Act. A hearing on the papers effectively took place in terms of s 153. Mr Hardie and Mr Brant were provided with extensive opportunities to respond to the allegations and I am satisfied these were fully taken up.

[125] What the NSC decided, in my view, was fair and proportionate in all the circumstances and, without taking what I see as an unwarranted microscopic analysis of everything that occurred here, they followed the required procedures in a proper and fair manner.

[126] Fair opportunities were given to Mr Hardie and Mr Brant on many occasions to respond to the allegations against them. They certainly provided the NSC with substantial material in response.

[127] At the conclusion of his initial synopsis of submissions before me, Mr Fisher for the plaintiffs confirmed that overall here the plaintiffs:[49]

> … would be comfortable if the Court were to make the declarations sought and set aside only the separate decision of the first defendant [the NSC] not to make any direction in relation to publication.

[128] The publication request, it seems, was and remains one of the main driving forces behind this particular application. Notwithstanding this, Mr Hardie and Mr Brant do seek the various declarations they outline in their statement of claim. So far as the publication request is concerned, two matters are clear. First, they seek a declaration that the Decision of the NSC of 29 June 2021 was not properly made and is a nullity. Secondly, and nevertheless with their publication request, it does seem they want to be able to distribute a copy of the redacted decision (though they claim it is a nullity) to lawyers. Their reasons for this are not entirely clear to me.

[129] Ultimately, however, I am satisfied the NSC acted properly and in an entirely orthodox manner in reaching the decision it did and, in line with the usual starting point in decisions of this kind, in refusing publication here.

Result

[130] For all these reasons, I am satisfied the NSC made no reviewable error here.

[131] The present application is dismissed.

Costs

[132] As to costs, I see no reason why the defendants, having succeeded in opposing the plaintiffs' present application, should not be entitled to an award of costs here. No submissions on costs, however, were made before me.

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49 Synopsis of submissions for the plaintiffs, 26 July 2022, at [135].

[133] Therefore, costs are reserved. Counsel are encouraged to liaise with a view to settling between themselves any issue of costs which might arise here. Failing this, they may file (sequentially) submissions on costs (each submission to have a maximum of five pages plus schedule) which are to be referred to me, and in the absence of either party indicating they wish to be heard on that question, I will decide the issue of costs based upon the memoranda filed and the material then before the Court.

Confidentiality

[134] As a final point, I note this matter is to remain confidential between the parties involved. As I have found, there was no issue with the NSC's view that the matter was confidential between the parties or its decision not to publish the Decision. I am also of the view that the nature of the subject matter involved, being an investigation into possible "misconduct" or otherwise "unsatisfactory conduct" meriting further disciplinary action, warrants such confidentiality. I also consider that the finding that the NSC was right in declining publication of the Decision would be substantially undermined if this judgment were to be released providing essentially the details I have found the NSC was right to keep confidential.

[135] The non-publication order put in place by the NSC therefore continues in force and accordingly I order that publication of this judgment and any part of these proceedings is prohibited.[50] I am satisfied the circumstances in this case outweigh any presumption in favour of publication. Out of an abundance of caution, I note this means the parties will not be able to release or distribute a redacted version of this judgment.

Gendall J

Solicitors:
Copy to the Applicant
Copy to the Respondent

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[50] Pursuant to s 240(2) of the Lawyers and Conveyancers Act 2006.