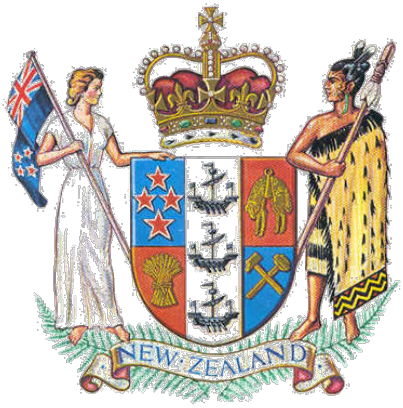


**Report of the**

# LEGAL COMPLAINTS REVIEW OFFICER

For the 12 months ended 30 June 2010

*Presented to the House of Representatives pursuant to Section 223 of the Lawyers and Conveyancers Act 2006*

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## OVERVIEW OF YEAR 2009/2010

This is the Annual Report of the Legal Complaints Review Officer required by s 223 of the Act to be provided to the Minister of Justice, the New Zealand Law Society and the New Zealand Society of Conveyancers. This report covers the year from 1 July 2009 to 30 June 2010.

This second operating year for the office of the Legal Complaints Review Officer (LCRO) has been characterised by change and consolidation.

A significant change occurred with the resignation mid-way through his term of Dr Duncan Webb who was appointed the first Legal Complaints Review Officer. His work in setting up the infrastructures of this office has been significant. I take this opportunity to acknowledge and thank Dr Webb for his enormous contribution which will stand this office in good stead for the future.

Staff changes have contributed to delays in timelines in completing reviews but this is expected to resolve with the appointment of a Legal Complaints Review Officer. Other changes include the resignation of the full time Case Manger, and the appointment of two new Case Managers to full time positions, which also replaces part time staff. This has provided additional stability for the office and enhanced file management.

Consolidation has most significantly occurred in relation to the operating procedures of the office. Issues of workability were revealed by some of the early applications for review during the first reporting year which led to a review of the procedural processes of this office, both in file management and in relation to undertaking reviews. As a result a review of the Guidelines was commenced, and which was almost completed at the close of this reporting period.

There has been the expected decline in applications for Lay Observer reviews. These are applications for review of decisions made by Complaints Committees under the former Law Practitioners Act. There has been a steady increase in the number of applications for review of Standard Committee decisions and also noted is the increased complexity of issues arising in the complaints and the volume of information provided. Preliminary indications are that about 17% of all decisions made by Standards Committees proceed to review.

This report has sought to provide some additional analysis of Applicants and outcomes of reviews. Applications for review continued to be made by a range of different Applicants and involve a large range of issues. Notably complaints concerning reasonableness of fees were in the minority, not taking into account where fees were challenged on the back of conduct-related complaints.

There have continued to be issues concerning compliance with formal requirements in making applications for review, but these are fewer than in the previous reporting period. This may be due to these issues having been addressed in a number of review decisions, including *D v T* LCRO 36/09, and due to Standards Committees uniformly including at the end of their determinations, all information that is necessary to enable a complainant to pursue a review.

Many of the decisions of the LCRO, along with other information, are posted on the website of the LCRO. Decisions of note have also been reported in *Lawtalk* (the magazine of the New Zealand Law Society) and in the *Law Society Bulletin*, an electronic awareness bulletin of the Auckland District Law Society. The wider dissemination of the LCRO's decisions is considered a positive development.

There is no right of appeal from a decision of the LCRO. However the exercise of the powers of the LCRO are amenable to Judicial Review by the High Court. As of 30 June 2010, four of the decisions of the LCRO (two by the same Applicant) were the subject of an application for Judicial Review. One of those applications was withdrawn during this reporting period, and another is on hold following an order by the High Court that the Applicant provide security for costs.

**Hanneke Bouchier**
**(Acting) Legal Complaints Review Officer**

## NATURE OF OFFICE

The Legal Complaints Review Officer provides independent oversight of the treatment of complaints by the Standards Committees which are administered by the New Zealand Law Society and the New Zealand Society of Conveyancers. The LCRO is appointed by the Minister of Justice after consultation with the New Zealand Law Society and the New Zealand Society of Conveyancers. The LCRO cannot be a lawyer or a conveyancing Practitioner (s 190).

The primary function of the LCRO is to review determinations of Standards Committees. Additionally the LCRO is to provide advice to the Minister of Justice, New Zealand Law Society and the New Zealand Society of Conveyancers in respect of any issue which relates to the manner in which complaints are received and dealt with.

The New Zealand Society of Conveyancers is of a modest size and to date no applications for review from its Standards Committee have been received. As such this report relates primarily to applications for review from lawyers' Standards Committees.

The Legal Complaints Review Officer was Duncan Webb until his resignation effective from 28 February 2010. The Deputy Legal Complaints Review Officer is Hanneke Bouchier, who commenced as (Acting) Legal Complaints Review Officer from the date of Dr Webb's departure and remained in this role at the end of this reporting period, no further appointment having yet been made. The office is administered by the Tribunals Unit of the Ministry of Justice and located in Auckland. As at 31 July 2010, two full time case managers were employed to provide support.

The Ministry of Justice also hosts a website for the Legal Complaints Review Officer (http://www.justice.govt.nz/tribunals). That website includes information on the role of the LCRO, how to apply for a review, procedural guidelines, and full copies of a selection of decisions which may be of interest.

## STATUTORY REPORTING

Section 224 of the Act requires the following information to be provided in the Annual Report of the Legal Complaints Review Officer (LCRO).

**Number applications for review**
237 applications for review were made to the LCRO during the 12 month period of 1 July 2009 to 30 June 2010. This is an increase of 103 from the previous reporting period.[1]

**Categories of applications for review**

- 211 of the review applications sought reviews of determinations made by Standards Committees pursuant to section 194 of the Act.
- 15 review applications were made to review the exercising of the Standards Committees functions or powers.
- 11 applications required the LCRO to exercise the duties and powers of the Lay Observer pursuant to section 355 of the Act.

**Whether the reviews have been completed**
Between 1 July 2009 and 30 June 2010, 173 reviews have been completed, 31 related to reviews filed in the previous reporting period.[2]

**Reviews outstanding**
Of the 237 applications filed in this period, 95 remain current as at 30 June 2010.

**The timeliness with which the reviews have been completed**
118 applications for review were completed in three months or less with 52 being completed between three and six months and the remaining 3 cases completed within a nine month period. The majority of decisions were determined within a three month period.

**Analysis of the results of review applications**
Review applications are considered successful or partly successful if the Standards Committee determination is reversed or modified and unsuccessful if the determination is upheld, or if there is a want of jurisdiction to consider the complaint.

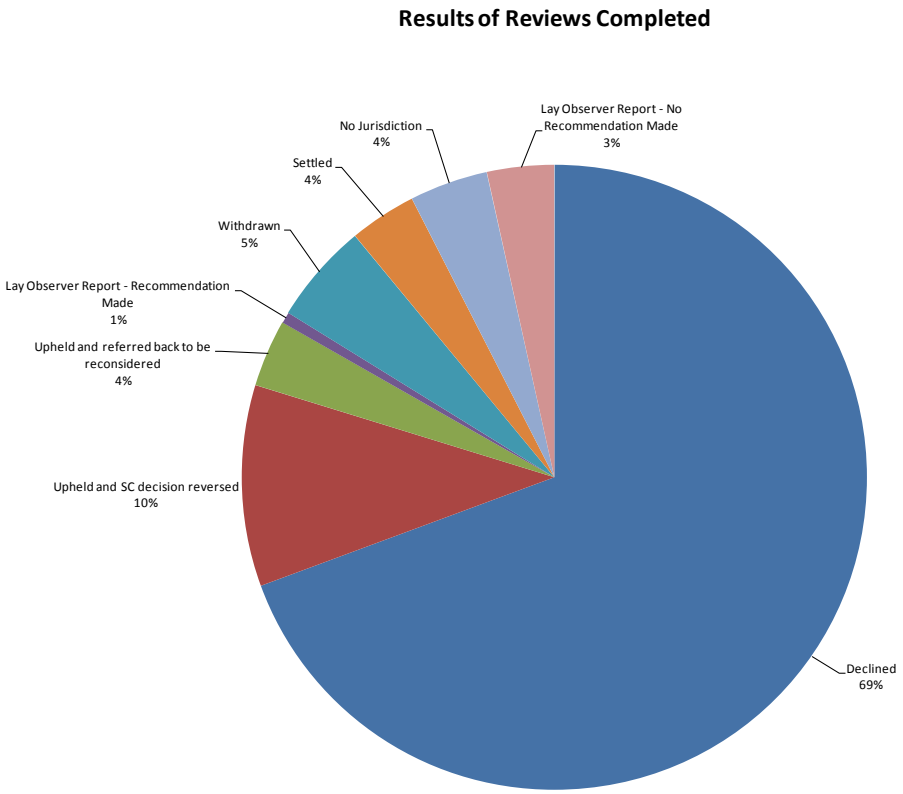
- 14% of those reviews undertaken were successful or partly successful.
- Around 73% of applications were unsuccessful. These comprised 120 that were declined (or a slight amendment only), and 7 instances where there was no jurisdiction to consider the application.

The categories of "successful or partially successful" have not been further analysed for this period but it is our intention to do so for the next reporting period. The remaining 9% can be attributed to withdrawn and settled matters. The above percentages do not include the 7 Lay Observer reports that were issued, one of which contained a recommendation.

Of the 14% of reviews that were successful, there were 13 occasions where the LCRO replaced or modified the Standards Committee decision with his or her own decision and on six occasions the matter was referred back to the Standards Committee either generally or in respect of a specific matter.

Of the 173 reviews completed, nine applications were withdrawn during the course of the review with the consent of the LCRO. Six were settled by way of agreement between the parties through negotiation, conciliation or mediation. This was generally facilitated by the LCRO although in one case a referral was made to an external mediator. Withdrawals and settlements account for a total of 8% of the review applications.

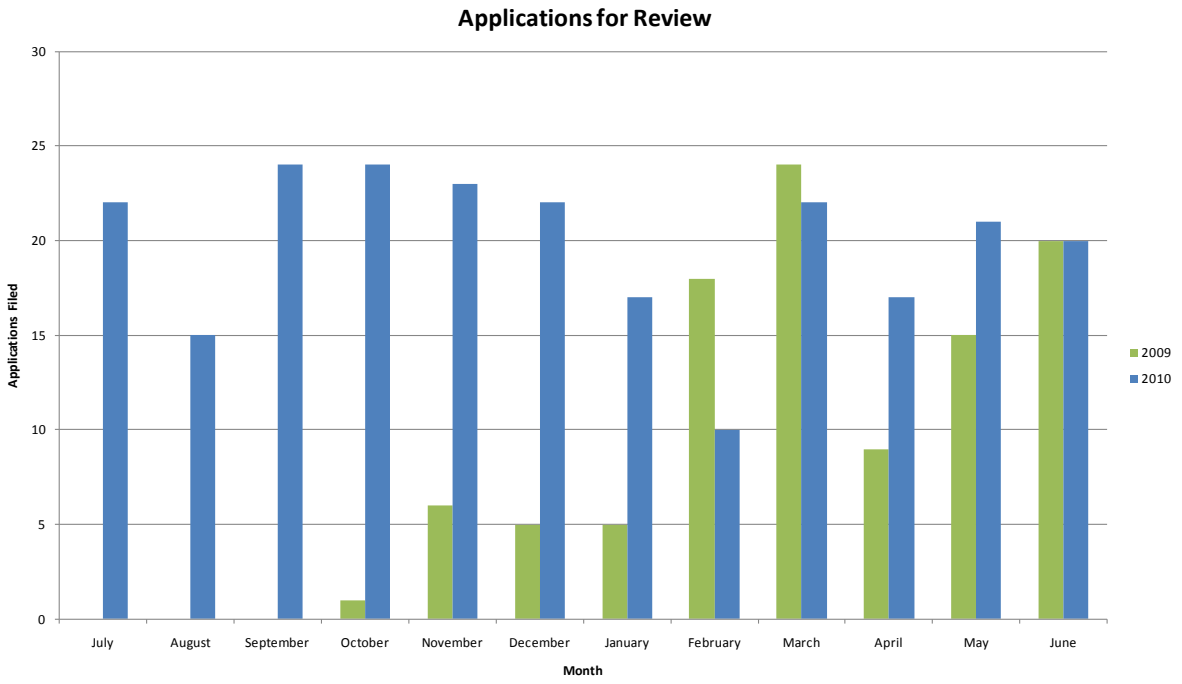
[1] The previous reporting year counted applications received over 9 months.
[2] This refers to actual numbers of completed reviews without taking into account when the review applications were filed.




## WIDER ANALYSIS

### Case Volumes

200 applications for review were projected for this review period. In fact 237 review applications were received, an increase of 18% over the projected figure. Approximately 20 applications were filed per month for the current period. The following graph illustrates the total number of applications for review filed each month (inclusive of Lay Observer matters).



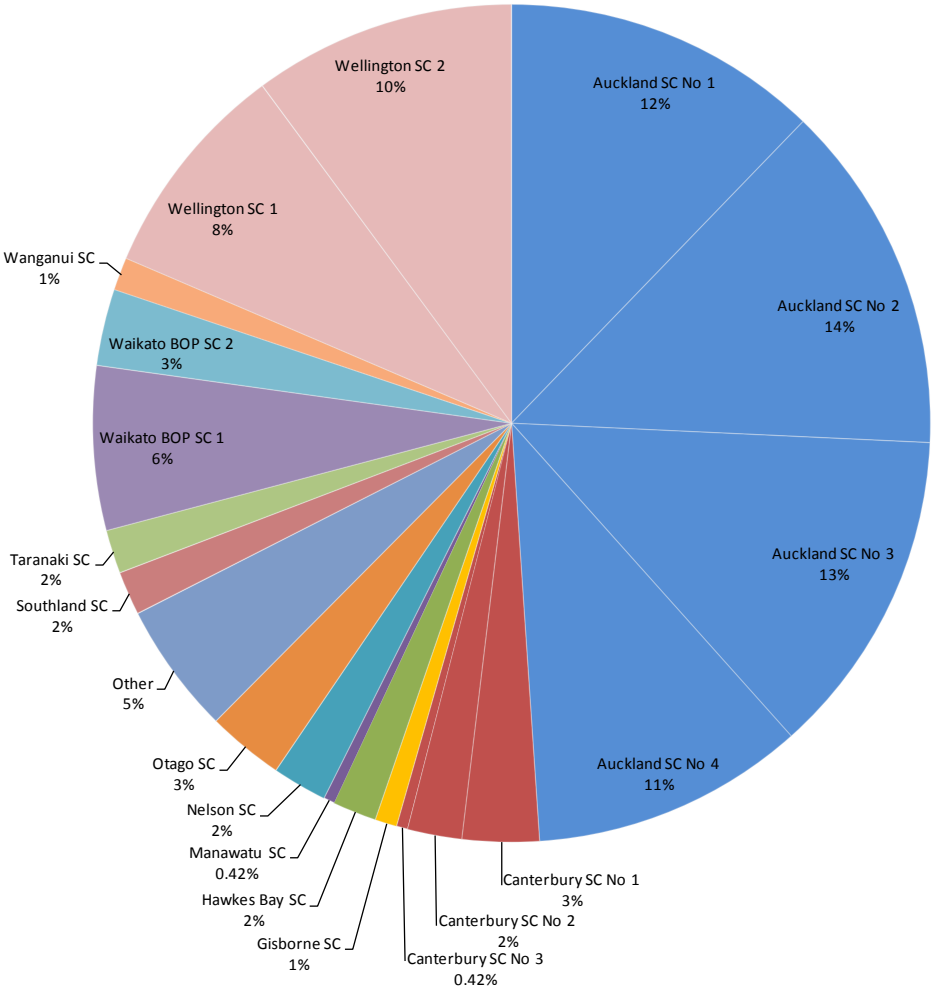
The last 3 months of this review period has seen an increase of 31% on the same period for the previous reporting year. Using this information as a guide, a projection can be made that in the ensuing year approximately 312 applications for review will be made.

**Source of applications**

All applications related to decisions involving lawyers. No applications for review were received involving conveyancers.

The following diagram illustrates the number and locations of applications for review. As is to be expected the majority of applications came from Auckland where there is the largest population of both lawyers and clients.

**Geographic Location of Complaints**




**Rate of Review Applications**

Based on information received from the New Zealand Law Society for the reporting period, a total of 1377 complaints had decisions issued by Standards Committees. In the same reporting period this office received 237 review applications. This suggests that 17% of all Standards Committee decisions proceed to review.[3]

[3] Given that there is a 30 day time frame for filing a review application, no exact match can be made between Standards Committee determinations and review applications for any given period of time.

**Applicants**
Of the 237 applications filed, 178 were filed by lay persons and 51 were filed by lawyers, 83% of these applications were made by the original complainant[4]. This excludes the eight applications which fell outside the jurisdiction of the LCRO.

56% of review applications were filed by clients against their own lawyer, 27% were filed by individuals who were not the lawyers client and 6% were filed by a lawyer against another lawyer. Eight applications were made in relation to decisions made by Standards Committees on an own motion investigation.

Approximately 72% of the review applications (those that proceeded and were within jurisdiction) involved conduct-related issues, 14% were fees related and a further 14% related to both conduct and fees charged by a lawyer.

**Lay Observer Reviews**
Applications to the Lay Observer were fewer in this reporting period. It is anticipated that these applications will continue to decline but as no time limit exists for a Lay Observer review application to be submitted, a few more may yet be received by the LCRO.

**Jurisdictional Issues**
Eight applications for review were not considered for jurisdictional reasons mainly resulting from a failure to comply with procedural requirements. In particular, applications to the LCRO for review must be made on a prescribed form, with a prescribed ($30) fee and within a strict 30 working day time limit. There have been occasions where the requirements were not met, sometimes due to no fault of the Applicant (for example where there have been postal delays). In considering these matters the LCRO has determined that the law requires strict compliance with such formalities and that because the statute confers no discretion there is no jurisdiction to relax the requirements or extend the time for making an application. Information on the process to file a review is now included in all Standards Committee determinations and also referred to on our website.

In general where an application is sought to be made out of time the Applicant will be informed of this by the registry staff. In some cases Applicants nevertheless wish to have the question of jurisdiction determined by the LCRO. A number of such decisions have been made in relation to this point - refer decisions: LCRO 10/2010, LCRO 36/2009, LCRO 211/2009 and 205/2009 which have been published on the website.

## PROCEDURAL MATTERS

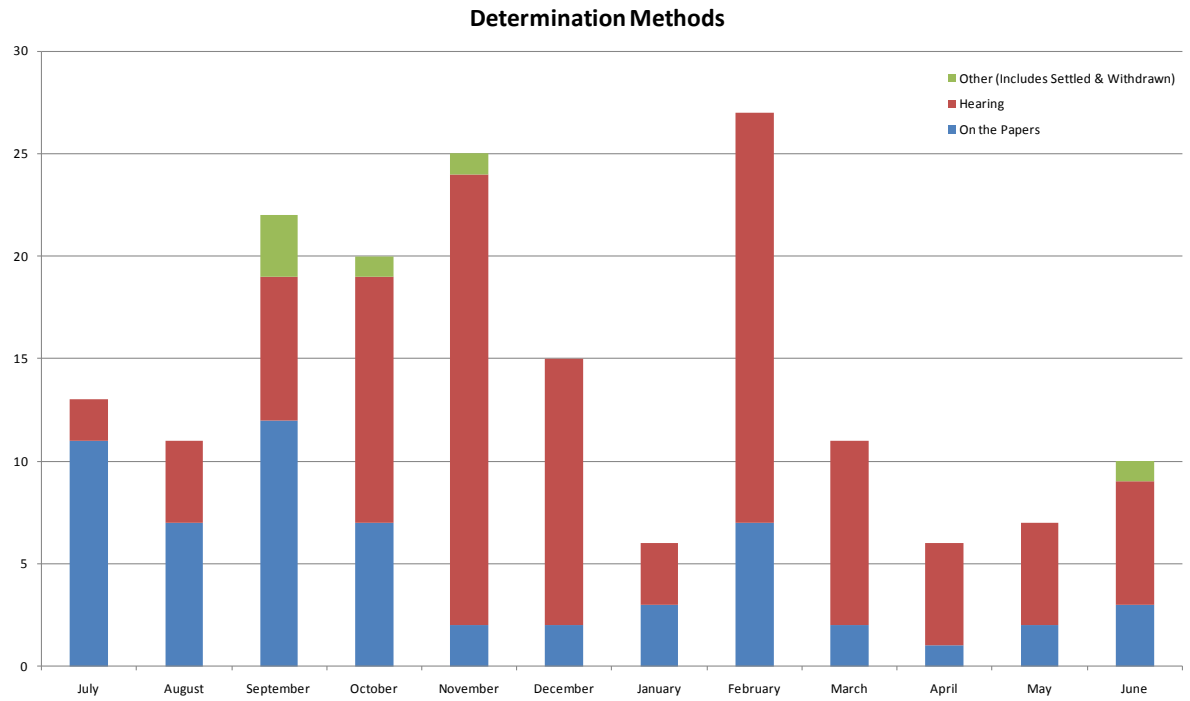
The LCRO is obliged to conduct reviews with as little formality and technicality, and as much expedition as possible as is consistent with the Act, a proper consideration of the review and the principals of natural justice.

**Hearings**
The majority of hearings are conducted in the presence of both parties. The process is inquisitorial. The hearing procedures are set out in the Guidelines which are on the LCRO website.

**Review on the papers**
Where the LCRO is of the view that the matter can be adequately determined in the absence of the parties, the parties may be invited to consent to a review on the papers. Parties are not obliged to consent, however, and have a right to be heard in person on a review. Full details of these procedures are set out in the Hearings Guidelines on the website.

In this current reporting period 108 reviews were conducted by a hearing in person and 59 reviews were conducted on the papers.

[4] The person who made the initial complaint to the New Zealand Law Society




**Applicant Only hearings**

The LCRO may direct that an Applicant-only hearing be scheduled in cases where the LCRO has assessed that the Respondent has fully addressed and responded to all of the issues and there appears to be no further information to be obtained that makes the Respondent's attendances necessary.

These have been referred to as Case to Answer hearings, but the nature of such hearings are subject to further clarification as part of the Guidelines review which will set out the circumstances for such hearings being conducted. Applicant-only hearings do not require the attendance of the Respondent who may nevertheless attend if he or she elects to do so. Any hearing involving one party only does not prevent further enquiry by the LCRO.

**Withdrawal from review**

Where an Applicant seeks to withdraw from his or her review application, the consent of the LCRO is required. Such consent is usually granted where no public interest issues are involved. In this reporting period one such application was declined.

**Costs, Fines and Rectification Orders**

The LCRO has the power to impose costs and has issued a guideline in respect of how that power will be exercised which is on the website.

Where a finding is made against a lawyer or Conveyancing Practitioner, that Practitioner will be expected to pay a substantial proportion of the costs of the conduct of the review. Costs orders totalling $32,000 were made against Practitioners.

In addition to the costs for the review, Practitioners were fined a total of $15,853, the largest being a fine of $7,000. These amounts are payable to the New Zealand Law Society and are taken into account when annual levies are set. Other monetary orders involving the reduction of fees and compensatory orders were made where the LCRO considered it appropriate.

The LCRO has indicated that in general, costs will not be awarded as between parties unless exceptional circumstances exist. Costs to parties, payable by the Practitioner were ordered, totalling $27,087 with the largest to date being $8,586.

**Publication of names / naming conventions**

Decisions of interest or of educational value are published on the LCRO website with names and identifying details removed. The LCRO has continued to adopt the approach that in general, decisions will not be published in a manner that identifies individuals where no adverse finding has been made. Where a Practitioner has been found to have breached professional standards, further consideration will be given to full publication in terms with the guidelines on the website.[5]

**Alternative Dispute resolution**

The Lawyers and Conveyancers Act 2006 provides for a review to be postponed for the parties to explore the possibility of resolving the issues by negotiation, conciliation or mediation. Where appropriate these options are offered to the parties. However, such opportunities also arise from time to time in the course of a review hearing during which one or both parties express a willingness to explore a resolution at that time. The increased focus on pursuing the mediation and conciliation opportunities on occasions resulted in parties reaching an agreement concerning quantum and/or payment of outstanding fees. Any negotiated settlement between the parties may result in either a full or partial settlement of their differences, but does not prevent the LCRO from nevertheless issuing a decision should that be considered appropriate. On one occasion only did the parties consent to the appointment of an external mediator with whose assistance the matter was resolved.

## MINISTER OF JUSTICE

The Legal Complaints Review Officer is required to provide advice to the Minister of Justice on any issue identified in the course of carrying out reviews. In this reporting period no issues of concern have arisen that have necessitated contact with the Minister.

However, in the discharge of the function of Lay Observer pursuant to Section 97(7) of the Law Practitioners Act, the LCRO is obliged to provide a report to the Minister of Justice in relation to the discharge of that function. This obligation arises by virtue of Section 355 of the Lawyers and Conveyancers Act which confers on the LCRO all of the duties and powers of a Lay Observer under the Law Practitioners Act as if that Act had not been repealed. This includes providing an annual report to the Minister.

Pursuant to that obligation, it is noted that 11 review applications were received which related to a Lay Observer review. This statistic includes any cases where an Applicant had sought to re-file a complaint that had been considered by a Complaints Committee, and declined by a Standards Committee for that reason. Seven reviews were completed during this reporting period. There were three instances where the earlier decision had already been reviewed by a Lay Observer, and in such cases the LCRO explained to the Applicant the reasons why no further steps were open to him or her to pursue the complaint further. Where it appeared that no Lay Observer review had been requested, or where such a request had been made but not completed, the review was undertaken by the LCRO pursuant to the exercise of the functions and powers conferred by Section 97 of the Law Practitioners Act 1982.

In this reporting period one case resulted in a recommendation being made by the LCRO, for the Standards Committee, acting as a Complaints Committee, to commence an enquiry into matters that had been previously overlooked.

The LCRO's role as Lay Observer is to undertake reviews of decisions made by Complaints Committees under the Law Practitioners Act 1982 (repealed). In this role the LCRO is confined to exercising the powers and functions of a Lay Observer as set out in section 97 of the Law Practitioners Act 1982. This essentially restricts the review to the manner in which a Complaints Committee had dealt with the complaint, and does not allow a review of a Committee's decision on the merits of the complaint. This would not however prevent an examination of whether the evidence before the Committee reasonably supported the final decision made.

[5] The publishing Guidelines of the LCRO are separate from those of the Standards Committees. A decision by a Standards Committee to publish a lawyers name may be the subject of a review application.

## NEW ZEALAND LAW SOCIETY

One of the functions of the LCRO is to provide advice to the New Zealand Law Society on any issue identified in the course of carrying out reviews. To facilitate this the LCRO meets with officers of the Complaints Service of the Society on a quarterly basis. In the course of those meetings recent decisions are discussed together with any matters concerning the manner in which Standards Committee or the Complaints Service are determining or handling complaints. This also provides an opportunity for exchange of matters of common concern or interest.

As a result of noting that many review applications cited inadequate explanation by the Standards Committee for their determinations, Committees have made significant improvements in providing fuller reasoning for their decision.

By section 124(g) and 125(g) of the Act the Complaints Service of the respective societies are required to provide to the LCRO copies of any complaints about the operations of the complaints service. A number of such complaints have been received in respect of the New Zealand Law Society Complaints Service. These complaints are reviewed by the LCRO and should they indicate any particular matter that requires attention that matter would be raised by the LCRO with the Society. In the reporting period no complaints have been referred that has led to any particular action or concern on the part of the LCRO.

## OPERATIONAL MATTERS

The LCRO is administered by the Ministry of Justice and funded through a levy imposed on the New Zealand Law Society (NZLS) and New Zealand Society of Conveyancers (NZSC) pursuant to s 217 of the Act. The societies recoup that levy through levies on their own members. The LCRO levy on the Law Society and the Conveyances Society for the 2009/10 year was $28.13 (incl GST). All levies were received by both Societies.

The Trust Account at 30 June 2010 had a surplus of $425,524.71. Actual costs for 2009/2010 were $594,382.18 (incl GST)

**Revenue received**

- LCRO Levies $307,588.34 (incl GST)
- LCRO Filing Fees $6,080.54 (excl GST) – note that Lay Observer applications do not attract a filing fee.

**2010 – 2011 Levies**

The levy for 2010/11 is still being negotiated with the Societies, but the same process as previous years has been used, namely that the Ministry, NZLS and the NZSC consult together near the end of each financial year to determine whether the levies set were actual and realistic. The estimated annual amount is adjusted in accordance with a recalculation based on a range of income and expenditure criteria that include:

- actual income;
- actual costs of function;
- budgeted amounts;
- filing fees received;
- interest received from the Trust Account; and
- costs awarded.

As a result of the above process a new levy is set at by dividing the amount of estimated costs by the number of practicing certificates issued by each society.

By section 222 of the Act, the Ministry of Justice is required to report in its own Annual Report in respect of funds received and expended in meeting the cost to the Crown of the performance of the functions of the Legal Complaints Review Officer.

## CASES OF INTEREST – SUMMARIES

### LCRO 99/09 S v R[6]

*Lawyer as Executor/Trustee in an Estate is thereby providing regulated services / costs in answering a complaint cannot be charged to client / costs not generally awarded against an unsuccessful lay Applicant / Unincorporated law firm cannot be the subject of a complaint but is a "related entity" (section 6 of the Act) and recognised as having an interest in the conduct of a review under section 194(2)(c) of the Act*

The complainant alleged that the lawyer had failed to administer the estate with due care, had been negligent, and refused to distribute investment to beneficiaries at their request. Further complaints related to charges made by the lawyer in answering the complaint.

The lawyer argued that as a Trustee/Executor, he was not acting as a solicitor and his conduct was therefore not subject to the jurisdiction of the Law Society. The LCRO observed that conduct that falls outside of the provision of regulated services is dealt with by section 7(1)(b)(i) of the Lawyers and Conveyancers Act 2006, and deals with conduct that could question whether the lawyer is not a fit and proper person or is otherwise unsuited to engage in practice as a lawyer, which was not the case here.

The LCRO considered whether the lawyer's conduct fell within the definition of "regulated services", referring to the section 6 definition (which included legal services) and also the definition of "legal work" which included, in subsection (a), reserved areas of work and other advisory or review work as set out in subsections (b) – (d) of that definition, and finally also noted, in subsection (e) to include "any work that is incidental to any of the work described in the paragraphs (a) – (d)". The LCRO noted that when acting as a Trustee and Executor, the lawyer was not specifically undertaking any of the work in paragraphs (a) – (d), so the question was therefore whether the work he undertook could properly described be as "incidental to" any of the work described in paragraphs (a) – (d) and therefore falling under paragraph (e).

The lawyer sought to rely on *Hansen v Young*[7] as establishing a clear distinction between the role of a solicitor and an Executor/Trustee even though the roles may be fulfilled by the same person. That case concerned the administration of an estate which held speculative shares. The LCRO noted that although that case assumed that the roles of solicitors and Executors/Trustees are distinct even if they are held by the same person, it shed little light on the question arising in the present case, that being whether the work of an Executor/Trustee of an Estate, who is also the solicitor of the Estate, is properly regarded as "work that is incidental" to the other established classes of work set out in section 6 of the Act. On this point the LCRO referred to parallel Australian legislation, citing as an example, section 4.4.2 of the Legal Profession Act 2004 which defined unsatisfactory professional conduct to include:

> "Conduct of an Australian legal practitioner occurring in connection with the Practice of Law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner."

It was observed that '*in connection with'* indicated a general legislative intent that a finding of an unsatisfactory conduct may be made in respect of any services that a lawyer offers in the course of his or her practice. This was considered by the LCRO to be consistent with the purposes of the Lawyers and Conveyancers Act 2006, a central purpose being to protect the consumers of legal services and conveyancing services[8]. The LCRO considered it appropriate to interpret the respective provisions in a way that was consistent with the purpose of protection of consumers of legal services, which purpose would be defeated if the legislation was to be interpreted to exclude from its scope, functions which a lawyer routinely undertook alongside the position of legal services if they were not considered to be regulated services. In this light, the LCRO concluded that the services provided by a lawyer were of a type usual for lawyers to provide and, were

[6] LCRO 99/09, 13 November 2009.
[7] [2004] 1 NZLR 37
[8] Section 3

provided in conjunction with legal work (as defined) and were incidental to that work. The LCRO concluded that a lawyer who is an Executor/Trustee is providing legal services if also acting as the solicitor for an Estate. The LCRO then considered whether the standard of professional services as set out in section 12 of the Act had been breached in this case, noting that the lawyer had deferred the distribution of the Estate because there had been a contested gift and questions about whether there were sufficient funds in the Estate to meet the debt. The LCRO concluded that the lawyer had adhered to the standard of competence and diligence that a member of the public is entitled to expect from a reasonably competent lawyer in the way he acted in the administration of the Estate.

The LCRO went on to consider whether it was appropriate for a lawyer to charge a client (the Estate in this case) the costs of answering a complaint that had been made against the lawyer, this being the cost of his time in addressing the complaint investigated by the New Zealand Law Society and this office. It was noted that the Estate derived no benefit from the lawyer's attendances in responding to the complaint, and that these were independent matters, and that even if the lawyer no longer acted for the Estate, he would still be obliged to respond to the complaint. Clause 6 of the Rule permitted the lawyer to charge for work done "in relation to my Estate or affairs". The LCRO concluded that responding to a complaint is a matter between the professional body and the lawyer, and it could not be said to be "in relation to my Estate or affairs" and such costs were therefore note able to be charged against the estate. In this case there was no evidence that the estate had in fact been charged with any of the costs of responding to the complaint.

The lawyer sought costs against the complainant on the basis that the complaint was fictitious, lacked substance. The LCRO's jurisdiction to award costs arises from section 210 of the Act which provides in sub-section (1) that "the Legal Complaints Review Officer may, after conducting a review under this Act, make such order as to the payment of costs and expenses as the Legal Complaints Review Officer thinks fit." Sub-sections (2) and (3) provide instances of the costs awards which may be made, in particular that costs may be "awarded to any person to whom the proceedings relate" and the LCRO may order that they be paid by Practitioners to whom the proceedings relate (including when no unsatisfactory conduct is found) or against the Law Society. There is no mention of costs being paid by a lay complainant. The LCRO's costs orders guidelines state that any power to award costs between parties will be exercised sparingly, with paragraph 13 of those guidelines providing:

> "A costs order may be made against a party to review (a practitioner or a lay person) in favour of the other party where there has been some improper conduct in the course of the Review. Such conduct may exist where a party has acted fictitiously, frivolously, improperly or unreasonably in bringing, continuing, or defending review. Improper conduct may also exist where a party has ignored or disobeyed an order or direction of the LCRO or breached an undertaking given by the LCRO to the other party."

While the complainant was unsuccessful in his review application, the LCRO accepted that the application appeared to have been brought with a genuine intention of airing the perceived grievances, and not simply to harass, noting that the complainant's conduct in the course of the review had been reasonable and measured. No costs orders were made. The application for review was declined.

## LCRO 55/09 W v S[9]

*Advising client of likely increase in fees / conduct commencing under Law Practitioners Act 1982 and continuing under the Lawyers and Conveyancers Act / Lawyer as stakeholder / right of lien or set-off*

The Practitioner had acted for the Complainant in relation to the purchase of commercial property. There were 3 main complaints arising from the transaction - that the fees were overall excessive, exceeded the amount quoted by the firm and there had been no information concerning any increase, that the lawyer's failure to inform the local authority of change of ownership led to failure to pay the rates and subsequent penalties, and the lawyer had wrongfully refused to pay a Metro Waste account from monies he held in trust for that purpose. None of these complaints had been upheld by the Standards Committee.

[9] LCRO 55/09, 26 August 2009.

The LCRO examined the Practitioner's file in relation to the transaction. In relation to the fees, the LCRO noted that there had been no fixed quote given to the Complainant who had been provided with a written estimate, explicitly (stated as such under the heading 'important notes' (in bold)) which was based on a straight-forward uncomplicated transaction as described in the attached job description, and where applicable, finance arrangements documented by one loan and mortgage alone, that any departure was likely to involve additional attendances and thus, additional costs, and if appropriate, a revised costs estimate would be provided. The file showed that the complainant received a revised costs estimate about a month later with an explanatory note, and a further revised costs estimate in the following month, which was explained on the basis that there were ongoing complications and concluded, *"once an outcome has been reached from our current negotiations, I will be in a better position to set a fee*". It is apparent from the above that the Complainant had not received a quote, and had been kept fully informed of increases to the original estimate and the reasons.

In respect of the complaint that the fees were excessive, the LCRO examined the transactions involved in the matter, noting that a considerably greater than normal volume of work was involved, which could not be foreseen at the time the original instructions were given. The LCRO noted that the details of all attendances were included in accounts that the Practitioner had sent, and that it reasonably supported the charges that had been made. On this basis, the LCRO was of the view that the Standards Committee's finding on this complaint was correct.

In relation to the complaint involving rates arrears, the LCRO noted that it was normal practice for the Vendors' lawyers to notify the local authority of a change of ownership. The LCRO confirmed that the rates calculations and apportionments on the settlement statement were correct, and noted that the second instalment became due about two months after the settlement date. In the normal course of events, the Council would have sent the new rates to the new owner, but in this case, they did not do so, apparently for the reason that no change of ownership had been recorded on the Council's records.

The LCRO observed that the Complainant owned other properties and would have been well aware of the obligations of a property owner to pay rates. The Complainant had admitted to having regular contact with the Council over the 14-month period following his purchase of the property, and the LCRO expressed the view that the Complainant would have been aware that rates were payable, and that no rates demand had been received by him, and that if the Complainant had taken no step to enquire into the rates situation, he must assume responsibility for what followed. The LCRO could find no evidence to support the complaint of error or wrongful action on the part of the lawyer and there was no proper basis for the lawyer being answerable for the penalties that had accrued.

The final complaint related to money withheld by the Practitioner and his refusal to apply it to clean-up costs for the commercial property that the Complainant had purchased. The Practitioner's file showed that an agreement had been made between lawyers acting on the transaction that the sum of $20,000 would be withheld from the purchase price for the specific purpose of paying for clean-up costs of the building. This was to be held in the Practitioner's trust account as stakeholder, and to be used to pay invoices presented and approved by the vendors for the cleaning. There was evidence that some of the money had already been paid to the Complainant, and others, for cleaning costs.

When the Complainant presented the final Metrowaste invoice for payment, the Practitioner refused to pay it from the fund. Metrowaste meanwhile commenced proceedings against the Complainant. The Practitioner had informed the Standards Committee that vendor approval for payment had not been received, and the account could not therefore be paid from the funds held. The LCRO discovered the vendor approvals on the file which had been given at some time after the invoices were provided to the Practitioner. Obtaining the Vendors' approval was complicated by the fact that the two Vendors were each presented by different lawyers, thus requiring separate consents. But both consents were on the file, contained in brief emails, and the LCRO it possible that the Practitioner had overlooked these consents. Copies of the Vendors' consents were forwarded to both parties, they being informed that the review would be postponed pursuant to section 201 of the Lawyers and Conveyancers Act to see if the particular complaint might be resolved by agreement.

A teleconference was arranged for that purpose, at which it was put to the Practitioner that the balance held in trust by the firm should be applied to Metrowaste's invoice in accordance with the firm's undertakings, and the vendor approval of the account. Although initially agreeing to apply the remaining funds to the debt, the

Practitioner subsequently withdrew from that agreement and in a subsequent letter he explained that the Complainant intended to defend the Metrowaste proceeding. He expressed the view that the Complainant's debt to the firm entitled the firm to retain the money. The Practitioner was invited to reconsider his position, referred to case law relating to a lawyer's obligations as stakeholder and where a lien or set-off could be asserted, and given a clear signal that withholding trust money in the circumstances could lead to an adverse outcome at the Review. These background matters were included in the LCRO's decision, because it was considered appropriate to record that the Practitioner had been given an opportunity to resolve the Complaint.

The Practitioner continued to refuse to apply the money to the Metro Waste account and the LCRO commenced the review of the Complaint. There was no dispute about the terms on which the money was held. The LCRO noted that the Practitioner's refusal to honour the undertaking was because the Complainant had not paid outstanding fees owed to the firm. The Practitioner's reasoning was that the undertaking given by the firm related to the Vendors' obligation to do the clean up, that the Vendors' failure to do the cleanup resulted in the money now being held for the benefit of the Purchaser (the Complainant), that the undertaking to the Vendors had lapsed and the Vendors' consents to release the funds were irrelevant and unnecessary as the funds were now held for the benefit of the Purchaser (the Complainant) and therefore could be the subject of a lien by the firm.

The LCRO disagreed, noting that the Practitioner's submissions did not reflect the undertaking which contemplated that others, and not the Vendors, would attend to the clean up and be reimbursed from the funds. The evidence on the file showed that the retention funds had remained in the lawyer's trust account from September 2007 until July 2008 on which day the Vendors both specifically approve the Metro Waste's account for payment. There was evidence that the Practitioner, a senior partner in his firm, had been personally involved with the overdue accounts of the Complainant and that he had signed correspondence in relation to that. The LCRO noted that there was evidence to show that within a few days of the Vendors' consents having been given that the Practitioner had decided that no action would be taken due to the non payment by the Complainant of his bills. The LCRO referred to *Heslop v Cousins*[10] wherein it was stated:

> "A solicitor has no lien or right of set off if funds have been deposited into the solicitor's trust account for a particular purpose. In that situation, the solicitor is obliged to use the funds for the particular purpose for which the funds have been entrusted to the solicitor."

The LCRO concluded that the fact that money was received in the trust account for a specific purpose prevented it from being applied to any other purpose without the expressed consent of the owner. There was no evidence that the Vendors had given any direction for an alternative application for the money or that they were even aware that the Metro Waste's account remained unpaid, and that the lawyer claimed lien over the funds. This meant that the money continued to be held for the benefit of the Vendors in terms of the original undertaking. The LCRO noted that the Practitioner's failure to pay the clean up accounts left the Vendors exposed to legal action (by the Complainant) for breach of contractual obligations, as well as exposing the law firm to a charge by the Vendors of breach of trust.

The LCRO found that the Practitioner's failure or refusal to honour the undertaking amounted to conduct unbecoming in his professional capacity, in breach of section 106(3)(a) of the Law Practitioner's Act 1982. This was conduct in respect of which disciplinary proceedings could have been taken against the Practitioner and therefore met the section 351 threshold, thus falling within the jurisdiction of the Standards Committee.

The conduct which had commenced under the Law Practitioners Act had continued into the jurisdiction of the Lawyers and Conveyancers Act, and therefore covered a timeframe where different professional standards applied. The LCRO noted the equivalent section under the Lawyers and Conveyancers Act was Rule 10.3 which requires a lawyer to honour all undertakings, whether written or oral, and was also a breach of Rule 10.3.2 which states "a lawyer who receives funds on terms requiring the lawyer to hold the funds in the trust account as a safe holder must adhere strictly to those terms and disburse the funds only in accordance with them."

The LCRO concluded that the ongoing refusal by the Practitioner to honour the undertakings amounted to conduct unbecoming that amounted to unsatisfactory conduct in terms of section 12(b) of the Lawyers and

[10] [2007] 3 NZLR 679

Conveyancers Act. The Practitioner was ordered pursuant section 156(1)(h) to rectify, at his own expense, the admission relating to the undertaking, and forward to Metro Waste the outstanding sum. The LCRO set out the functions of a penalty, and took into account not only that the Practitioner had failed to honour the undertaking, but had deliberately refused to honour that undertaking, despite having been reminded of the consents given, and provided with information that fundamentally question the approach he was taking. The LCRO was of the view that the conduct was of an egregious nature and taking all matters into account, considered a fine of $1,500.00 to be appropriate. The Practitioner was also censured, and ordered to pay $1,200.00 to the New Zealand Law Society in respect of costs incurred in the conduct of the Review.

## LCRO 110/09 M v R[11]

*Jurisdiction / meaning of 'regulated services'/whether a duty of confidence exists*

The Practitioner ran both a law practice and an immigration consultancy business. He acted for the Complainant in respect of certain immigration matters and also in respect of police matters, and at a later time assisted the Complainant with residency matters. At some stage the Practitioner's concerns about his client's conduct (including alleged acts of violence against his employee) led him to contact the Immigration New Zealand (INZ) office on two occasions. Notes on the INZ file provide a record of those calls, the first advising that the Complainant had assaulted his employee, the second advising that he had been arrested by the Police.

The complaint was investigated by the New Zealand Law Society which found that the Practitioner's conduct in communicating this information to INZ was conduct, which fell short of the standard of conduct considered acceptable to the standards of "competent, ethical and responsible Practitioners"[12] and found it to be conduct unbecoming a Practitioner. The Practitioner was fined and ordered to pay costs.

The Practitioner sought a review of the decision essentially on the ground that his conduct fell outside of the regulatory reach of the Law Society because he was not acting as a lawyer at the relevant time. He argued that the information that he had acquired about the Complainant had been acquired in the course of his immigration business and not as a lawyer.

The LCRO was required, in the first instance, to determine whether the conduct fell within the jurisdiction of the Law Society, having acknowledged that it was not open to a Standards Committee to make a finding of unsatisfactory conduct in respect of conduct which occurs outside of the course of providing regulated services. A Practitioner's conduct outside of providing regulated services is dealt with by section 7(1)(b)(i) of the Lawyers and Conveyancers Act which allows a finding of misconduct to be made where the conduct, unconnected with the provision of regulated services by a Lawyer, would justify a finding that the Lawyer is not a fit and proper person, or is otherwise unsuited to engage in practice as a Lawyer. That is to say, a finding of unsatisfactory conduct cannot be made in relation to conduct falling outside of regulated services.

The LCRO was required to determine whether the Practitioner's conduct had occurred *"at a time where he or she is providing regulated services"* under section 12 of the Act. In undertaking this interpretive task the LCRO referred to the text and purposes of the legislation (section 5 Interpretation Act 1999), noting that a central purpose of the Lawyers and Conveyancing Act is to protect the consumers of legal services and conveyancing services (section 3). Reference was also made to section 4 of the Act which affirms that the fundamental obligation of a lawyer is to act in accordance with all fiduciary duties and duties of care owed to a client. The LCRO considered that the proper approach to interpretation is one that was consistent with the protection of consumers of legal services, and the provision of a responsive and expeditious complaints process (section 120(2)(b)).

The LCRO noted that regulated services include legal services as defined in Section 6 of the Act. Included in that definition is any work that is incidental to any of the work outlined in the definition. The LCRO also noted parallel legislation from Australian jurisdictions, noting that the Legal Professional Act 2004 (VIC) defines unsatisfactory professional conduct to include conduct of an Australian Legal Practitioner occurring in

[11] LCRO 110/09, 12 November 2009.
[12] See *B v Medical Council* [2005] 3 NZLR 810 per Elias J at pg 811.

connection with the practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian Legal Practitioner.

In considering whether the conduct in this case could properly be considered to be conduct, which occurred in connection with the practice of law, it was noted that the Practitioner appeared to have adopted several roles; he acted as a lawyer and as an immigration consultant. The LCRO stated that where there are overlapping roles, there is a strong policy reason for presuming that the professional duties of a lawyer is attached if there is any doubt. An analogy was provided by *Sims v Craig Bell and Bond*[13] Richardson stated:

> "It will be disruptive of the Solicitor-Client relation, undermining of the principles fiduciary relationship and contrary to the public interest to allow this Solicitor to opt out of that professional duty by pleading that acting in a different capacity he had discharged the different responsibility attached to that other relationship. There is every reason to require the Solicitor who has two roles to play to discharge the fiduciary responsibilities attached to each."

In the same case, Hardie Boys J made a similar observation when he said:

> "The distinct, and more stringent, obligations imposed on the Solicitor-Client relationship cannot be diminished by virtue of another kind of relationship which mixes between the parties; it's only for the reason that those obligations are inter alia for the protection of clients with whom there is just another kind of relationship."

The LCRO considered that the words of section 12 of the Act that the conduct in question must be "conduct of the lawyer ... that occurs at the time when he or she is providing regulated services" and must be construed broadly and consistently with the wider purposes of the legislation to include any conduct which occurs in connection with the practice of law, and that there is a strong presumption that a lawyer who occupies more than one role must adhere to his professional obligations as a lawyer at all times. The LCRO noted that the Practitioner accepted that INZ were interested in speaking with him because he was the Complainant's former lawyer and has dealt with his immigration matters. The LCRO therefore considered that the telephone calls, which were the subject of the review, were connected with the Practitioner's provision of legal services to the Complainant. In this light, the LCRO considered that the Practitioner's conduct was connected with the provision of regulated services.

Turning to the question of whether the conduct could be considered conduct unbecoming in terms of section 12(b) of the Act, the LCRO considered the Practitioner's submission that the information he had disclosed to the INZ was not confidential because the information had not come to him in the course of lawyer and client relationship, and therefore there could be no breach of confidence. As the conduct in question occurred when the Law Practitioners Act was still in force, the relevant rule was Rule 1.08 of the Rules of Professional Conduct of Barristers and Solicitors, which provided that "a Practitioner has a duty to hold in strict confidence, all information concerning the business and affairs of the client acquired in the course of professional relationship". The Standards Committee had considered that the Practitioner's breach flowed from the fact that he would not have acted as he did had he not had knowledge of the Complainant's immigration matters and therefore concluded that the relevant knowledge was acquired in the course of his professional relationship with the Complainant.

The LCRO noted that Rule 1.05 of the former rules of Professional Conduct also provided that a lawyer was prohibited from acting against a former client when "through prior knowledge of the former client of his or her affairs which may be relevant to the matter, to so act would be or would have potential to be, the detriment of the former client..." The Practitioner's calls to the INZ had been made after the termination of the professional relationship. The LCRO's view was that the Rule reflected the fact that while there is no general ongoing duty of loyalty on the part of a lawyer to a former client, there is an ongoing duty of confidence. The LCRO noted that the duty prevents disclosing any confidential information, and also prohibits using the information to the detriment of the former client, or the benefit of another party.

The LCRO noted that the complainant appeared to have been unaware of any difference between the roles played by the Practitioner. The LCRO further noted the Practitioner's substantive submission appeared to be that the duties and obligations attaching to his status as a lawyer did not attach to him when he adopted a

[13] [1991] 3 NZLR 535, (CA)

different role. The LCRO observed that the question of whether the professional obligations of a lawyer attached to any particular conduct does not depend on the niceties of any particular business structure through which the service is being provided or the formalities of the role the provider purports to occupy. Rather, it is necessary to consider objectively whether a reasonable person in the shoes of the client would consider that he was obtaining legal services. Reference was made to *Longstaff v Birtle*[14]*s,* that:

> "A duty may endure beyond the termination of the retainer which initially formed the professional relationship of [lawyer] and client ... The source of the duty is not the retainer itself but the circumstances (including the retainer) creating a relationship of trust and confidence, from which flow obligations of loyalty and transparency."

The LCRO observed that when a lawyer claims that obligations do not attach to him because he is occupying a different role, it is appropriate that a heavy onus be placed on that lawyer to show that the conduct complained of did not have a connection with his role as a lawyer, and the client could not reasonably have thought he was acting as a lawyer. The Practitioner had not discharged that onus in this case, and it is therefore reasonable that the Standards Committee had concluded that the Practitioner was in breach of his obligations as a lawyer to not use confidential information held to the detriment of the client. The question is a global one of whether when all of the circumstances are taken into account, the conduct of the Practitioner was such as to be "conduct that would be regarded by a lawyer of good standing as being unacceptable" where there is "conduct unbecoming a lawyer", or "unprofessional conduct". The LCRO noted that Standards Committees are comprised of experienced legal practitioners and lay observers and it would be with considerable reluctance that a Committee's decision would be departed from without a proper basis for doing so. The Standards Committee's finding was upheld.

## LCRO 136/09 E v Standards Committee[15]

*Procedures of Standards Committee / privilege / relationship between Law Practitioners Act and Lawyers and Conveyancers Act 2006 / natural justice / internal report of the Standards Committee / application of the Law Practitioners Act / Trust Account regulations and joint accounts / trust money and dormant funds*

The New Zealand Law Society received a complaint against a law firm and initially treated this as a complaint against the Principal of that firm. Subsequently the Standards Committee broadened its enquiry and resolved, of its own motion, to enquire into the conduct of another Practitioner of the firm who was found to be guilty of unsatisfactory conduct pursuant to section 12 of the Lawyers and Conveyancers Act, and ordered to pay a fine of $500.00 and costs of $750.00. The Practitioner sought a review of that determination.

The complaint was that the sum of $1,500.00 paid into the firm's trust account had not been properly accounted for. The conduct occurred prior to the commencement of the Lawyers and Conveyancers Act, and by virtue of section 351 of that Act could only be considered if it was related to conduct in respect of which proceedings of a disciplinary nature could have been commenced under the Law Practitioners Act 1982.

The LCRO noted that the standards applicable to the conduct were those found in section 106 and 112 of the Law Practitioners' Act, and that the threshold for this primary intervention was high and could include findings of misconduct or conduct unbecoming. In particular the LCRO noted that the conduct had to be sufficiently grave to be termed reprehensible, or if negligent, needed to be of such a degree or of such frequency as to reflect on the Practitioner's fitness to practice.

The LCRO traversed the background. In short, the money had been transferred from a ledger in the joint names of the firm's client and his partner to the ledger of the client alone and then taken as fees; the Practitioner was responsible for the file. The complaint involved questions about proper receipting, proper authority for the transfer from one ledger to another, and authority for dealing with it.

The Practitioner had raised a number of objections to the Committee's investigative procedures and these were reiterated at the review. The Practitioner contended that much of the information relating to the matter

[14] [2002] 1 WLR 470, 471
[15] LCRO 136/09, 5 November 2009.

was privileged. The LCRO noted that privilege attaches to a communication between a client and his or her lawyer, and doubted that a trust account record amounted to such a communication. The LCRO added that even if some documents sought by a Standards Committee under section 147 of the Act were privileged, there was no obligation on a Committee to disclose information it obtains in the course of any enquiry to a third party. The fact that a lawyer cannot raise privilege in a professional conduct enquiry was discussed in *Parry-Jones v Law Society*[16]. The LCRO also noted that privilege in this case belonged to the client and not the lawyer, and as such a lawyer is misconceived in claiming the client's privilege in respect of the inquiry to which he (and not the client) is the subject. The LCRO noted that as far as the Practitioner was concerned the information he held was not privileged, and for the position to be otherwise would make the investigation of complaints by third parties against lawyers impossible.

The LCRO then addressed the Practitioner's submissions challenging the jurisdiction of the Standards Committee to have made a finding of unsatisfactory conduct against him. This rested on the basis that section 351 of the Lawyers and Conveyancers Act allowed a complaint to be made against the lawyer only in respect of conduct of which proceedings of a disciplinary nature could have been commenced under the Law Practitioners Act. The Practitioner argued that this placed a limit on the powers of the Committee because unsatisfactory conduct was not conduct in respect of which disciplinary proceedings could have been commenced under that Act. The LCRO considered this argument to be ill-founded, since the question was whether the Practitioner's conduct was of a kind that could have given rise to disciplinary proceedings under the old Act, and failure to properly account for trust funds was clearly conduct of such a kind. Although, it was noted that the Standards Committee had not clearly set out the fact that it was considering the matter pursuant to section 351, the Committee clearly directed itself to consider whether the conduct was in breach of the Law Practitioners Act and the Solicitors' Trust Account Regulations 1998. The LCRO was satisfied that the Committee was able to make the findings it did within the jurisdiction conferred by section 351 of the later Act. The LCRO commented that the submissions appeared to confuse the conduct complained of with the determination of a Committee.

The LCRO noted that when a Standards Committee considers conduct that occurred prior to the commencement of the current Act, it must first satisfy itself that it meets the criteria set out in section 351, namely that it concerns conduct in respect of which proceedings of a disciplinary nature could have been commenced under the Law Practitioners Act. Once that threshold was reached, it could then go on to consider whether any of the standards set out in the Lawyers and Conveyancers Act had been breached and if so could make orders, providing that any orders were confined to those that could have been made under the repealed Act. The Committee in this matter adhered to those requirements.

The Practitioner further submitted that the Standards Committee had not adhered to the principles of natural justice, in particular alleging that the Notice of Resolution to undertake inquiry had failed to adequately inform the Practitioner of the matter under investigation. The Practitioner argued that he had not been fairly put on notice of "act, omission, allegation, practice or other matter" which was under investigation, and referred to section 24(a) of the New Zealand Bill of Rights Act 1990 (the right of persons charged with an offence to be informed promptly and in detail of the nature and course of the charge), a provision that the LCRO considered was of no relevance here because the proceedings before a professional body did not amount to a Practitioner being charged with an offence. The LCRO agreed that the provision of section 27(1) of the Bill of Rights Act would apply to the proceedings of the Standards Committee but that section did no more than affirm the right to natural justice which was not in doubt.

The LCRO traversed in some detail the extent to which the Committee had informed the Practitioner of the issues that were under investigation, with reference to the entire Standards Committee file and concluded that it was not tenable to suggest that the Practitioner did not know the nature of the allegations against him, given that the nature of the transactions had been clearly identified by the questions and the core question was whether the funds were properly dealt with was never in doubt. The LCRO observed the Practitioner had not co-operated with the Committee's investigation, had suggested that officers of the Society were incompetent and had embarked on a fishing expedition, and that his reluctance to answer questions were based on the claim that the Society was exceeding its jurisdiction. The Law Society had set out its understanding of the facts of the matter which, if correct, would mean that the Practitioner had transferred

[16] [1969] 1 Ch 1; [1968] 1 All ER 177

funds in breach of his obligations. The Practitioner sent a substantive response to the Society and a section 152 (2) hearing on the papers was then scheduled, Notice having been given to the Practitioner in identical terms to the Notice of Inquiry. The Practitioner's submissions again alleged breach of natural justice.

The LCRO concluded that the exchange of correspondence between the Practitioner and the Society showed that the Practitioner could have been under no illusion as to the nature of the allegations against him, noting also that there was no requirement in professional discipline to state the particular provision of legislation or rules that the Practitioner may have breached. There was no obligation for a Standards Committee to explicitly notify a Practitioner of the exact findings that it might make. The legislation was clear that the procedure of the Standards Committee is summary in nature and may be partly inquisitorial. The Standards Committee's obligations were found in section 141 of the Act which provides that the Committee:

> "[M]ust send particulars of the Complaint or Matter to the person to whom the Complaint or Inquiry relates and invite that person to make a written explanation in relation to the Complaint or Matter"

The LCRO noted that the Committee was required to adhere to the principles of natural justice (section 142(1)), when a matter was to go to a hearing the procedure to be adopted was set out in section 153. These provisions had been adhered to. The LCRO referred to *B v Canterbury District Law Society*[17] where, in discussing what guidance should be given to a lawyer who is the subject of a complaint, Randerson J, stated:

> "Generally, referring the letter of complaint for comment will be sufficient but if the letter does not make the substance of a complaint clear, the Committee may need to clarify it for the Practitioner."

The LCRO considered that there had been due compliance by the Standards Committee in this case, generally noting that the obligation was to ensure that a lawyer is aware of the nature of the allegations made, either from the complaint itself or from correspondence of the complaints service or from some acknowledgement by the lawyer demonstrating awareness of the allegations. It was also noted that if additional matters emerged in the course of the investigation which had not been referred to in the complaint, the Practitioner would need to be informed that these matters were under consideration, obligations which were considered to have been met by the Committee in this case. It was for the lawyer, in full possession of all the information, to address whether the course of conduct that was apparent from that information fell foul of any applicable standards. The LCRO was satisfied in this case that the Practitioner was fully aware of the allegations of breach of trust and had responded to it.

The Practitioner further submitted that it was not appropriate for the Committee to have considered a report prepared by a staff member for the Complaints Service. This referred to an internal report of the Complaints Service, it being submitted by the Practitioner that a copy of it should have been given to him so he could have corrected any alleged errors or insinuations. The LCRO noted that there are obvious practical reasons for the Committee of a Complaints Service to be provided with a briefing document but that it should not usurp the fact-finding and the decision making function of a Committee. It was equally obvious that such document give a fair and accurate summation of the position of the parties and the facts in dispute. The LCRO expressed the view that it was not necessary for the Standards Committee to provide that document to parties to any enquiry prior to deciding the matter, (which would impede expeditious disposal of the complaint) but once the matter was determined, such a document should be provided if requested by a party.

The Practitioner also submitted that the conduct complained of occurred while providing regulated services and therefore could not be stated to be conduct unbecoming which could only apply to conduct outside of the provision of regulated services. It was argued that in section 106 of the Law Practitioners Act, conduct unbecoming is used in distinction to "misconduct in his professional capacity". The LCRO considered that the argument must fail for two reasons. Firstly, even under 1982 Act, conduct unbecoming could relate to conduct in the course of practice, and secondly, and more importantly, the finding here was made under section 12(b) of the Lawyers and Conveyancers Act which allowed for a finding of conduct unbecoming amounting to unsatisfactory conduct in respect of conduct of the lawyer *"which occurs at the time when he or she is providing regulated services".* The Standards Committee is only empowered to make findings under the Lawyers and Conveyancers Act and it was accordingly this standard that was breached rather than that found in section 106 of the old Act. The LCRO further noted that conduct outside the practice of law is dealt with in

[17] [2002] 3 NZLR 113

section 7(1)(b)(ii) which being unconnected with the provision of regulated services, reflected on a Practitioner's fitness to practice.

The Practitioner further submitted that the money had been held in the joint names of the firm's client and a third person, and therefore either party could direct how it was to be applied. Reference was made to the then applicable Trust Account Guidelines and Solicitors' Trust Account Rules (since replaced) which, by Rule 5(1)(c), stated that clients having a joint account are considered as a single client. On this basis it was further argued that it was open to the firm to accept the client's instructions to take the money as fees. The LCRO rejected this interpretation of the Rule, because when read in context the purpose of that Rule was to clarify that it was not necessary to open up separate accounts for individual clients (as required by Rule 5(1)(b)) where the funds belong to more than one client jointly in which case a single account in the parties joint names is to be used. Rule 5(1)(c) did not permit a lawyer who held disputed funds as stakeholder to accede to the request of his or her client as to the use of the money and to ignore the basis upon which the funds were expressly paid.

There had also been enquiry into the way the money had been receipted. The Practitioner argued that the receipt showed that the funds were received on account of costs and that this was conclusive as regards the purpose of the money. The LCRO noted a lawyer is obliged to ensure that there is accurate receipting of money received, and the firm's copy of the receipt showed that it was originally noted as being for "valuation", but at some point this was crossed off and replaced with "on a/c of costs". In reply the Practitioner suggested that if the complainant had no objection to the narration on the receipt she should not complain now that it was used to pay costs. The LCRO did not find this convincing; also noting that the firm's copy of the receipt was inconsistent with the trust account ledger entry. The LCRO formed the view that reference on the receipt showing the funds were on account of legal costs was erroneous, and while it was not clear how the error had occurred, it could not be laid at the door of the complainant who had (as had her barrister) provided a considerable body of evidence which was inconsistent with the Practitioner's claim. That is, the erroneous receipt could not be used to found some kind of estoppels against the person entitled to the funds. The law firm could not adopt its own error when dealing with the funds and then claim it was no breach of trust. It was noted that the erroneous receipt did not affect the fundamental obligation to deal with funds for the purposes for which they were paid. The LCRO furthermore noted that the Practitioner's argument lacked merit because by his own admission he had not sighted a copy of the receipt when authorising transfer of the funds to fees.

The Practitioner then argued that because the funds had been in the firm's trust account in the joint names of the parties for some two years, the account could properly be considered as dormant and as such it was proper to transfer it to the client's sole ledger. The LCRO referred to section 110 of the Act (section 89 of the old Act), and Regulation 3(1) of the Trust Account Regulations 1998 which required a lawyer to account properly for trust money to his or her client, and where the person entitled to the funds could not be found, the funds are to be paid to the Inland Revenue Department (pursuant to section 377 of the Act and section 90 of the former Act). The LCRO noted that it was not open to the Practitioner to deal with the money in breach of the purpose for which it was paid into a trust account. Furthermore, the LCRO disagreed that the money could be considered dormant, and it would have been reasonable to have raised with the third party or her advisors the fact that the money was still held as stakeholder and to seek some resolution as to how it should be dealt with. It was not opened to a Practitioner to unilaterally decide to transfer money held in one account on one basis to another account on another basis simply because it had been there for a long time and there had been no activity in the account.

The LCRO then went on to generally consider the conduct particularly giving consideration to submissions that there had been a degree of confusion about what these funds were held for, and the breach in payment of funds was a mere error of judgment and having been prior to 1 August 2008 was not properly the basis for an adverse finding against the Practitioner. The LCRO had to consider whether the Practitioner's conduct was a mere error of judgment which did not warrant an adverse finding, or whether it was conduct unbecoming. The LCRO accepted that the Practitioner was not an employee of the firm at the time the funds were receipted, but noted that the Practitioner was aware that the funds were not intended to be used at the sole direction of only the firm's client. The LCRO did not accept that the Practitioner was unaware that the funds belonged to both parties, as he had sent a letter to the firm's client in which he had acknowledged that the funds belonged to the client and the third party. The LCRO also noted that there was no evidence that the Practitioner had any independent instructions from either party that the funds could be transferred to the

account of the firm's client and applied to outstanding fees of that client. The impetus for this transaction seemed to have come from the Practitioner when he issued invoices to the client and undertook reconciliation of the account. The LCRO was satisfied that it was the Practitioner who had given these instructions to the firm's accountant. The LCRO further noted that the trust account ledger in the name of both parties was noted that the funds were "stake", noting that it was commonplace for lawyers to hold funds as stakeholder particularly in relationship property matters.

The Practitioner further suggested that because the third party was not his client, it would not have been proper to have communicated with her on the matter, a matter not accepted by the LCRO on the basis that the third party was also the person the firm was obliged to account in respect of funds it held on her behalf.

The Practitioner also submitted that the firm had a lien on the funds in respect of costs owed by its client. The LCRO referred to *Heslop v Cousins*,[18] which found that a solicitor has no lien or right of set off if funds have been deposited into the solicitor's trust account for a particular purpose. The LCRO added that even if a right of lien for set off existed, this would not have entitled the Practitioner to appropriate the money but only to retain it.

The LCRO traverses a number of questions he had specifically put to the Practitioner concerning his knowledge over the funds and reached the conclusion that the Practitioner had knowledge sufficient to have put him on notice that the funds were in dispute and it was not appropriate to transfer the money and to take it as fees. The LCRO found that the Practitioner had knowledge that the firm's entitlement to the funds was questionable and had failed to make further enquiries that an ethical and responsible law practitioner would have made to be sure that the proposed course of action was permissible. This was seen by the LCRO as a reckless failure to enquire or wilful blindness to the facts, and amounted to an unacceptable failure to adhere to the fundamental obligation to account properly for trust funds in the circumstances. It was open to the Standards Committee to conclude that the conduct of the Practitioner amounted to conduct unbecoming, and the LCRO, having made further inquiry of the Practitioner at the hearing, considered that the Standards Committee's finding was correct.

[18] [2007] 3 NZLR 679