

**No's.**

**Concerning** Part 7 of the Lawyers and Conveyancers Act 2006

**And**

**Concerning** Own motion investigation by the National Standards Committee (No 2) about Peter Hardie and Giles Brant dated 25 February 2020

**Notice of Decision by the National Standards Committee (No 2)**

1. On 6 December 2019, the Complaints Service received an anonymous report asserting that lawyers Peter Hardie and Giles Brant had engaged in email correspondence that is “distastefully sarcastic, extremely discriminatory, unprofessional, and unbecoming of lawyers”.
2. The 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 11.52am 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

## Investigation

3. The anonymous report was first considered by the Committee on 25 February 2020. At that meeting the Committee resolved to commence an investigation of its own motion under s 130(c) of the Lawyers and Conveyancers Act 2006 (**Act**).
4. Having sought and considered Mr Hardie and Mr Brant’s responses to the report, the Committee resolved to require Mr Brant and Mr Hardie to provide copies of the relevant emails and the related email chain. The resolution was made pursuant to the Committee’s powers of investigation under s 147 of the Act and was communicated to the Mr Brant and Mr Hardie by letters dated 8 May 2020.
5. By letters dated 21 May 2020 and 2 July 2020, Mr Hardie raised procedural concerns relating to the Committee’s investigation including:

- a. whether the Committee was performing any function under the Act;
  - b. whether the Committee was acting ultra vires of the Act;
  - c. whether the communication the subject of the complaint and of the investigation is the protected by ss 13, 14 and/or 15 of the New Zealand Bill of Rights Act 1990 (**NZBORA**); and
  - d. Whether the demand under s 147(2) of the Act is in conflict with or amounts to a breach of s 21 of the NZBORA.
6. By emails dated 12 June 2020 and 2 July 2020, Mr Brant raised similar concerns.

### **Issues**

7. Having considered all the correspondence received from Mr Hardie and Mr Brant, the Committee determined the primary issues before it to be:
- a. whether the Committee's investigation and its directions under s 147(2) of the Act were lawful and appropriate in light of the concerns raised; and
  - b. whether, in all the circumstances, further investigation into the allegations was necessary or appropriate.

### **Consideration**

#### *Lawfulness of Committee's investigation and s 147 direction*

8. As noted above, both Mr Hardie and Mr Brant provided separate responses to the Committee's direction under s 147 of the Act. Although expressed differently, the underlying issues raised Mr Hardie and Mr Brant are essentially the same, namely that the Committee's investigation and direction under s 147 were unlawful given:
- a. the anonymous report did not meet the statutory criteria for a complaint<sup>1</sup> and therefore:
    - i. the Lawyers Complaints Service did not have the authority to refer the matter to the Committee in the first instance; and
    - ii. the Committee had no jurisdiction or power to commence an own motion investigation(s) into the allegations contained in the anonymous report;
  - b. there was insufficient evidence before the Committee to indicate that Mr Hardie's or Mr Brant's conduct may have amounted to unsatisfactory conduct. In this regard, it is submitted that there was insufficient evidence to show that the relevant conduct of Mr Brant or Mr Hardie was connected to the provision of regulated services;<sup>2</sup>

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<sup>1</sup> See s 132 of the Act and reg 8 of the Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committee) Regulations 2008

<sup>2</sup> It is submitted that the Committee concedes as much in its minute of 25 February 2020 which records that the Committee identified that an issue arose concerning whether or not the relevant conduct was connected to the provision of regulated services.

- c. as a consequence of a. and b. the above, the continuing investigation and directions under s 147 were unlawful; and
- d. irrespective of whether the Committee has jurisdiction to commence an investigation, the Committee's direction under s 147(2) of the Act is otherwise unlawful as:
  - i. the direction is inconsistent with the protections afforded by the NZBORA;
  - ii. the Committee already has before it a copy of the email exchange and therefore cannot sensibly argue that a direction under s 147(2) is essential or reasonably necessary to the conduct of the investigation; and
  - iii. the email communications were personal and private and did not relate to the provision of regulated services by Mr Brant or Mr Hardie.

9. Consideration of each of these objections is given below.

*Referral of non-complaint*

10. The functions of standards committees are set out under s 130 of the Act and include:
- a. to inquire into and investigate complaints made under s 132; and
  - b. 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.
11. As noted by Mr Hardie and Mr Brant, the anonymous report received by the Complaints Service does not meet the criteria of a complaint under s 132 of the Act. However neither the Law Society, nor the Committee, have treated the report as a complaint under s 132. Rather the report was considered in accordance with the Standards Committee's function to investigate matters of its own motion under s 130(c). That function, together with the balance of the functions under s 130 of the Act, reflect standards committees' role as the primary decision-making bodies in the lawyers and conveyancers disciplinary regime. In contrast, the role of the Law Society is administrative.<sup>3</sup>
12. Given their respective roles, referral of such reports, including non-complaints, by the Law Society to a Standards Committee is necessary to facilitate standards committees executing their function under s 130(c) of the Act. Given the administrative nature of the Law Society's role, the threshold for referral must be significantly lower than the threshold required for a Standards Committee resolving to commence an investigation under s 130(c) of the Act.
13. For the reasons outlined above, the submission that the Complaints Service (or the Law Society more generally) cannot refer matters not amounting complaints for consideration by a Standards Committee is incorrect.

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<sup>3</sup> See s 124 of the Act and reg 6 of the Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008

*Threshold for own motion investigation*

14. Mr Hardie and Mr Brant submit that there was insufficient evidence before the Committee to indicate that their conduct was connected to the provision of regulated services and therefore there was insufficient evidence to reach the threshold for commencing an investigation. The conclusion reached is that the Committee's resolution of 25 February 2020 was therefore unlawful.
15. With respect, the submissions advanced by Mr Hardie and Mr Brant in this regard are misconceived.
16. First, section 130 of the Act establishes a threshold for commencing an own motion investigation that falls well short of requiring evidence that establishes unsatisfactory conduct. In this regard, it is noted that allegations that appear to indicate that there may have been unsatisfactory conduct or misconduct will be sufficient.
17. Connection to the provision of regulated services is the first element for establishing unsatisfactory conduct as defined by s 12(b) of the Act. The second is that the conduct would be considered by lawyers of good standing as being unacceptable. Mr Hardie and Mr Brant appear to read into 130(c) a requirement that the Committee must be satisfied of the first element before an investigation can be commenced. However, the natural and ordinary meaning of the words of s 130(c) impose no such requirement, nor can the Committee see any justification for such a position. Such a requirement would also be inconsistent with the inquisitorial nature of the role of Standards Committees.<sup>4</sup>
18. Second, a finding of unsatisfactory conduct is not limited to conduct that occurs at a time when the lawyer is providing regulated services. Unsatisfactory conduct as defined by s 12(c) of the Act is conduct that consists of a contravention of the Act, or any rules or regulations made under the Act. There is no requirement under s 12(c) that the conduct occur at a time when the lawyer was providing regulated services.
19. Having reassessed all the material before it, the Committee is satisfied its resolution to commence an own motion investigation was lawful under s 130(c) of the Act. In this regard, the Committee notes that:
  - a. Mr Hardie's email of 27 November 2020 contains language that could be reasonably be characterised, and was characterised in the anonymous report, as being unprofessional and discriminatory. In this regard the Committee considers:
    - i. viewed in its entirety Mr Hardie's email could be seen to be derisive of inclusivity, and discriminatory towards and offensive to transgender and/or gay persons. In particular the Committee notes the following statements contained in that email:
      - 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.
      - There are of course always knockers (though apparently not on "Maxine"); and

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<sup>4</sup> See for example *A Lawyer v New Zealand Law Society* [2019] NZHC 1961 and *PD v City A Standards Committee* LCRO 75/2015

- 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.
  - b. Mr Brant's email in response, viewed in isolation, could be reasonably be interpreted as derisive of inclusivity and, viewed in context with Mr Hardie's email, could be reasonably be interpreted as derogatory and offensive to transgender persons.
  - c. the email correspondence in question was sent from Mr Hardie and Mr Brant's professional email address, identifies them as a lawyers and partners of their respective firms, and contains their respective email sign offs together with a legal disclaimer;
  - d. unsatisfactory conduct as defined by section 12 of the Act includes:
    - i. conduct of a lawyer, that occurs at a time when providing regulated services, that would be regarded by lawyers of good standing as being unacceptable, including conduct unbecoming a lawyer or unprofessional conduct; and
    - ii. conduct consisting of a contravention of the Act, or of any regulations or practice rules made under the Act that apply to lawyers.
  - e. rules 10 and 12 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (**Rules**) respectively provide:
    - 10 A lawyer must promote and maintain proper standards of professionalism in the lawyer's dealings.
    - 12 A lawyer must, when acting in a professional capacity, conduct dealings with others, including self-represented persons, with integrity, respect and courtesy.
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.

*Section 147 direction*

- 21. Mr Hardie and Mr Brant also object to the requirement under s 147(2) of the Act. The objections are primarily on grounds already covered by the Committee's reasoning above, however additional objections were raised on grounds that:
  - a. copies of the requested material are not essential or reasonably necessary to the conduct of the investigation: and
  - b. the requirement constitutes a breach of sections 13, 14, 15 and 21 of the NZBORA.
- 22. In respect of the objection regarding the necessity of the production of the email, the Committee considers that production of the required emails was reasonable considering:

- a. the material before it does not include a copy of the email in question as suggested by Mr Hardie rather the Committee has a report in which the email was reproduced;
  - b. the material before the Committee does not disclose to whom the email was sent, to how many recipients, and the precise context in which it was sent. In this regard, it is noted that Mr Hardie has indicated that his email was sent to Mr Brant alone but the email itself is addressed “Dear Gentlemen”; and
  - c. the context in which the comments were made, including any subsequent emails or replies are relevant to the current inquiry and determining whether or not the conduct occurred at a time when Mr Hardie and Mr Brant were providing regulated services.
23. In respect to the allegation that the requirement under s 147(2) was a breach of the sections 13, 14, 15 and 21 of the NZBORA, while the Committee does not accept that there has been such a breach it does not consider the NZBORA prohibits a Standards Committee from making such requirements. In reaching this view, the Committee notes the following passage from *Orlov v New Zealand Law Society* [2013] 1 NZLR 390:
- [86] In my view, only limited assistance can be gained from references to international instruments and the Bill of Rights. My focus must be on the purpose of the disciplinary process created by Parliament, the words of the 2006 Act and its objectives. Other legislation and international instruments will only inform my consideration of the application if directly relevant to the interpretation of a relevant provision in the 2006 Act.
- [87] The disciplinary regime was carefully crafted to promote those objectives. The procedures established by Part 7 of the 2006 Act inform the standards expected from practising lawyers and the way in which the terms “misconduct” and “unsatisfactory conduct” should be interpreted, for disciplinary purposes. The name “Standards Committee” itself reflects an intention that the conduct of members of the profession be judged against standards applicable to all.
- [88] The 2006 Act is designed to provide an efficient and fair process, having regard to the interests of both complainant and practitioner. The ability of a Standards Committee to initiate “own motion” inquiries stresses the public interest in ensuring that practising lawyers maintain appropriate standards, even in a case where there is no specific complainant. The focus on both efficiency and fairness dictates an approach that requires a differing intensity to be given to particular complaints, depending on the seriousness of the allegation. A similar approach, based on proportionality, is justified in this Court, on review.
24. For the reasons outlined above, the Committee does not accept Mr Hardie’s and Mr Brant’s submissions that its investigation under s 130(c) of the Act, or its direction under s 147(2) of the Act were unlawful, ultra vires, or made outside of the Committee’s authority or jurisdiction to make.

*Further investigation into the allegations necessary or appropriate.*

25. It is not disputed that Mr Hardie and Mr Brant are entitled to hold the views expressed in their emails. They are also entitled to express those views however they wish, provided that occurs in their personal capacity. 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.

26. Mr Hardie and Mr Brant are resolute that the authoring and sending of their respective emails was personal and not professional conduct. In support of this position they note that the purpose of the emails was the arrangement of an annual cricket match and that there were no identifiable regulated services being provided at the relevant time.
27. Against this, the Committee notes that the correspondence was sent during normal working hours, was sent from Mr Hardie and Mr Brant's professional email addresses, identifies Mr Hardie and Mr Brant's status as a lawyers and partners of their respective firms, and contains their respective email sign offs complete with legal disclaimers. It is also noted that professional conduct is not confined to conduct that directly arises out of the provision of regulated services to a particular client but also includes conduct that is connected to the provision of regulated services.<sup>5</sup>
28. Mr Hardie and Mr Brant's conduct in authoring and sending the email correspondence sits uncomfortably astride the divide between professional conduct and personal conduct. While the type of correspondence is largely of a personal nature, the Standards Committee considers that it is nonetheless not unconnected to the provision of regulated services.
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. Such a position would be consistent with the preface to the Rules which states that "*the preservation of the integrity and reputation of the profession is the responsibility of every lawyer*". 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.
30. However, such a finding would appear to be inconsistent with previous decisions of the Legal Complaints Review Officer (LCRO). For example in *XN v VO* LCRO 75/2016, the LCRO states:
- [72] By corresponding on his or her firm's letterhead or notepaper on a personal matter, the lawyer concerned runs that risk that he or she may be perceived, to a greater or lesser degree, to be acting as a lawyer, and may be held to be acting as a lawyer.
- [73] Acknowledging these risks, the Law Society has cautioned lawyers "not to blur the line between acting in a personal vs professional capacity, such as by using the firm letterhead". This was explained by a Standards Committee which sounded a warning that lawyers who:
- included practice details in a private email ran the risk that a member of the public would be misled about the capacity in which the lawyer was communicating and [the lawyer's] intentions... Practitioners should therefore consider the tone and content of such correspondence, together with the way in which they hold themselves out when sending [the correspondence].
- [74] Mr VO assumed that risk by corresponding on his letterhead. However, it does not automatically follow that because he did so he was acting in a professional capacity as a lawyer. As noted earlier, whether a lawyer is providing regulated services (or the lawyer's conduct is connected to the lawyer's provision of regulated services), or the lawyer is acting in a personal capacity, must be considered objectively.

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<sup>5</sup> See the definition of unsatisfactory conduct under s 12(c) of the Act and by the wide definition of "at a time when ... providing regulated services" given by the High Court in *Orlov v New Zealand Lawyers and Conveyancers Disciplinary Tribunal* [2015] 2 NZLR 606 at [96] to [112]



31. Ultimately, the Committee does not consider that it is necessary to resolve the issue in the current circumstances. 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. 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 number of persons known to Mr Hardie and/or Mr Brant. Further Mr Hardie and Mr Brant clearly considered their correspondence to be personal and intended it to be private to its intended recipients.
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 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.

### **Decision**

33. The Committee, having considered the confidential report, decides to take no further action on the matter pursuant to s 138(2) of the Act as no further action is necessary or appropriate.

### **Confidentiality**

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.

### **Right to apply for review – Legal Complaints Review Officer ("LCRO")**

You may be able to apply for a review of this decision by the LCRO. On review, the LCRO may:

- a. direct the Standards Committee to reconsider the whole or any part of the complaint;
- b. confirm, modify or reverse the decision of the Standards Committee; and/or
- c. exercise any of the powers the Standards Committee could have exercised in relation to this complaint.

Any application for a review of this decision must be lodged with the LCRO within 30 working days after a copy or notice is served on, given to, or otherwise brought to the attention of, the applicant for review. In the absence of proof to the contrary this is presumed to have occurred on the fifth working day after the date of this decision.

If you received this determination by email, please call the LCRO on the number below to confirm when the 30 working days start.

An application for review must be on the prescribed form and be accompanied by the prescribed fee of \$50.00. Contact details for the LCRO are:

**Postal address:**

Level 6  
Auckland District Court  
69 Albert Street  
Auckland 1010  
(Physical address; suitable for courier and hand delivery)

DX CX 10072  
(Postal address only; not suitable for courier delivery)

**Email:**

[LCRO@justice.govt.nz](mailto:LCRO@justice.govt.nz)

For further information about the LCRO and the review process, call 0800 367 6838 (extn 2) or go to:  
[www.justice.govt.nz/tribunals/legal-complaints-review-officer/contact-us](http://www.justice.govt.nz/tribunals/legal-complaints-review-officer/contact-us).

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Karen Radich  
Convenor  
National Standards Committee (No 2)

Date: 29 June 2021

To: Mr Peter Hardie  
Mr Giles Brant  
New Zealand Law Society | Te Kāhui Ture o Aotearoa