IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA490/2022
[2024] NZCA 90

BETWEEN	PETER MICHAEL HARDIE AND GILES HERBERT JOHN BRANT Appellants
AND	NEW ZEALAND LAW SOCIETY First Respondent
	NATIONAL STANDARDS COMMITTEE NO 2 Second Respondent

Hearing:	3 August 2023 (further submissions received 7 August 2023)
Court:	Brown, Gilbert and Wylie JJ
Counsel:	M J Fisher and T J Yoon for Appellants P N Collins and K A Pludthura for First and Second Respondents
Judgment:	8 April 2024 at 11.00 am

JUDGMENT OF THE COURT

A The appeal is allowed.

B A declaration is made that the National Standards Committee No 2 erred in failing to give the appellants an opportunity to be heard in respect of its adverse comments in the Notice of Decision.

C A declaration is made that the National Standards Committee No 2 erred in failing to give the appellants an opportunity to be heard concerning publication of the Notice of Decision.

D The decision not to publish the Notice of Decision is set aside. The Notice of Decision is not confidential.

E **The order prohibiting publication of the High Court judgment and any part of those proceedings is set aside.**

F **The order for costs in the High Court is set aside. The appellants are entitled to one set of costs in the High Court on a 2B basis and usual disbursements. Any dispute concerning quantification is to be determined in that Court.**

G **In this Court the respondents must pay the appellants one set of costs for a standard appeal on a band A basis and usual disbursements.**

REASONS OF THE COURT

(Given by Brown J)

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Introduction

[1] On 27 November 2019, the appellants, who are practising lawyers, exchanged communications in the course of organising a cricket game through their professional email accounts which they intended to be personal. On 6 December 2019, the first respondent, the New Zealand Law Society (the NZLS), received an anonymous complaint about the appellants' emails. The NZLS referred the complaint to the second respondent, the National Standards Committee No 2 (the NSC2), which resolved to commence an "own motion" investigation under s 130(c) of the Lawyers and Conveyancers Act 2006 (the Act). Ultimately, in July 2020, the NSC2 resolved to take no further action on the matter under s 138(2) of the Act. However, its written notice of decision (the Notice of Decision), which was confidential, was not notified to the appellants until 29 June 2021.

[2] The appellants sought judicial review of various actions of the NZLS and the NSC2 at several stages of the investigation process, including the refusal to publish the Notice of Decision. On 22 August 2022, their claim was dismissed in a judgment of Gendall J,[1] publication of which was prohibited.[2] The appellants now appeal.

Statutory framework

[3] Any person may complain about the conduct of a practitioner by giving written notice of the complaint to the NZLS complaints service.[3] Part 7 of the Act provides a framework within which complaints about lawyers may be processed and resolved expeditiously, and disciplinary charges against lawyers may be heard and determined expeditiously.[4] The NZLS is required by practice rules to establish lawyers standards committees as part of its complaints service.[5]

[4] The functions of a standards committee include:[6]

(a) to inquire into and investigate complaints made under s 132;

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1 *Hardie v National Standards Committee (No 2)* [2022] NZHC 2090 [High Court judgment].
2 At [134]–[135].
3 Lawyers and Conveyancers Act 2006, ss 132(1)(a)(i), 134 and 135(1).
4 Section 120(1)–(3).
5 Section 126(1).
6 Section 130(a), (c) and (e).

(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; and

(c) to make final determinations in relation to complaints.

[5] Misconduct in relation to a lawyer is defined in s 7(1) of the Act:

> (1) In this Act, **misconduct**, in relation to a lawyer or an incorporated law firm,—
>
> (a) means conduct of the lawyer or incorporated law firm that occurs at a time when he or she or it is providing regulated services and is conduct—
>
> (i) that would reasonably be regarded by lawyers of good standing as disgraceful or dishonourable; or
>
> (ii) that consists of a wilful or reckless contravention of any provision of this Act or of any regulations or practice rules made under this Act that apply to the lawyer or incorporated law firm or of any other Act relating to the provision of regulated services; or
>
> (iii) that consists of a wilful or reckless failure on the part of the lawyer, or, in the case of an incorporated law firm, on the part of a lawyer who is actively involved in the provision by the incorporated law firm of regulated services, to comply with a condition or restriction to which a practising certificate held by the lawyer, or the lawyer so actively involved, is subject; or
>
> (iv) that consists of the charging of grossly excessive costs for legal work carried out by the lawyer or incorporated law firm; and
>
> (b) includes—
>
> (i) conduct of the lawyer or incorporated law firm that is misconduct under subsection (2) or subsection (3); and
>
> (ii) conduct of the lawyer or incorporated law firm which is unconnected with the provision of regulated services by the lawyer or incorporated law firm but which would justify a finding that the lawyer or incorporated law firm is not a fit and proper person or is otherwise unsuited to engage in practice as a lawyer or an incorporated law firm.

[6] Unsatisfactory conduct in relation to lawyers is defined in s 12:

> **12 Unsatisfactory conduct defined in relation to lawyers and incorporated law firms**
>
> In this Act, **unsatisfactory conduct**, in relation to a lawyer or an incorporated law firm, means—
>
> (a) conduct of the lawyer or incorporated law firm that occurs at a time when he or she or it is providing regulated services and is conduct that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer; or
>
> (b) conduct of the lawyer or incorporated law firm that occurs at a time when he or she or it is providing regulated services and is conduct that would be regarded by lawyers of good standing as being unacceptable, including—
>
> (i) conduct unbecoming a lawyer or an incorporated law firm; or
>
> (ii) unprofessional conduct; or
>
> (c) conduct consisting of a contravention of this Act, or of any regulations or practice rules made under this Act that apply to the lawyer or incorporated law firm, or of any other Act relating to the provision of regulated services (not being a contravention that amounts to misconduct under section 7); or
>
> …

[7] On receipt of a complaint, a standards committee may:[7]

- inquire into the complaint;
- give a direction under s 143 for the exploration of resolution by negotiation, conciliation or mediation; or
- decide, in accordance with s 138, to take no action on the complaint.

[8] A standards committee that receives a complaint must, as soon as practicable, advise the complainant and the person to whom the complaint relates which course the committee proposes to adopt.[8]

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7 Section 137(1).
8 Section 137(2)

[9] If a committee decides to inquire into a complaint, it must do so as soon as practicable.[9] Section 141 states that the relevant standards committee:

> (a) must 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:
>
> (b) may require the person complained against to appear before it to make an explanation in relation to the complaint or matter:
>
> (c) may, by written notice served on the person complained against, request that specified information be supplied to the Standards Committee in writing.

[10] The standards committee procedure is specified in s 142, which states:

> (1) A Standards Committee must exercise and perform its duties, powers, and functions in a way that is consistent with the rules of natural justice.
>
> (2) A Standards Committee may, subject to subsection (1), direct such publication of its decisions under sections 138, 152, 156, and 157 as it considers necessary or desirable in the public interest.
>
> (3) Subject to this Act and to any rules made under this Act, a Standards Committee may regulate its procedure in such manner as it thinks fit.

[11] If a standards committee decides to take no action, or no further action, on a complaint, that committee must forthwith give written notice of that decision to the complainant, the person to whom the complaint relates and the NZLS.[10] The notice must state the decision, the reasons for it, and the period within which an application for review may be lodged.[11] The circumstances in which the committee may adopt that course are spelled out in s 138, which states:

> (1) A Standards Committee may, in its discretion, decide to take no action or, as the case may require, no further action, on any complaint if, in the opinion of the Standards Committee,—
>
> (a) the length of time that has elapsed between the date when the subject matter of the complaint arose and the date when the complaint was made is such that an investigation of the complaint is no longer practicable or desirable; or
>
> (b) the subject matter of the complaint is trivial; or

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9 Section 140.
10 Section 139(1).
11 Section 139(2).

(c) the complaint is frivolous or vexatious or is not made in good faith; or

(d) the person alleged to be aggrieved does not desire that action be taken or, as the case may be, continued; or

(e) the complainant does not have sufficient personal interest in the subject matter of the complaint; or

(f) there is in all the circumstances an adequate remedy or right of appeal, other than the right to petition the House of Representatives or to make a complaint to an Ombudsman, that it would be reasonable for the person aggrieved to exercise.

(2) Despite anything in subsection (1), a Standards Committee may, in its discretion, decide not to take any further action on a complaint if, in the course of the investigation of the complaint, it appears to the Standards Committee that, having regard to all the circumstances of the case, any further action is unnecessary or inappropriate.

[12] Regulation 31 of the Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008 (the Regulations) states that decisions of standards committees must remain confidential unless a standards committee directs otherwise under s 142(2) of the Act or reg 30(1).[12]

Relevant background

An anonymous complaint

[13] In November 2019 at the Spitfire Kent Cricket Awards, the award of Club Player of the Year in the women's category to a transgender women sparked some controversy. Later that month Mr Hardie sent an email referencing that controversy which stated:[13]

> 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

[12] Regulation 30(1) concerns censure orders.
[13] Paragraphing and emphasis added by NZLS.

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

…

[14] Later that day Mr Brant sent the following email in reply:

> 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 …

[15] It appears that each email recorded the lawyer's firm and contact details following the name of the sender.

[16] The "confidential report submission" received by the NZLS via its website (the anonymous complaint) stated:

> There has been a email conversation initially instigated by Peter Hardie, to which Giles Brant has replied, which is distastefully sarcastic, extremely discriminatory, unprofessional, and unbecoming of lawyers and the parties' respective law firms. The emails were sent on 27 November 2019. I am unsure how I am to attach a screenshot of the email thread on this however I will copy and paste the contents of the emails …
>
> > [Text of the Hardie email].
> >
> > [Text of the Brant email].
>
> I was disgusted to not only have seen such emails, but to also know that they were sent by these men in their professional capacity. I do not wish to provide any personal details of myself, so unfortunately you will not be able to contact me. I understand without screenshots this may be a hard matter to pursue. However, I urge you to do your best. As lawyers, these men are supposed to represent people of standing in our communities. With a willingness to openly share such repulsive and discriminatory views in their professional capacities, demonstrate these men are in fact the exact opposite.

The own motion investigation

[17] Following a discussion among some regulatory employees of the NZLS, the anonymous complaint was referred to the NSC2. At a meeting on 25 February 2020,[14]

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[14] Consideration of the matter at the NSC2 meeting on 16 December 2019 was deferred because of the lack of a quorum.

the NSC2 resolved to commence an own motion investigation into the authoring and sending of the emails under s 130(c) of the Act.

[18] The NSC2 perceived that issues could arise concerning whether or not the conduct in question was connected to the provision of regulated services and hence within the purview of s 12(b) of the Act.[15] As the NSC2 considered that responses from the appellants would assist in determining the matter, it decided to seek their responses to the allegations.

[19] On 13 March 2020, the NSC2 forwarded a copy of the anonymous complaint to the appellants, advising them that it had resolved to commence an own motion investigation and that, in doing so, it was satisfied their conduct, as reported, appeared to indicate that they may have engaged in unsatisfactory conduct as defined by s 12 of the Act. It specifically requested their responses to the following matters:[16]

> (a) whether the comments made by you were made at a time when providing regulated services for the purposes of s 12(b) of the Act. In this regard the Committee notes that the email correspondence appears to have been sent to and from your work email account;
>
> (b) whether the comments would be considered by lawyers of good standing as being unacceptable. In this regard the committee takes guidance from the following extract from Dal Pont in *Lawyers' Professional Responsibility*:
>
> > A lawyer is ethically obliged to recognise the essential dignity of each individual in society and the principles of equal rights and justice, an obligation that applies to lawyers' relationships. Their status as professionals, coupled with their responsibility to protect individual rights, means that lawyers should lead by example in non-discriminatory conduct.
>
> (c) whether the comments raise any professional conduct issues rr 10 and 11 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 which provide:
>
> > i. Rule 10 – Professional dealings
> >
> > A lawyer must promote and maintain proper standards of professionalism in the lawyer's dealings.
> >
> > ii. Rule 12 – Third Parties

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15 At [6] above

16 Footnote ommitted.

> A lawyer must, when acting in a professional capacity, conduct dealings with others … with integrity, respect, and courtesy.

This letter was received by Mr Hardie shortly before the first COVID-19 lockdown. On 27 March 2020, in response to Mr Hardie's request that he be permitted to respond two weeks after the expiry of the lockdown period, the NSC2 granted a limited extension until 6 May 2020.

[20] On 20 April 2020 Mr Hardie responded to the NSC2 in considerable detail and in reasonably forthright terms. In short, he stated that the NZLS had no power to regulate private opinions or otherwise interfere with the right of lawyers to freely express themselves in private correspondence, and he advised that he did not accept that the NSC2 or the NZLS had any jurisdiction to investigate the complaint in the circumstances. He explained that the email that was the subject of the complaint was not correspondence entered into at a time that he was providing regulated services, asserting that the fact it was sent from a work email account was irrelevant. The content of the email was said to be completely disconnected from the provision of any regulated service; nor could it fairly be said to be written in a professional capacity. On 24 April 2020 Mr Brant sent a response of a similar tenor.

[21] The correspondence was considered by the NSC2 at its meeting on 1 May 2020. The minutes record that the Committee:

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

[22] On 8 May 2020 the NSC2 informed the appellants of the request for documentation including the email of 27 November 2019, any emails received in

response and any further responses from Mr Hardie. On the issue of the provision of regulated services the letter stated:[17]

> (i) At this stage, the Committee is proceeding with its own motion investigation on the preliminary view that sending correspondence from a professional email account is sufficiently connected to the provision of regulated services for the purposes of s 12(b) of the [Act].
>
> (ii) Notwithstanding the above, if this matter proceeds to a hearing on the papers – as is required for disciplinary action to be taken – you will be provided with a further opportunity to provide submissions on this issue.

[23] The appellants declined to comply with the direction under s 147(2)(a)(ii). They maintained that the NSC2 had no jurisdiction to demand personal and private correspondence in the circumstances. While neither confirming nor denying that there was any correspondence of the nature requested, they contended that even if the demand was within the NSC2's jurisdiction, it was nevertheless unlawful because the NSC2 already had a copy of the email exchange and the purported direction amounted to a breach of s 21 of the New Zealand Bill of Rights Act 1990.

[24] There followed an exchange of correspondence between the NSC2 and the appellants which culminated in the NSC2's meeting on 30 July 2020. The minutes of that meeting stated:

> The Committee noted the most recent correspondence sent by the practitioners challenging the Committee's direction under s 147 of the Act. The Committee did not consider that its request for the underlying email correspondence was ultra vires, inconsistent with the purpose of the Act, or a breach of the New Zealand Bill of Rights Act 1990.
> Nonetheless, the Committee decided that to take no further action on the matter pursuant to s 138(2) of the Act. In reaching its decision the Committee noted that:
>
> a) it is required to conduct its investigations with proportionality to the seriousness of the conduct alleged. Given that Mr Hardie and Mr Brant's conduct in authoring and sending the email correspondence was at the lower end of conduct that might be considered to be unsatisfactory as defined by s 12 of the Act, on reflection the Committee considered that proceeding with its investigation was not proportionate to the severity of the conduct alleged; and

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[17] Footnotes omitted.

b) in the absence of the emails sought, there was not enough information before it to conclude that Mr Hardie and Mr Brants' drafting of the email correspondence was connected to the provision of regulated services.

The minutes concluded by stating that full reasons were to be provided in a notice of a decision in a form approved by the NSC2.

[25] Remarkably, neither the existence nor the content of the 30 July 2020 decision was communicated to the appellants until the Notice of Decision on 29 June 2021. The only communication to them prior to the Notice of Decision was an acknowledgment, sent on 5 October 2020, of an email from Mr Brant sent the previous day advising him that the email would be "provided to the [NSC2] for its consideration".[18]

The Notice of Decision dated 29 June 2021

[26] On 29 June 2021, the NSC2 issued its Notice of Decision, a copy of which was sent to the appellants that day. In its statement of defence, the NSC2 stated that the delivery of the NSC2's decision of 29 June 2021 "was, in the circumstances, not expeditious". In our view that was something of an understatement.

[27] After briefly reciting the facts and the investigation process, the Notice of Decision addressed a number of the challenges made by the appellants. While accepting the contention that the anonymous report did not meet the statutory criteria for a complaint,[19] the NSC2 considered that referral of such reports, including non-complaints, by the NZLS to a standards committee was necessary to facilitate standards committees exercising their function under s 130(c) of the Act. The NSC2 rejected the appellants' contention that its investigation under s 130(c) and its direction under s 147(2) were unlawful, ultra vires, or made outside its authority or jurisdiction.

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18 In its statement of defence, the NSC2 admitted the absence of any communication with the appellants between 2 July 2020 and 29 June 2021, save for the exchange with Mr Brant in October 2020.

19 See Lawyers and Conveyancers Act, s 132; and Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committee) Regulations, reg 8.

[28] With reference to the substance of the complaint, the Notice of Decision materially stated:[20]

> 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.
>
> 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.

[29] The NSC2 recognised that such a finding appeared to be inconsistent with previous decisions of the Legal Complaints Review Officer, noting in particular *XN v VO*,[21] in which it was stated that whether a lawyer is providing regulated services or is acting in a personal capacity must be considered objectively.[22] However, the NSC2 did not consider it was necessary to resolve that issue, explaining:

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20 Footnotes omitted, emphasis in original.
21 *XN v VO* LCRO 75/2016, 25 February 2019.
22 At [64].

> 31. … 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 [of] correspondence sent from their professional email accounts, particularly where their lawyer sign-off is included, as the way in which they hold themselves out when sending it will in turn determine whether it is conduct by them as lawyers which might be able to be considered as a disciplinary matter.

[30] For those reasons, the NSC2 decided pursuant to s 138(2) to take no further action as it considered that further action was neither necessary nor appropriate. Under the heading "Confidentiality", the NSC2 stated:

> 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.

The appellants' request that the Notice of Decision be published

[31] On 14 July 2021, Mr Hardie wrote to the NSC2 concerning the implications of the Notice of Decision being confidential. Relevantly, he stated:

> I should like to share with other lawyers for educational purposes a redacted version of the above decision, thereby preserving the Standards Committee's objective of keeping the Notice of Decision confidential.
>
> I have redacted from the Notice of Decision dated 29 June 2021 references to the National Standards Committee (NO. 2) and to any other person identified in the Decision.
>
> Would you please confirm that I may share with other lawyers a copy of the attached redacted version of the Notice of Decision.

[32] On 23 July 2021, the NSC2 replied in these terms:

> We appreciate that some Standards Committee decisions may be helpful in terms of learnings for the lawyer involved and, as you have indicated, the

> wider profession and that you have considered this in preparing your redacted version of the decision.
>
> However, in this case the Standards Committee has not ordered publication of its decision in any form. Therefore, it is unable to be shared with your colleagues as you have requested.

[33] Mr Hardie replied on 28 July 2021, requesting confirmation that it was the NSC2 which had made the decision to decline his request to permit the publication of the redacted version of the Notice of Decision. He also requested the reasons for the NSC2's decision.

[34] The senior professional standards administrator of the Lawyers Complaints Service replied on 2 August 2021, stating:

> I confirm that the New Zealand Law Society was responding to your request. This is because decisions of the Standards Committee are final and neither the Standards Committee (nor Law Society) can change these once issued, including directions around publication.

He also drew attention to Mr Hardie's right to seek a review by the Legal Complaints Review Officer.

[35] The following day Mr Hardie sent a response pointing out that he had not actually asked the NSC2 to change the Notice of Decision, but for permission to disclose a redacted version. He went on to make the point that standards committees had jurisdiction to change their decisions where there had been an accidental slip or omission, or an inadvertent omission to give an affected practitioner an effective opportunity to be heard in relation to a matter decided. Mr Hardie contended:

> The [NSC2] in this case was not asked to consider and did not consider whether to make a direction to permit publication of a redacted version of the decision for the purposes of regulation 31 of the Regulations. The inference is irresistible that this omission was a matter affecting me which was overlooked.

[36] The team leader of the Lawyers Complaints Service replied on 9 August 2021, advising that the question of publication or otherwise formed part of the NSC2's full decision and carried review rights. He further stated:

> In reference to a possible 'slip' or omission by the [NSC2] in not considering redacted publication, this is not the case. The [NSC2] considered it and

> determined not to publish the decision or a summary of the decision. A Standards Committee may regulate its own procedures under s142(3) of the [Act], and this does not extend to recalling any of its written determinations for reasons other than general correction of factual or clerical errors. For this reason, we cannot refer the matter back to the [NSC2] on this occasion.

The High Court judgment

[37] The appellants commenced a proceeding against the NSC2 and the NZLS under the Declaratory Judgments Act 1908. The Judge described their pleadings as "critical" of the NSC2 and the NZLS at every level of the process, and noted their assertion that reviewable errors had occurred throughout.[23]

[38] Although the appellants' amended statement of claim traversed in some detail the process followed by the respondents in response to the anonymous complaint, it did not explicitly frame a cause of action. However, the relief sought was clearly focused on the issues raised concerning the non-publication of the Notice of Decision:

> A Declarations that:
>
> (a) the purported decision dated 29 June 2021 in relation to File 20362 concerning an Own Motion Investigation by the [NSC2] of the [NZLS]:
>
> (i) is not a decision within the meaning of sub section 138(2) of the [Act];
>
> (ii) is not a determination within the meaning of sub section 152(2) of the [Act];
>
> (iii) is not subject to regulation 31 of the [Regulations];
>
> (b) Peter Hardie and Giles Brant are not subject to any obligations of confidentiality in relation to the purported decision dated 29 June 2021.
>
> B Further and/or alternatively, declarations that:
>
> (a) under sub section 142(3) of the [Act] a Standards Committee has the power in its absolute discretion to recall any decision or determination it may have made in order to deal with an accidental slip or omission, including any omission to give a practitioner an opportunity to be heard in relation to a direction concerning publication under sub section 142(2) of the [Act];

---

23 High Court judgment, above n 1, at [21].

(b) alternatively, a Standards Committee has the inherent power to recall its decision in the above circumstances.

C Further and/or alternatively, an order setting aside the separate decision of the first defendant not to make any direction relating to publication of the decision of 29 June 2021;

…

[39] The Judge recognised that one of the appellants' real objectives in bringing the proceeding was to obtain publication of the Notice of Decision (in a redacted form) to lawyers as members of the NZLS, so as to show details of the handling by the NSC2 and the NZLS of both the anonymous complaint and the publication request.[24] However, the Judge then stated:[25]

> [24] Notwithstanding this, the plaintiffs' allegations of reviewable error here seem broadly to involve the following:
>
> (a) that there was no jurisdiction for the [NSC2] to investigate the report on its own motion because the emails were personal (although they were sent from their respective professional office email addresses);
>
> (b) the correctness of the [NSC2]'s decision to take no further action, including declining to hold a hearing;
>
> (c) the legitimacy of the delegation of certain functions of the [NSC2] to an employed in-house lawyer;
>
> (d) allegedly adverse comments made in the [Notice of] Decision about the plaintiffs;
>
> (e) declining to publish the [Notice of] Decision and the refusal to authorise distribution of Mr Hardie's redacted material, the status of the [NSC2] as *functus officio* and the appropriate handling of the publication request by the NZLS;
>
> (f) issues over compliance by the [NSC2] with the obligation to provide particulars to the plaintiffs; and
>
> (g) the lawfulness of the direction by the [NSC2] to require Mr Hardie and Mr Brant to produce the emails under s 147(2)(a)(iii) of the Act.

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[24] At [23(a)]. The other objective the Judge identified, at [23(b)], was to provide the material to Professor Ron Paterson to enable him to take the decision into account in his independent review of the regulation of lawyers in the legal profession.

[25] Emphasis in original.

[40] After proceeding to consider each of those topics (in what the respondents described as a "multi-faceted" judgment), the Judge concluded that no reviewable error was established.[26] The Judge reserved the question of costs and made an order prohibiting publication of both the judgment and the proceedings.[27]

[41] Costs were the subject of a further judgment dated 29 September 2022.[28] The Judge rejected the appellants' contention that there should be no order for costs against them because their proceeding concerned matters of public interest within the meaning of r 14.7(e) of the High Court Rules 2016.[29] Costs, payable by the appellants jointly and severally, were awarded to the NSC2 alone.[30]

The issues on appeal

[42] The amended notice of appeal asserted errors by the Judge not only in respect of the issue of non-publication, but also in relation to the meaning and application of a number of provisions in the Act,[31] as well as rr 9(1)(b) and 10 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008. The appellants' written submissions critiqued several aspects of the process followed in relation to the anonymous complaint.

[43] Informed by those submissions, counsel for the respondents filed, in compliance with r 42A(3) of the Court of Appeal (Civil) Rules 2005, the following list of issues:[32]

> … the issues to be determined on appeal are whether:
>
> 1. the Appellants had a right to be heard concerning the publication of the [NSC2]'s Notice of Decision dated 29 June 2021;
>
> 2. the [NSC2] had jurisdiction to decide to take no further action on an own motion investigation, whether under [s 138(2)] of the [Act] or otherwise, in circumstances where that provision refers only to complaints and not own motion matters;

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26 At [130].
27 At [132] and [134].
28 *Hardie v National Standards Committee No 2* [2022] NZHC 2487.
29 At [14].
30 At [16].
31 Lawyers and Conveyancers Act, ss 12(b) and (c), 130(c), 132, 138, 142(2), 147(2)(a)(iii), and 152(1)(b) and (2)–(4).
32 Emphasis in original.

3. the High Court was wrong to conclude that the [NSC2] was not empowered to recall its decision to reconsider the matter of publication. If it was, whether the [NSC2] was wrong, at the level of reviewable error, because it did not do so…;

4. the [NSC2] was obliged to give notice to the Appellants, and to provide them with an opportunity to be heard, before making any comments in the decision which they assert were adverse to them;

5. the High Court was in error when it found that the full text of the actual emails was not disclosed to the [NZLS] or [the NSC2];

6. the [NSC2] had jurisdiction to investigate the anonymous report;

7. the [NSC2] was wrong to have purported to exercise a coercive power under [s 147(2)(a)(iii)] of the Act to compel the Appellants to provide the original email chain;

8. the [NSC2] was wrong to delegate the drafting of the decision dated 29 June 2021 to a person employed by the [NZLS];

9. the [NSC2] was wrongly influenced in its decision by the [NZLS]'s *"internal policy on inclusivity"*; and

10. the High Court was wrong to order the Appellant's to pay costs to the [NZLS], and not to have reduced or extinguished costs on grounds of public interest.

[44] However, in their statement of issues, the appellants clarified that the statutory interpretation issues were raised only because of their relevance to the issue of public interest in the context of s 142(2) of the Act. Consistent with that approach, the orders sought on the appeal to this Court were essentially the same as those in the amended statement of claim.[33]

[45] Consequently, we consider that the issues most relevantly raised by the arguments we heard are as follows:

1 Were the emails exchanged at a time when regulated services were being provided?

2 Could the NZLS or the NSC2 have declined to investigate the anonymous complaint?

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[33] At [41] above. The amended notice of appeal did not seek a declaration in the form of (B)(b) of the amended statement of claim that the NSC had the inherent power to recall its decision.

3 Having commenced an own motion investigation, could the NSC2 decide under s 138(2) not to take any further action?

4 Did the NSC2 make an adverse finding concerning the appellants?

5 Should the NSC2 have afforded the appellants an opportunity to respond on its proposed adverse finding?

6 Should the NSC2 have afforded the appellants an opportunity to make a submission concerning publication of the Decision?

Issue 1: Were the emails exchanged at a time when regulated services were being provided?

[46] The essence of the appellants' explanations on the regulated services issue in response to the NSC2's letter of 13 March 2020 is conveniently recited in their amended statement of claim:

> 13. By letter dated 20 April 2020 Mr Hardie's response to the [NSC2] included the following statements by him:
>
> > "…I do not accept any allegation of unsatisfactory conduct…I have known Mr Brant since the mid 1980's when we met at University…Mr Brant and I enjoy many common friends and acquaintances…Mr Brant and I regularly correspond by e-mail on a variety of topics…Over the last many years we and a group of friends have organised and participated in an annual cricket match…the cricket match is played at private premises at Newstead, hence the reference to the Newstead CC…My email to Mr Brant was an invitation and reminder to him that we should start organising the 2020 game…It was private and personal correspondence on a sporting topic between friends who hold similar values (and who happen to be lawyers)…The content of the email was quite unconnected in any way with the provision of any regulated service…it was not correspondence sent in a professional capacity...It was not written at a time when either of us were providing regulated services as defined by s 12(b) of the Act nor were we acting in a professional capacity….".
>
> 14. By email dated 24 April 2020, Mr Brant's response to the [NSC2] included the following statements by him:
>
> > "…At the time I was writing my e-mail in response I was not engaged in a regulated service. I was part of a private discussion around organizing a game of cricket. This is

> self-evident from the content of the e-mail. Not even the most tortured interpretation of my response could suggest it is anything other than personal, a personal view of a philosophical outlook and a parody of same…I was not acting in a professional capacity. I was corresponding in a private capacity about a game of cricket and a critique of philosophical thought."

[47] It seems that, ultimately, the NSC2 accepted the appellants' description of the content of the email exchange. The Notice of Decision noted that the emails "appeared to have been authored as deliberate banter" and that the appellants clearly considered their correspondence to be personal and intended to be private to the recipients, a finite number of persons known to the appellants.[34]

[48] However the NSC2's preliminary view was that the authoring and sending of the emails was sufficiently connected to the provision of regulated services for the purposes of s 12(b).[35] Although in its decision of 30 July 2020, the NSC2 considered it had insufficient information to conclude that drafting the emails was connected to the provision of regulated services,[36] eleven months later the NSC2's stated view was that the appellants' conduct sat "uncomfortably astride the divide between professional conduct and personal conduct". While accepting that the correspondence was "largely" of a personal nature, the NSC2 considered that it was "nonetheless not unconnected to the provision of regulated services".[37]

[49] As the Judge observed,[38] the NSC2 ultimately decided it did not need to resolve the issue whether the appellants had been providing regulated services at the time of their email exchange.[39] That may have been a legitimate course of action if the NSC2 had determined to take no further action on the anonymous complaint, including refraining from expressing a view on the appellant's conduct the subject of the complaint. However, if the NSC2 intended to make what might fairly be construed as an unfavourable observation about the appellants' relevant conduct before ceasing to pursue its investigation, it had to first conclude that the jurisdictional prerequisites for

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34 See [31] above
35 See [22] above.
36 See [25] above.
37 See [30] above.
38 High Court judgment, above n 1, at [57].
39 See [31] above.

such an observation were satisfied and it had to provide the appellants with an opportunity to respond.

[50] As the NSC2 recognised, the issue whether a lawyer is providing regulated services or is acting in a personal capacity must be considered objectively.[40] Although "the Law Society has cautioned lawyers 'not to blur the lines between acting in a personal vs professional capacity, such as by using the firm letterhead'", whether that person is holding themselves out as a lawyer is coloured by the tone and content of correspondence.[41]

[51] While Messrs Hardie and Brant's emails were sent from their work email addresses, with their firm names, job titles and work contact details following their names, it does not follow they were acting in a professional capacity as lawyers.[42] We consider it is apparent from the content of the emails and the intended recipients that the appellants were acting in their personal capacity. They were plainly not sent in conjunction with the provision of regulated services. While the Judge described the NSC2's approach as cautious, in our view there was justification for Mr Hardie's contention that it ought to have been "obvious" from tone and content that the emails were correspondence between friends.

[52] We do not consider that the facts of this case can sustain the attempt by the NSC2 to pray in aid the category of misconduct in s 7(1)(b)(ii) which extends to conduct of a lawyer which is "unconnected with the provision of regulated services". That definition is directed at conduct which would justify a finding that a lawyer is not a fit or proper person, or is otherwise unsuited to engage in practice as a lawyer. It could not realistically apply to this case. It is noteworthy that the NSC2's letters of 13 March 2020 and 8 May 2020 only referenced s 12 (unsatisfactory conduct) and not s 7 (misconduct).

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40 High Court judgment, above n 1, at [65]–[71].

41 *XN v VO*, above n 21, at [73], citing New Zealand Law Society "Risk of signing correspondence as a 'lawyer'" (2018) 914 *LawTalk* 57 at 57 (amended citation).

42 *XN v VO*, above n 21, at [74].

Issue 2: Could the NZLS or the NSC2 have declined to investigate the anonymous complaint?

[53] The amended statement of claim advanced the proposition that there was a role for the NZLS in considering the anonymous complaint. In summary, it was asserted that, in light of the NZLS's implied obligation to take all reasonable steps to ensure that the Complaints Service operates expeditiously and fairly, the NZLS should avoid subjecting a practitioner to a baseless or frivolous own motion investigation. In particular, it was said that there was a reasonable possibility that an informal inquiry of the appellants by the NZLS as to whether the email exchange had related to the provision of a regulated service might have resolved the matter conclusively and could have avoided altogether the need for any decision to be made whether or not to commence an own motion investigation under s 130(c) of the Act.

[54] We do not consider that the NZLS had the power to decline to progress the anonymous complaint. We share the Judge's view that only a standards committee, and not the NZLS or its management staff, has the jurisdiction to consider and adjudicate upon conduct-related reports about lawyers.[43] We also agree with the Judge's observation that "[w]hen an own motion investigation is commenced, it has much the same status as a general complaint investigation, including procedural safeguards [for] the lawyers subject to such an investigation".[44]

[55] However, it follows from our conclusion on the first issue that, having notified the appellants of the anonymous complaint and received their explanations which made clear that the email exchange was not made as part of or in connection with the provision by them of regulated services, there were proper grounds on which the NSC2 could have decided to take no action on the anonymous complaint. In our view that would have been the appropriate course.

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43 High Court judgment, above n 1, at [33]. Subsequently, at [39], the Judge referred to the NZLS on occasion clearly exercising a "gatekeeper role" in respect of "vexatious, repetitive, or unjustified complaints". However, the Judge does not identify any statutory basis for the exercise of such a power by the NZLS. Indeed s 135(1) states that the complaints service must refer a complaint to a Standards Committee.

44 High Court judgment, above n 1, at [34].

Issue 3: Having commenced an own motion investigation, could the NSC2 decide under s 138(2) not to take any further action?

[56] This issue arose from the appellants' contention that the power in s 138 for a standards committee to decide to take no or no further action relates only to complaints and not to own motion investigations. On this proposition the Judge ruled:

> [75] It is true that s 138, which I have reproduced above, refers in its terms only to "complaints". By way of comparison, this differs, for example, from s 152, which is concerned with the power of a Standards Committee to "determine complaint or matter".
>
> [76] The use of the term "matter" appears to be a reference to a matter under investigation on a Standards Committee's own motion.
>
> [77] Despite arguments which Mr Fisher endeavoured to advance on behalf of Mr Hardie and Mr Brant, I do not accept that the absence of any reference to "matters" or own motion investigations in s 138 must mean that a Standards Committee, once it has decided to start such an own motion investigation under s 130(c), is constrained from terminating the investigation until it has conducted a hearing. To hold otherwise, in my view, would be an absurdity.
>
> [78] As I see the position, there is no reason in principle why the power of a Standards Committee (such as the [NSC2] here) to cease investigating the matter at any time should apply to complaints but not to own motion investigations. A Standards Committee must be able to bring an end to an own motion investigation once it determines that it does not warrant further inquiry (for example because it does not disclose anything requiring a disciplinary response). It would be entirely burdensome and oppressive of lawyers under investigation, and not in any way in the public interest, if a Standards Committee was obliged to proceed to a hearing in every case, not to mention the fact that it would be wasteful of the resources of Standards Committees and the Lawyers Complaints Service.

[57] The Judge also invoked a standards committee's power in s 142(3) to regulate its procedures in such manner as it thinks fit.[45] The Judge viewed the case as one where "judicial gap-filling" was warranted.[46]

[58] The appellants challenged that conclusion, contending that the statute works perfectly well without any judicial gap-filling. They maintained that their interpretation was reinforced by s 152(1), which distinguishes between an enquiry into a complaint and an enquiry into a "matter under section 130(c)". In both instances the

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45 At [79].

46 At [81], citing *Northern Milk Vendors Association Inc v Northern Milk Ltd* [1998] 1 NZLR 530 (CA) at 537-538.

power to make a determination under s 152(2)(c) to take no further action arises following the conduct of a hearing referred to in s 152(1). Hence they argued that the NSC2's decision to take no further action on the anonymous complaint was not a valid decision under s 138. Nor could it be treated as a decision properly made under s 152 because the NSC2 did not conduct or purport to conduct a hearing.

[59] Only a very limited exception was contemplated by the appellants:[47]

> 37.4 the appellants accept however that in very exceptional circumstances that are difficult to imagine other than in cases where an own motion investigation should never have been commenced in the first place, section 142(3) could arguably be relied upon as providing a procedural power to "discontinue" pre-emptively an own motion investigation without a hearing on the papers under section 152. But the exercise of such a procedural power would carry the unnecessary risk of unfairness particularly if a notice to discontinue were to include a reasoned decision that was critical of the practitioners or were to include matter on which they had not been given an opportunity to respond.

The scenario there described was, of course, precisely how the appellants viewed the way in which they had been treated in the Notice of Decision.

[60] Mr Collins submitted it was irrational to suggest that a standards committee should be obliged to continue with its investigation after forming the view that no meaningful disciplinary or protective purpose would be served. Supporting the Judge's reasoning, he suggested that any constraint on the ability to terminate an investigation would result in an undue and unnecessary burden both on the lawyer under investigation and on the standards committee.

[61] Section 152 provides for the power of a standards committee to determine a complaint or matter. It applies only in the circumstances where an enquiry has been completed and a hearing has been held, that is, it addresses the culmination of the investigation process.[48] Section 138 empowers a standards committee to conclude an investigation into a complaint without completing the enquiry and hearing process. That power is acknowledged in s 152(3), which states that nothing in s 152 limits the

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47 Footnote omitted.

48 Lawyers and Conveyancers Act, s 152(1).

power of a standards committee to make, at any time, a decision under s 138 with regard to a complaint.

[62] We do not consider that the provision of an express power, equivalent to that conferred by s 138 in respect of complaints, is necessary in relation to the conduct of own motion investigations. Such investigations are commenced unilaterally by a standards committee. Similarly, we consider that they can be terminated unilaterally without proceeding to any conclusion. Of course, that is subject to the proviso that, in terminating an own motion investigation, the standards committee does not make any adverse finding or unfavourable reference concerning the practitioner. To do so would generate the unfairness which is the appellants' concern in this matter.

[63] It follows that we do not consider that there is a lacuna in s 138. There is no gap which requires filling by the courts. Indeed, if s 138 were to be construed as the source of the power to not proceed further with an own motion investigation, then, in theory at least, it could place a constraint on the inherent power of a standards committee to discontinue an investigation unilaterally commenced.

[64] For these reasons, which are different in some respects from the judgment, we do not accept the appellants' argument that the absence of a reference in s 138 to a matter under s 130(c) has the consequence that an own motion investigation must proceed to a hearing and hence the NSC2's decision to take no further action was invalid on that account.

Issue 4: Did the NSC2 make an adverse finding concerning the appellants?

[65] The focus of this issue are [31] and [32] of the Notice of Decision, in particular the statement that the NSC2 was satisfied that the appellants' conduct "was at the lower end of the type of conduct by lawyers that could attract a disciplinary response".[49]

[66] The appellants' amended statement of claim asserted:[50]

> 22.4 By e-mail including those dated 24 April 2020 and 12 June 2020, Mr Brant sought particulars of the impeachable conduct, (ie the words

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49 See [31] above.
50 Emphasis in original.

used in his e-mail) and why the words used were impeachable. No particulars were provided yet the [NSC2] proceeded to make a "decision";

22.5 It contained an adverse comment that the '*conduct was at the lower end of the type of conduct by lawyers that could attract disciplinary response*', which was not a finding of a contravention of section 12 of the Act but implicitly provided gratuitous support for the anonymous complainant's irrelevant philosophical views and implicitly impugned the plaintiffs for their irrelevant critique of those philosophical views.

22.6 It contained adverse comments or implied findings relating to tone and content of private correspondence of Mr Hardie and Mr Brant and implied that they may lack appropriate judgement when it comes to the tone and content of correspondence that relates to the provision of regulated services, but without the [NSC2] having given them either notice that it intended to proceed to a hearing of the matter or the opportunity to make further submissions on the proper construction of section 12 of the Act, which opportunity the [NSC2] had represented it would give to them in its letter of 8 May 2020;

The NZLS admitted [22.4] but denied [22.6].

[67] In relation to [31] and [32] the Judge commented:

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

[68] Then, after recording that the NZLS accepted that natural justice may require persons who are likely to be significantly criticised to be given an opportunity to respond before a final decision is made and published,[51] the Judge concluded:

> [100] I am satisfied, however, that the references here to which Mr Hardie and Mr Brant object did not reach the level of "adverse comment" or "significant criticism" such that they were entitled to an opportunity to respond before the [NSC2] communicated its decision to them in its final form. I reach this conclusion for the following reasons:
>
> (a) In the [Notice of] Decision there is no real assertion of professional culpability against either of these lawyers. That [Notice of] Decision, as I see it, would have been interpreted

[51] At [99].

by any reasonably informed person as devoid of criticism detracting from Mr Hardie's or Mr Brant's professional standing or reputation.

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

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

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

[69] In this Court, Mr Collins supported the Judge's analysis, describing the observations in the Notice of Decision as "mild". We agree that the NSC2's statements could not be viewed as serious or severe. But even mild criticism from a disciplinary body can have significant implications for practitioners and their careers.

[70] Unsurprisingly, the appellants submitted that the NSC2's comments were critical of them and could affect their professional standing and reputations. They made the point that non-publication of the decision did not mean they would not suffer reputational harm, noting that:[52]

42.1 the president of NZLS may have access to decisions of Standards Committees when assessing the suitability of applicants for appointment to various offices, including when undertaking enquiries in relation to judicial appointments;

42.2 applicants for admission to the inner bar or to judicial office are required to disclose any investigations by professional bodies;

42.3 applications for renewals of professional indemnity insurance and any applications for public or private appointments to boards or trusts

[52] Footnotes omitted.

> (private, charitable or public) or decision-making bodies often require disclosure of investigations by professional bodies into an applicant's conduct;

[71] We consider that these are valid concerns. We accept their contention that the "lower end" evaluation implied that their conduct may have constituted unsatisfactory conduct. It is a statement that the NSC2 is "satisfied" that their conduct fell within the spectrum of conduct that could justify a "disciplinary response". We are unable to agree with the Judge's assessment that such statement would be interpreted by any reasonably informed person as "devoid of criticism" detracting from the professional standing and reputation of the appellants.

Issue 5: Should the NSC2 have afforded the appellants an opportunity to respond on its proposed adverse finding?

[72] We proceed on the assumption that some threshold needs to be recognised whereby at least trivial criticisms or constructive professional guidance ought not to give rise to an obligation to provide an opportunity to engage with the intended statement.

[73] The NZLS endorsed the threshold adopted by the Judge of "adverse comment" or "significant criticism". In particular, it submitted that there was no error in the Judge's observation concerning the absence of specific findings of impropriety.[53] However, the Judge's comment was directed to [19(a)] and [19(b)] of the Notice of Decision where the NSC2 was explaining why its resolution to commence an own motion investigation under s 130(c) was lawful. Furthermore, as the Judge noted, those statements "simply record one possible reasonable interpretation" of the comments in the emails.[54] They do not signal any conclusion by the NSC2.

[74] In our view, the evaluation of the appellants' conduct in the concluding paragraphs of the Notice of Decision is very different in nature. That evaluation is adverse in nature and could not be dismissed as insignificant. We consider that the NSC2 should have given the appellants an opportunity to respond before issuing the

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53 High Court judgment, above n 1, at [100(d)].
54 At [100(d)].

decision containing such comments. The fact that the NSC2 did not intend to take any further steps in the investigation did not absolve it from that obligation.

Issue 6: Should the NSC2 have afforded the appellants an opportunity to make a submission on publication of the Decision?

[75] There is no reference in the minutes of the meeting of 30 July 2020 to the decision to take no further action being confidential. However the Notice of Decision ultimately released stated that the decision was confidential, the NSC2 having "made no such direction [otherwise] in relation to the complaint".[55]

[76] In their pleadings, the appellants asserted that the NSC2 failed to give them the opportunity to be heard on the issue of confidentiality, and thereby acted inconsistently with the rules of natural justice and the duty to act fairly implied by s 123 of the Act. The NZLS admitted that its decision not to make a direction concerning publication was made without the appellants having the opportunity to be heard on that point, but denied that it was under any obligation to take that step.

[77] Under the heading "Publication and the refusal by the [NSC2] to authorise distribution of a redacted decision", the judgment first notes that the appellants did not take the step of referring an objection to "the publication decision" to a Legal Complaints Review Officer.[56] It then discusses the correspondence relating to the request for approval to disclose a redacted version and upholds the NZLS contention that the NSC2 was *functus officio*.[57]

[78] The judgment then turns to discuss an argument apparently advanced on behalf of the NZLS, that the request for publication was an attempt by the appellants to advance an ideological platform. On this issue, the Judge said:

> [110] In any event, and notwithstanding my view that the [NSC2] was *functus officio* here, even considering the substance of Mr Hardie's request for authorisation to distribute the redacted decision for the purpose, in his words "to share with other lawyers for educational purposes", it is my view that the [NSC2] was also substantively justified in concluding that publication in any form was not warranted here.

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55 See [32] above.
56 High Court judgment, above n 1, at [104].
57 At [105]–[109].

> [111] First, the educational value of any decision the [NSC2] makes is a matter for the [NSC2] in this case to determine. It is not a matter for the lawyers who have been under investigation to drive in any way.
>
> [112] Secondly, though I make no definitive conclusions on this point, I am concerned here that, as Mr Collins suggests, a reasonable argument exists that the request for publication of the [Notice of] Decision comes not from a bona fide desire to educate the legal profession, but rather largely as an attempt to advance an ideological platform. The plaintiffs have noted from the outset that their comments related to their views about transgender people. Indeed, this has been something that has featured prominently in the present litigation and involved a significant amount of correspondence and material both before the [NSC2] and this Court. Though I refrain from making any finding in this regard, particularly in light of the absence of evidence the Court has heard on the point, I nevertheless note a possible argument exists that such an impression is reasonably available here. I note in particular the descriptions used by Mr Hardie and Mr Brant on the moral and cultural issues relating to freedom of speech and expression in this case and their references to "post-modern neo-Marxist ideologies". The NZLS and the [NSC2] appear to have taken the view that advancing a particular platform is not a legitimate function of the lawyers complaints process, nor of the [NSC2]'s own motion regime contained in Part 7 of the Act. I accept, as Mr Collins contends, that generally is not a legitimate reason for publication. Consequently, whether or not such a situation is truly at play here, I am satisfied the [NSC2] was justified in taking an arguably cautious approach in these circumstances in declining to publish the [Notice of] Decision.

[79] We note that there is no hint in the Notice of Decision that the NSC2 advised the appellants either of the fact of such a concern or the prospect that it might impinge on the approach to be taken to the decision concerning publication.

[80] The thrust of the appellants' attack on the judgment was that it did not make express reference to their argument that the NSC2 failed to observe the principles of natural justice when deciding not to make a direction in relation to publication under s 142(2). The response in the NZLS submissions was surprising:[58]

> 3.1 The argument that the learned Judge was wrong *"… in finding that the Appellants did not have a right to be heard in relation to whether the [NSC2] should make a direction as to publication"* misdescribes what happened. The [NSC2] decided to take no further action and issues of publication did not arise. The decision was to *"remain confidential"*. …

[81] This argument, which we found somewhat obscure, appeared to contend that, because a decision was made to take no further action, there was no need for the NSC2 to consider the question of publication. For that reason, the NSC2 did not in fact make

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[58] Footnote omitted, emphasis in original.

any decision on the issue of publication. We are unable to accept this construction of events. It is inconsistent with the NZLS pleading.[59] It is also at odds with the Judge's statement that it was the contention of the NZLS and NSC2 that "the decision not to publish the [Notice of] Decision was entirely orthodox".[60] The correct construction of events is that, having made a decision to take no further action on the anonymous complaint, at some point the NSC2 made a decision that the Notice of Decision would not be published.

[82] Given the unusual circumstances where the complaint was anonymous, the NSC2 had come to the conclusion that the appropriate course was to take no further action and, as we have found, the appellants' conduct was not part of or connected to the provision of regulated services, the NSC2 should have sought the appellants' views on the desirability of publication. The NSC2 should also have disclosed its view as to the appellants' motivations and the implications of that view for the publication decision.

[83] The NSC2 failed to do so. In consequence we accept the appellants' submission that they were not treated fairly. For this reason we consider that the NSC2's decision not to allow publication is invalid. It is set aside. The Notice of Decision is not confidential.

The order prohibiting publication of the High Court judgment and the proceeding

[84] The judgment concluded in this way:[61]

> **Confidentiality**
>
> [134] As a final point, I note this matter is to remain confidential between the parties involved. As I have found, there was no issue with the [NSC2]'s view that the matter was confidential between the parties or its decision not to publish the [Notice of] Decision. I am also of the view that the nature of the subject matter involved, being an investigation into possible "misconduct" or otherwise "unsatisfactory conduct" meriting further disciplinary action, warrants such confidentiality. I also consider that the finding that the [NSC2] was right in declining publication of the [Notice of] Decision would be

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59 See [78] above.
60 High Court judgment, above n 1, at [27].
61 Footnote omitted.

> substantially undermined if this judgment were to be released providing essentially the details I have found the [NSC2] was right to keep confidential.
>
> [135] The non-publication order put in place by the [NSC2] therefore continues in force and accordingly I order that publication of this judgment and any part of these proceedings is prohibited. I am satisfied the circumstances in this case outweigh any presumption in favour of publication. Out of an abundance of caution, I note this means the parties will not be able to release or distribute a redacted version of this judgment.

[85] One might infer from the opening sentence of [134] that the blanket suppression order was made at the parties' behest. However, during the hearing counsel advised that they had not sought the order made by the Judge. Nor did they seek an order for confidentiality in respect of this Court's decision.

[86] In those circumstances and in light of the rulings in this judgment we consider that the confidentiality order is neither necessary nor appropriate. It is set aside.

Result

[87] The appeal is allowed.

[88] A declaration is made that the National Standards Committee No 2 erred in failing to give the appellants an opportunity to be heard in respect of its adverse comments in the Notice of Decision.

[89] A declaration is made that the National Standards Committee No 2 erred in failing to give the appellants an opportunity to be heard concerning publication of the Notice of Decision.

[90] The decision not to publish the Notice of Decision is set aside. The Notice of Decision is not confidential.

[91] The order prohibiting publication of the High Court judgment and any part of those proceedings is set aside.

[92] The order for costs in the High Court is set aside. The appellants are entitled to one set of costs in the High Court on a 2B basis and usual disbursements. Any dispute concerning quantification is to be determined in that Court.

[93] In this Court, the respondents must pay the appellants one set of costs for a standard appeal on a band A basis and usual disbursements.

Solicitors:
Claymore Partners Ltd, Auckland for Appellants
New Zealand Law Society, Auckland for First and Second Respondents