NEW ZEALAND LAW SOCIETY
LAWYERS COMPLAINTS SERVICE

No.	17177
Concerning	Part 7 of the Lawyers and Conveyancers Act 2006
And	
Concerning	an Own Motion Investigation by the National Standards Committee concerning Catriona MacLennan dated 23 February 2018

Notice of Decision by National Standards Committee

Introduction

1. This decision concerns the balance to be struck between a lawyer's right of freedom of expression to comment on judicial decisions, and a lawyer's professional duty not to act in a way that undermine the processes of the court or the dignity of the judiciary.

Background

2. In December 2017 barrister Catriona MacLennan was reported in the media as having commented on a judicial decision by Queenstown District Court Judge Brandts-Giesen. The Judge had reportedly decided to discharge without conviction a male defendant who was reported in the media as having been charged by the New Zealand Police for assaulting his wife, his children and a male friend following the defendant's discovery of a text message between his wife and friend declaring their love for each other.

3. During the course of sentencing the defendant the Judge was reported in the media as having said:

> Really, this is a situation that does your wife no credit and it does the [male] no credit.
>
> There would be many people who would have done exactly what you did, even though it may be against the law to do so.
>
> I consider that the consequences of a conviction are out of all proportion to what happened on this occasion.

4. Ms MacLennan's statements, and the Judge's sentencing comments, were outlined in a *New Zealand Herald* article entitled 'Police reviewing judge's decision to discharge man who assaulted wife'. The article described Ms MacLennan as an "Auckland barrister and spokeswoman for the Auckland Coalition for the Safety of Women and Children".

5. Ms MacLennan was reported as having made the following statements about the Judge, the Judge's decision to discharge the defendant without conviction, and the Judge's reported comments during the course of sentencing the defendant (emphasis added):

    (a) ***"It is inappropriate for Judge Brandts-Giesen to continue sitting on the bench"***.

    (b) *"His reported comments and the sentence imposed display a complete lack of understanding of domestic violence".*

    (c) *"He victim blames and minimises assaults on three people".*

    (d) The Judge's comments during sentencing were *"abhorrent".*

    (e) *"It is the role of the judiciary to uphold the law and foster respect for the law"* [the inference being that the Judge acted contrary to such function].

    (f) *"Stating that 'many people would have done exactly what you did' condones and excuses domestic violence".*

    (g) *"The education provided to date* [to the judiciary, about domestic violence] *has plainly been inadequate".*

    (h) *"The police should appeal the discharge without conviction. It is inappropriate and out of line with penalties in similar cases".*

    (i) *"Judicial attitudes like this and the lack of penalty are part of the reason why women do not come forward to report domestic violence".*

6. There were other contemporaneous public criticisms of the Judge's decision and sentencing comments by other persons, but none of those suggested that the Judge ought to be removed from office.

Complaint about Ms MacLennan from member of the public

7. On 18 December 2017, the Lawyers Complaints Service (**LCS**) of the New Zealand Law Society (**Law Society**) received a complaint about Ms MacLennan from a member of the public. Amongst other things, the complaint said:

> My complaint is that Ms MacLennan has crossed a line which means that she has brought the Court and the Justice system into disrepute.
>
> . . .
>
> There is a law against anyone criticizing a judge. This is seldom enforced which is a good thing. I am supportive of [a charitable trust] . . . Sometimes they formally call for the sentence to be appealed. This option was open to Ms MacLennan. She also could have made a formal complaint to the Judicial Conduct Commissioner.
>
> I have no real understanding of the case other than what is in the media. Perhaps Ms MacLennan has the sentencing notes.
>
> . . .

> Ms MacLennan is in a privileged position with her skills and she can more effectively lobby for change than a lay person so she should respect the legal process and not publicly criticize a judge.
>
> In the same article victim advocate, Ruth Money is critical of the judgement [sic] but does not launch into a personal attack on the judge.
>
> . . .
>
> My point is that Ms MacLennan is not only wrong in publicly criticising a judge but that her complaint may be unjustified.

8. A copy of the complaint was provided to Ms MacLennan by the LCS by email dated 12 January 2018. Ms MacLennan was asked to respond to the complaint by 30 January 2018.

9. Ms MacLennan responded by letter from counsel dated 29 January 2018. Ms MacLennan submitted that the National Standards Committee (**NSC**) of the Law Society should take no action on the complaint but, other than submitting that the complainant did not have a sufficient personal connection to the subject matter of the complaint and that she was not providing regulated services at the time she made her public statements, did not provide a substantive response to the matters raised. The complainant replied by letter dated 13 February 2018 and reiterated the complaint about Ms MacLennan.

10. By Notice of Decision dated 6 March 2018, the NSC advised Ms MacLennan and the complainant that the NSC had decided to take no action on the complaint pursuant to sections 137(1)(c), 138(1)(e) and 138(2) of the Lawyers and Conveyancers Act 2006 (**Act**). The NSC's decision was made on the basis that the complainant did not have a sufficient personal interest in the subject matter of the complaint and that the NSC had instead decided to inquire into Ms MacLennan's publicly reported statements of its own motion.

NSC own motion investigation

11. By letter dated 7 March 2018 the LCS advised Ms MacLennan (via her counsel) that the NSC had resolved to commence an own motion investigation concerning her publicly reported statements, pursuant to section 130(c) of the Act.

12. Section 130(c) of the Act relevantly states that it is a function of each Standards Committee to investigate of its own motion any act or allegation or other matter that appears to indicate that there may have been "unsatisfactory conduct"[1] on the part of a practitioner.

13. The letter on behalf of the NSC identified the various criticisms made by Ms MacLennan about the Judge, the Judge's decision and the Judge's sentencing comments, including but not limited to Ms MacLennan's reported statement that it was inappropriate for the Judge to continue sitting on the bench.

14. Amongst other things, the letter on behalf of the NSC requested a response from Ms MacLennan to the following questions:

    (a) Did Ms MacLennan accept that she did in fact make the statements that she was reported by the *New Zealand Herald* to have made?

[1] See sections 12 (a) - (c) of the Lawyers and Conveyancers Act 2006.

(b) Had Ms MacLennan reviewed and considered the Judge's Sentencing Notes, or other such primary material, prior to making her statements?

(c) Did Ms MacLennan's statements amount to a breach of rule 13.2 ('Protection of court processes') of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008?

(d) Were Ms MacLennan's statements made at a time when she was providing "regulated services"?

15. Ms MacLennan responded (personally) by letter dated 15 March 2018. Ms MacLennan's response reiterated why she considered the Judge's decision and sentencing comments to be inappropriate but, other than saying that she was not providing legal work at the time she made her statements, did not address any of the questions asked of her by the NSC in its letter of 7 March 2018.

16. In the absence of a substantive response to the NSC letter of 7 March 2018, and given the NSC's concerns that Ms MacLennan's statement(s) could have contravened rule 13.2 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (**Rules**) by undermining the dignity of the judiciary, on 23 March 2018 the NSC resolved to set the matter down for a hearing on the papers pursuant to sections 152(1) and 153(1) of the Act.

17. Ms MacLennan was asked to provide written submissions in response to the NSC's related Notice of Hearing which was emailed to Ms MacLennan on 27 March 2018. Amongst other things, the Notice of Hearing:

(a) Recorded that "As a preliminary matter, the NSC accepts that lawyers are entitled to express views publicly which are critical of judicial decisions and to make complaints about judicial officers".

(b) Recorded that of particular concern to the NSC was Ms MacLennan's public statement that *"It is inappropriate for Judge Brandts-Giesen to continue sitting on the bench".*

(c) Sought submissions on the professional conduct issue of whether Ms MacLennan breached rule 13.2 of the Rules by acting in a way that undermined the dignity of the judiciary.

(d) Sought submissions as to whether Ms MacLennan had an objective foundation for making her statements, such as by having first reviewed and considered the Judge's Sentencing Notes.

(e) Sought submissions as to whether Ms MacLennan was providing "regulated services"[2] at the time she made her statements.

18. Ms MacLennan was asked to provide her written submissions by 12 April 2018. Ms MacLennan provided submissions (personally) by letter dated 11 April 2018. Amongst other submissions, and to paraphrase and summarise, Ms MacLennan submitted that:

(a) Aspects of the Notice of Hearing were not compliant with natural justice:

[2] See section 6 of the Lawyers and Conveyancers Act 2006.

> Also, it is impossible for me to respond to an investigation if I have no idea of what is being investigated or alleged against me.

(b) She relied on section 14 ('Freedom of expression') of the New Zealand Bill of Rights Act 1990, which says that:

> Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.

(c) The "correctness" of her public statement that the Judge's decision to discharge the defendant without conviction was inappropriate, was demonstrated by the Crown having subsequently appealed the sentence and the High Court having allowed the Crown's appeal[3].

(d) She was commenting on the case "as an expert in domestic violence, on a case and on an issue in which I had no personal interest".

(e) The Chief District Court Judge considered the sentencing comments of Judge Brandts-Giesen to be inappropriate.

(f) In relation to the issue of her public statement that it is inappropriate for Judge Brandts-Giesen to continue sitting on the bench:

> Accordingly, while it is commendable that the Chief District Court Judge is arranging domestic violence training for the judge, my view is that it is unlikely that a limited amount of domestic violence training can produce a fundamental shift in the judge's views. This is particularly the case for someone of the judge's age and length of time in law.
>
> The fact that the Chief District Court Judge, the Police, the Crown and the High Court all were of the view that either the judge's comments or sentence were inappropriate, clearly indicates that a fundamental shift in the judge's perspective would be required.

(g) She did not undermine the dignity of the judiciary:

> I made comments to one media outlet on one occasion, based on my 21 years of experience relating to domestic violence.

(h) She did not breach the Act or the Rules:

> The judge made comments condoning breaking the law and condoning domestic violence. I was upholding the rule of law by making my comments.
>
> I do not consider it appropriate or acceptable for a judge to make a statement during the course of sentencing which condones breaking the law. Does the committee consider that it was acceptable for the judge to make this comment?

(i) New Zealand has the highest reported rate of domestic violence in the developed world.

[3] See *New Zealand Police v XY* [2018] NZHC 414.

(j) "The 'objective foundation' for my comments is my expertise of 21 years in relation to domestic violence".

(k) She was not providing regulated services:

> No client was involved, I was not paid, I was not involved in court proceedings and I had no personal interest in the matter I commented on.

(l) The NSC should "dismiss its own complaint".

Procedural matters

19. In her letter dated 11 April 2018 Ms MacLennan said that the Notice of Hearing was inadequate, asserting (amongst other things) that "Also, it is impossible for me to respond to an investigation if I have no idea of what is being investigated or alleged against me" and ". . . I consider the current process lacking in natural justice. I do not know what it is that I have done that is alleged to be inappropriate – instead, I am left to deduce what it might be from the questions posed to me in the communications dated 7 March and 27 March 2018".

20. The NSC was and is satisfied that the Notice of Hearing sufficiently identified the professional conduct matters which were at issue. The NSC considers that Ms MacLennan was on notice of the matters being investigated, namely whether her various public criticisms of Judge Brandts-Giesen (and, in particular, her public comment that *"It is inappropriate for Judge Brandts-Giesen to continue sitting on the bench"*) had undermined the dignity of the judiciary. This ought to have been apparent to Ms MacLennan both from the correspondence from the NSC pursuant to this own motion investigation matter, as well as from the earlier and related complaint about Ms MacLennan from a member of the public.

21. The NSC is also satisfied that it has exercised its duties, powers and functions in a way that is consistent with the rules of natural justice (as required by section 142(1) of the Act). To the extent it is required, the NSC also relies on the following observations of the Legal Complaints Review Officer[4]:

> [54] There is no obligation for a Standards Committee to explicitly notify a practitioner of the exact findings that it might make or which (if any) professional rule is alleged to have been breached. While the laying of a charge is an appropriate procedure for the Disciplinary Tribunal the legislation makes it clear that the procedure of the Standards Committee is a [sic] summary in nature and may be partly inquisitorial. The obligation of the Standards Committee in this regard is found in s 141 of the Act which provides that the Committee:
>
> > 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:
>
> The more general obligation of the Committee the Committee [sic] to adhere to the principles of natural justice is set out in s 142(1). Where the matter goes to a hearing the procedure to be adopted (including the obligation to provide an opportunity for the lawyer to make submissions) is set out in s 153. These provisions have been adhered to.

[4] LCRO 136/09 (5 November 2009) at [54].

22. By letter from her counsel dated 17 April 2018, and amongst other things, Ms MacLennan sought an extension until 16 May 2018 to provide further submissions and evidence to the NSC. Ms MacLennan also requested an in-person, rather than an "on the papers", hearing.

23. By letter from the LCS dated 18 April 2018, Ms MacLennan was advised that: her extension request had been approved; that the default position provided for in section 153(1) of the Act is for hearings to be held "on the papers" (i.e. without the party or parties appearing in-person before the Standards Committee concerned) but that a Standards Committee has a statutory discretion to direct otherwise; and that her request for an in-person hearing would be considered further by the NSC at its meeting on 7 May 2018.

24. Ms MacLennan was asked to advise the identity and number of persons whom she sought to attend any hearing and to briefly outline the nature of the evidence to be provided by the witnesses. Ms MacLennan did not address the NSC's request. Further questions were asked of the NSC in a letter from Ms MacLennan's solicitor dated 3 May 2018.

Rules and law

25. Rule 13.2 of the Rules says:

> **Chapter 13**
> **Lawyers as officers of court**
> ***Protection of court processes***
>
> **13.2** A lawyer must not act in a way that undermines the processes of the court or the dignity of the judiciary.

26. There is tension in rule 13.2 of the Rules between:

    (a) a lawyer's fundamental and democratic right as a private citizen to speak freely about the exercise of power, including the freedom to criticise the judicial system and the judiciary[5] (i.e. freedom of expression); and

    (b) a lawyer's professional duty, as an officer of the Court, not to act in a way that undermines the processes of the Court or the dignity of the judiciary[6].

27. The NSC considers that the rationale for rule 13.2 of the Rules, as with the rationale for the form of contempt of court known as "scandalising the court", derives from the need to uphold public confidence in the administration of justice and the judicial system. As said by former Attorney-General Paul East QC in the context of contempt of court[7]:

> However, . . . criticism [of the Courts], publicly and widely made, with no knowledge of the special facts on which the Judge has had to make a decision, can be particularly damaging. Such statements can wrongly perpetuate the notion that Judges are not aware of the real pressures facing society. Nothing could be further from the truth. The Judges, probably more

[5] *Contempt of Court: Scandalising the Court – A Consultation Paper* (Law Commission, Wellington, 2012) at 1.
[6] Rule 13.2 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.
[7] Paul East QC, "The Role of the Attorney-General" in Philip A Joseph (ed) *Essays on the Constitution* (Brookers, Wellington, 1995) 184 at 201.

> than any other section of the community, have paraded before them, on an almost daily basis, people whose lives have suffered the trauma of criminal offending and civil disputes.
>
> What has also to be carefully considered is the principle which protects the freedom of speech, and in particular the freedom of the press, which is recognised as fundamental to a democratic and open society. Balancing such considerations with the independence of the judiciary calls for an astute assessment as to how the situation should be handled . . .

28. Judges can speak only through their judgments and cannot, by constitutional convention, publicly answer any criticism[8]. While lawyers are entitled, and ought not to be discouraged, to publicly criticise judicial decisions and to make complaints about judicial officers where considered appropriate[9], there is a professional duty on lawyers not to launch public and personal attacks on judicial officers who are, by the nature of their office, unable to respond publicly. To do so would undermine the dignity of the judiciary.

29. Standards Committees have a duty to ensure that an appropriate balance is struck when a lawyer criticises a member of the judiciary. Lawyers have a statutory obligation to comply with the "fundamental obligation" to uphold the rule of law and to facilitate the administration of justice in New Zealand[10]. In turn, one of the regulatory functions of the Law Society is "to uphold the fundamental obligations imposed on lawyers who provide regulated services in New Zealand"[11].

30. Where a lawyer publicly criticises a member of the judiciary, the NSC considers that the role of Law Society Standards Committees is analogous to that of the Attorney-General and the Solicitor-General when those Law Officers of the Crown exercise their responsibilities in protecting the judiciary in matters of contempt of court by members of the public (occurring outside of the Court) which can undermine public confidence in the administration of justice[12]. In particular, it is the role of Standards Committees to investigate a lawyer's conduct in circumstances where the lawyer may have acted in a way that undermines the processes of the court or the dignity of the judiciary[13].

Right to criticise judiciary, but not without limitation

31. The right to criticise the judiciary is well-established and has been accepted by the Courts. In *Re Wiseman* North P said[14]:

> . . . we wish to make it perfectly clear that Judges and Courts are alike open to criticism and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, no Court could or would treat that as contempt of Court. No wrong is

[8] *Reforming the Law of Contempt of Court: A Modern Statute* (Law Commission, Wellington, 2017) at 105.
[9] Complaints about judicial officers ought to be directed to the Office of the Judicial Conduct Commissioner and/or the appropriate Head of Bench.
[10] See rule 2 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 and section 4(a) of the Lawyers and Conveyancers Act 2006.
[11] See section 65(b) of the Lawyers and Conveyancers Act 2006.
[12] Above, n 8, at 106.
[13] See rule 13.2 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.
[14] *Re Wiseman* [1969] NZLR 55 (CA) at 58.

> committed by any member of the public who exercises the ordinary right of criticising, in good faith, in private or public, public acts done in the seat of justice.

32. To similar effect, Richmond P in *Solicitor-General v Radio Avon Ltd* said[15]:

> The Courts of New Zealand, as in the United Kingdom, completely recognise the importance of freedom of speech in relation to their work provided that criticism is put forward fairly and honestly for a legitimate purpose and not for the purpose of injuring our system of justice.

33. The NSC also notes the following comments of Lord Denning, M.R. in *R v Metropolitan Police Commissioner, Ex parte Blackburn (No. 2)*[16] (emphasis added):

> It is the right of every man, in Parliament or out of it, in the Press or over the broadcast, to make fair comment, even outspoken comment, on matters of public interest. Those who comment can deal faithfully with all that is done in a court of justice. **They can say that we are mistaken, and our decisions erroneous, whether they are subject to appeal or not. All we would ask is that those who criticise us will remember that, from the nature of our office, we cannot reply to their criticisms. We cannot enter into public controversy. Still less into political controversy. We must rely on our conduct itself to be its own vindication.**

34. While they do not concern the position of lawyers, the NSC endorses the above comments. It is for that reason that the NSC ultimately takes no issue with Ms MacLennan's public criticisms recorded at paragraphs 5.b. to 5.i. above. The only statement of concern to the NSC is Ms MacLennan's public statement that:

> It is inappropriate for Judge Brandts-Giesen to continue sitting on the bench.

35. The NSC is also mindful that the right to freedom of expression in New Zealand is not absolute and unqualified. As the High Court stated in *Solicitor-General v Smith*[17]:

> The rights guaranteed by the BORA [New Zealand Bill of Rights Act 1990] depend upon the rule of law, the upholding of which is the function of Courts. Courts can only effectively discharge that function if they command the authority and respect of the public. A limit upon conduct which undermines that authority and respect is thus not only commensurate with the rights and freedoms contained in the BORA, but is ultimately necessary to ensure that they are upheld . . . No right guaranteed by the BORA is wholly unrestricted: each depends upon and is ultimately limited by the need to uphold other rights.
>
> . . .
>
> The right to justice is, of course, another right guaranteed by the BORA, this time by s 27.

36. The NSC considers that while freedom of expression and the right to comment on the performance and role of the judiciary is afforded to all persons, including lawyers, such freedom of expression is not unfettered and a lawyer's comments are subject to the professional obligation that rule 13.2 of the Rules imposes. The issue for the NSC has been whether Ms MacLennan's public statement that *"It is inappropriate for Judge Brandts-Giesen*

[15] *Solicitor-General v Radio Avon Ltd* [1978] 1 NZLR 225 (CA) at 230.
[16] *R v Metropolitan Police Commissioner, Ex parte Blackburn (No. 2)* [1968] 2 All ER 319 at 320.
[17] *Solicitor-General v Smith* [2004] 2 NZLR 540 at 568.

to continue sitting on the bench" went too far and amounts to a breach of rule 13.2 of the Rules.

Orlov v New Zealand Lawyers and Conveyancers Disciplinary Tribunal[18]

37. In relation to the tension between freedom of expression and a lawyer's professional duty not to act in a way that undermines the processes of the court or the dignity of the judiciary, the High Court in *Orlov* said:

> [84] Another example is that one of the conduct rules said to have been breached by Mr Orlov is the duty on practitioners not to undermine "the dignity of the judiciary". We accept that the value to be accorded free speech means one cannot be unduly precious when faced with robust or extravagant comment. If it is said that language is having the effect of undermining the dignity of the judiciary, regard needs to be had to where it was said and what was said, all against a backdrop of not lightly restricting the right to make comment, even if ill-informed and extravagant.
>
> [85] That said, there is equally no doubt that the protection afforded by freedom of expression is not absolute . . .

38. In allowing Mr Orlov's appeal as to penalty, the High Court said (emphasis added):

> [195] Second, we place weight on the circumstances in which the statements were made. **Mr Orlov sought to use the proper channels – the Chief High Court Judge, the Judicial Conduct Commissioner and the Human Rights Review Tribunal. These were not public bodies, and were the appropriate recipients of the type of complaint**. The filing of Court proceedings was less circumspect, but still relatively easy to manage. Publicity would generally only occur if the litigation had passed the initial hurdles, and if it did, publicity would at that point be appropriate. In that sense he still avoided going public with these claims.
>
> [196] **The press release is in a different category and has caused us grave misgivings**. It was insulting to the Disciplinary Tribunal ahead of its hearing. It was unwise and highly inappropriate. We note, however, that before us Mr Orlov accepted it was unwise thing to do, which is a step forward.

JK v Molloy QC[19]

39. A complaint was made about barrister Anthony Molloy QC arising from an article published in the *National Business Review* in 2012. The article, entitled 'New Zealanders shafted by fraudulent justice system says top QC" reported quotes said to be sourced from an interview with Mr Molloy concerning Mr Molloy's arguments in favour of judicial specialisation in the High Court.

40. Amongst other things, Mr Molloy was quoted as having said that he was not mounting "an attack on the competence of judges, but on their delusions of omnicompetence".

41. When assessed in context, the Legal Complaints Review Officer (**LCRO**) decided that Mr Molloy's comments had a logical rational basis and that Mr Molloy had an "objective

[18] *Orlov v New Zealand Lawyers and Conveyancers Disciplinary Tribunal* [2014] NZHC 1987.
[19] *JK v Molloy QC* (LCRO 155/2013, 14 April 2016).

foundation" for making his statements. Such an objective foundation included views expressed by colleagues, judges and academics which provided a logical and rational basis for his statements. The LCRO decided that Mr Molloy had demonstrated a justifiable (rather than justified) foundation for his arguments consistent with the High Court's approach in *Orlov*.

42. In deciding that Mr Molloy had not breached rule 13.2 of the Rules, the LCRO said:

> [168] As noted above, there is good reason to accept, and no reason to reject, Mr Molloy's evidence that his arguments are aimed at benefiting the public. That objective is not inconsistent with upholding the rule of law or facilitating the administration of justice. There is no compelling evidence that his actions undermine the processes of the court of the dignity of the judiciary only because the arguments are primarily aimed at making what Mr Molloy and others argue are improvements.
>
> [169] While the fragments of language that appeared in the article may be objectionable to some, to others they will not. Considered in the context of the commentary and academic articles in which they appear, the language of Mr Molloy's arguments does not warrant a disciplinary response.

Application of Rules and law to facts

43. At the time of commencing its own motion investigation on 23 February 2018 in relation to Ms MacLennan's public statements the NSC had concerns about Ms MacLennan's statement that:

> It is inappropriate for Judge Brandts-Giesen to continue sitting on the bench.

44. In particular, the NSC concerns were:

(a) The NSC considers it generally unacceptable for a lawyer to personally and publicly attack a member of the judiciary in the context of criticising a particular judicial decision.

(b) Ms MacLennan called for the Judge's removal from office based on only one example of what she considered to be an inappropriate judicial decision by the Judge (to discharge the defendant without conviction) coupled with what she considered to be inappropriate comments by the Judge during the course of sentencing the same defendant.

(c) By the nature of his office as a sitting District Court Judge, Judge Brandts-Giesen was not and is not in a position to respond to Ms MacLennan's public statement that it is inappropriate for the Judge to continue sitting on the bench.

(d) The NSC is not aware of any steps being taken to remove the Judge from office and, as a result, other litigants will be appearing before the Judge in circumstances where there has been a public statement made by a lawyer calling for the Judge to be removed from office. This has the risk of undermining public confidence in the judiciary and the administration of justice in New Zealand.

(e) Instead of publicly stating that the Judge ought to be removed from office, Ms MacLennan could have utilised the proper channels for concerns of this nature. For example, Ms

MacLennan could have directed her concerns to the Chief District Court Judge (which the NSC understands Ms MacLennan did do, in addition to her public statement) and/or to the Office of the Judicial Conduct Commissioner.

(f) Ms MacLennan's statement prompted a complaint to the Law Society by a member of the public, who asserted that Ms MacLennan had effectively brought the administration of justice into disrepute.

45. The NSC accepts that judges, like lawyers, are fallible. When judges make judicial errors their errors can be remedied on appeal. That is how the judicial system operates in a country governed by the rule of law. Lawyers have a legitimate role in being critical of such judgments, the treatment of the case by a judge, and to point out the grounds for appeal.

46. The NSC considers, however, that for a lawyer to publicly call for a judge to be removed from office due to a one-off decision or sentencing comment that the lawyer disagrees with, may well be a step too far and has a real risk of undermining the dignity of the judiciary. Judges cannot respond to such public criticism and, as noted by the High Court in *Orlov*, there are sound reasons why such matters ought to be addressed and considered by the proper channels in private by the Judicial Conduct Commissioner and/or the appropriate Head of Bench. For a lawyer to debate a judge's fitness for office in the public domain has the real prospect of undermining public confidence in the judiciary and the administration of justice.

47. It is for these reasons, coupled with Ms MacLennan's omission to address the related questions asked of her by the NSC by letter dated 7 March 2018, that the NSC resolved to set this matter down for a hearing on the papers. The purpose of the intended hearing was for the NSC to determine whether Ms MacLennan had an objective foundation for making her statement (as outlined in the *Molloy* LCRO decision) or rather whether Ms MacLennan's statement amounted to a breach of rule 13.2 of the Rules and, if so, whether any such breach amounted to unsatisfactory conduct pursuant to section 12(c) of the Act.

NSC decision: no further action on matter – section 138(2) of the Act

48. Having now received Ms MacLennan's written submissions dated 11 April 2018 (which were received by the NSC in response to the NSC's Notice of Hearing), the NSC has had an opportunity to consider for the first time (at its scheduled meeting on 7 May 2018) the context in which the public statements were made, Ms MacLennan's intentions in making such statements, and the basis for those statements[20].

49. Having done so, the NSC has decided that it is appropriate for it to exercise its statutory discretion to take no further action on the matter pursuant to section 138(2) of the Act and that accordingly it should conclude the matter on that basis and without continuing to a hearing (either "on the papers" or "in-person"). Had Ms MacLennan provided the NSC with the contents of her written submissions dated 11 April 2018 in response to the NSC's letter of 7 March 2018, it is likely that the NSC would not have set this matter down for a hearing.

[20] The NSC also reviewed and considered the letter from counsel for Ms MacLennan dated 17 April 2018 (which requested an "in-person" hearing) and the letter from the solicitor for Ms MacLennan dated 3 May 2018 (which asked various questions of the NSC).

50. For the following reasons the NSC exercises its statutory discretion to take no further action on the matter pursuant to section 138(2) of the Act:

    (a) Ms MacLennan provided an "objective foundation" for her statement that it was inappropriate for the Judge to continue sitting on the bench, namely her familiarity with research relating to the efficacy of domestic violence training in changing attitudes about domestic violence. The NSC also takes into account that Ms MacLennan is a recognised expert in the field of domestic abuse.

    (b) Ms MacLennan has satisfied the NSC that she made her statements: in good faith; for the benefit of the public; and not in a manner intended to bring the administration of justice into disrepute.

    (c) The context in which Ms MacLennan made her statements is important and in the particular circumstances the NSC considers that Ms MacLennan's public statements did not undermine the dignity of the judiciary.

    (d) The NSC notes the High Court's observation that the Judge's comments during the course of sentencing the defendant that *"there would be many people who would have done exactly what you did"* and *"this is a situation that does your wife no credit and it does the first complainant no credit"*, were inappropriate.

    (e) Ms MacLennan made her statements, partially if not wholly, in her capacity as a spokesperson for the *Auckland Coalition for the Safety of Women and Children*.

    (f) Given her professional background, Ms MacLennan was well-placed to comment about the appropriateness or otherwise of the judicial decision to discharge the defendant without conviction.

    (g) The NSC wholly accepts that domestic violence is a significant issue in New Zealand. Proper public debate and scrutinising of the courts' handling of such matters is necessary to help address the issue. Lawyers have an important role to play in this regard and are uniquely positioned to comment so long as they do so in an appropriate way.

51. For the reasons outlined above, the NSC decides to take no further action on the matter. Adopting the language of section 138(2) of the Act, it appears to the NSC that, having regard to all the circumstances of the case, any further action is unnecessary or inappropriate.

Publication

52. The default position is that decisions of Standards Committees remain confidential to the parties concerned. This is the position pursuant to regulation 31 ('Confidentiality of decisions') of the Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008 (**Standards Committees Regulations**). Standards Committees can, however, direct such publication of their decisions under section 138 of the Act as the Standards Committee considers necessary or desirable in the public interest.

53. It is unusual for a Standards Committee to publish a "no further action" decision. But this is an unusual case which, despite the terms of regulation 31 of the Standards Committees Regulations, has attracted considerable publicity.

54. As agreed by Ms MacLennan in respective emails by her counsel dated 10 May 2018, the NSC directs named publication of this decision as the Law Society considers appropriate. The NSC's direction is made pursuant to section 142(2) of the Act.

55. Given the publicity surrounding this matter, the NSC considers that publication of an anonymised decision is likely to be artificial and that it is necessary or desirable in the public interest to publish this decision in full and for the decision to identify Ms MacLennan as the lawyer concerned.

Right to Apply for Review – Legal Complaints Review Officer

56. If you have received this Notice, you may have a right to apply for a review of this decision by the Legal Complaints Review Officer (**LCRO**). On review, the LCRO may:

    a. direct the NSC to reconsider the whole or any part of the matter;

    b. confirm, modify or reverse the decision of the NSC; and/or

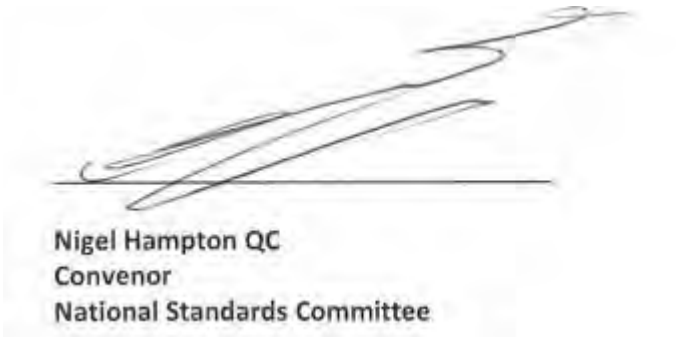
    c. exercise any of the powers that could have been exercised by the NSC in relation to this matter.

57. Any application for a review of this decision must be lodged with the LCRO within 30 working days after a copy or notice of this decision 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.

58. 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

Private Bag 92535
Wellesley Street
Auckland 1141

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



Nigel Hampton QC
Convenor
National Standards Committee

Date: 11 May 2018

To:

Ms Catriona MacLennan, by counsel
New Zealand Law Society