

Report of the

LEGAL COMPLAINTS REVIEW OFFICER

For the 12 months ended 30 June 2012

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OVERVIEW OF YEAR 2011/2012

The role of the Legal Complaints Review Officer (LCRO) is to independently review decisions made by the New Zealand Law Society (NZLS) and New Zealand Society of Conveyancers (NZSC) Standards Committees on complaints against lawyers and conveyancers. Part 7 of the Lawyers and Conveyancers Act 2006, which governs the regulatory scheme of the Act, essentially provides for the LCRO to undertake a second tier investigation into complaints where a party is dissatisfied with the first tier investigation by the Standards Committees.

In that light it is necessary to not overlook that the activities of this office also reflect the activities of the Standards Committees. This may be measured by the extent to which the LCRO upholds, or substantially upholds, the original decision of the Committee. The statistics in this report show that 62% of the Committees' determinations were upheld or substantially upheld in this reporting period, and 6% were wholly reversed. This suggests that self-regulation of the profession by the NZLS, through its Standards Committees, is proving effective, and may provide a degree of confidence in the adequacy of the first tier investigations. It does not follow, however, that the unsuccessful reviews are unnecessary as in many cases the review process is able to address the limitations of the Standards Committee procedures, and/or deal with issues arising from the Committee's decision.

In the last reporting period I noted an increase in delays in completing reviews. The delays have increased during this reporting period, and managing the backlog has been a dominating issue throughout this year. This is so despite a larger number of reviews having been completed than previously. The numbers alone disguise factors that have contributed to this trend which include (a) increases in numbers of review applications, (b) increase in the complexity of issues arising, and (c) a marked increase in the volume of accompanying materials. The increased publicity and the fact that access to review is simple and inexpensive, has seen a larger number of review applications being filed, and at a rate greater than can be dealt with by two judicial officers.

A year ago I also reported that steps were underway to amend the Third Schedule of the Lawyers and Conveyancers Act to make provision for the appointment of a further (Deputy) LCRO. At that time it was expected to be concluded prior to this reporting period, but in the event this did not happen. Whether additional resourcing (through one further Deputy appointment) alone will be sufficient to deal with the current trends may be doubtful.

Managing the increasing workload continues to be the main challenge of this office, and there is an increasing urgency to address this issue. However, this requires urgent attention to not only resources but also to improvements that could be made to the current procedures. Tensions exist between the statutory procedures applying to reviews and the statutory requirement of expeditiousness. There is no discrimination in the way that review applications are dealt with given that the procedures apply to all reviews. In line with the consumer protection focus of the Act, all applicants (whether the original complainant or respondent) are entitled to a de novo enquiry into the complaint and to be personally heard. This is costly both financially and in time when taking into account that a significant number of reviews could, if the appropriate procedures were available, be dealt with summarily. It is becoming evident at this 4-year juncture that the original design of the Act did not take into account (and could not have predicted) the high numbers of review

applications and in the event the processes as established did not contemplate events which have in fact transpired.

In short, the philosophical and conceptual structures and purposes of the Act work very well indeed. But there is room for improvement in the procedural efficiency and effectiveness of the review process, which could be achieved in a way that preserves the purposes of the Act and the intention of the legislature.

Throughout the reporting period this office has continued to support the work of the NZLS in establishing its early intervention and resolution processes which are expected, over the long term, to have some impact on the workload of this office. The attendance by the LCRO at the NZLS update days for Standards Committees have continued to provide opportunity for frank and useful exchanges that are considered by all attendees as a helpful educational forum for assisting the work of those involved in the regulatory work of the Lawyers and Conveyancers Act.



Hanneke Bouchier
Legal Complaints Review Officer

NATURE OF OFFICE

The LCRO was established in 2008 under the Lawyers and Conveyancers Act 2006 (the Act) to provide independent oversight and review of decisions made by Standards Committees of the NZLS and the NZSC.

The LCRO is appointed by the Minister of Justice after consultation with the NZLS and the NZSC. Under the Act, the LCRO cannot be a lawyer or a conveyancing practitioner.

The primary function of the LCRO is to review determinations of Standards Committees. Additionally the LCRO is to provide advice to the Minister of Justice, the NZLS and the NZSC in respect of any issue which relates to the manner in which complaints are received and handled.

The LCRO is Ms Hanneke Bouchier, who is supported by a Deputy LCRO, Mr Owen Vaughan.

STATUTORY REPORTING

Section 224 of the Act requires the following information to be provided in the Annual Report of the LCRO.

The number and types of applications for review

The LCRO received **300** applications for review during the reporting period of 1 July 2011 to 30 June 2012. This is similar to the previous reporting year, in which 296 applications were received.

The 300 applications can be broken down into the following types:

- **276** related to a Standards Committee decision on a complaint made, pursuant to section 194 of the Act.
- **1** related to a Lay Observer review pursuant to section 355 of the Act.
- **6** applications related to review of determinations from Standards Committees following own motion inquires pursuant to section 195 of the Act.
- **1** related to intervening with the power of the Standards Committee to investigate a complaint. This application was declined on the basis of lack of jurisdiction.
- **16** related to decisions of Standards Committees to refer a matter to the Lawyers and Conveyancers Disciplinary Tribunal.

All applications received relate to decisions made by Standards Committees of the NZLS. The NZSC is of modest size and to date no applications for review from its Standards Committees have been received.

Completion of reviews

During the reporting period the LCRO completed **200** reviews¹. This compares with 172 reviews completed in the previous reporting year. Of the 200 completed reviews, 155 related to reviews filed in the previous reporting period.

¹ This refers to actual numbers of completed review without taking into account when the review applications were filed.

Timeliness of completed reviews

Of the 200 reviews completed:

- 22 percent were completed within six months;
- 50.5 percent were completed within six to twelve months; and
- 27.5 percent were completed in over twelve months.

Outcomes of reviews

The outcomes of the 200 reviews completed by the LCRO in the reporting year are shown below. Under section 211 of the Act, the LCRO can confirm, modify or reverse any decision of a Standards Committee. The LCRO also has the power, under section 209, to direct a Standards Committee to reconsider a decision.

In the reporting year:

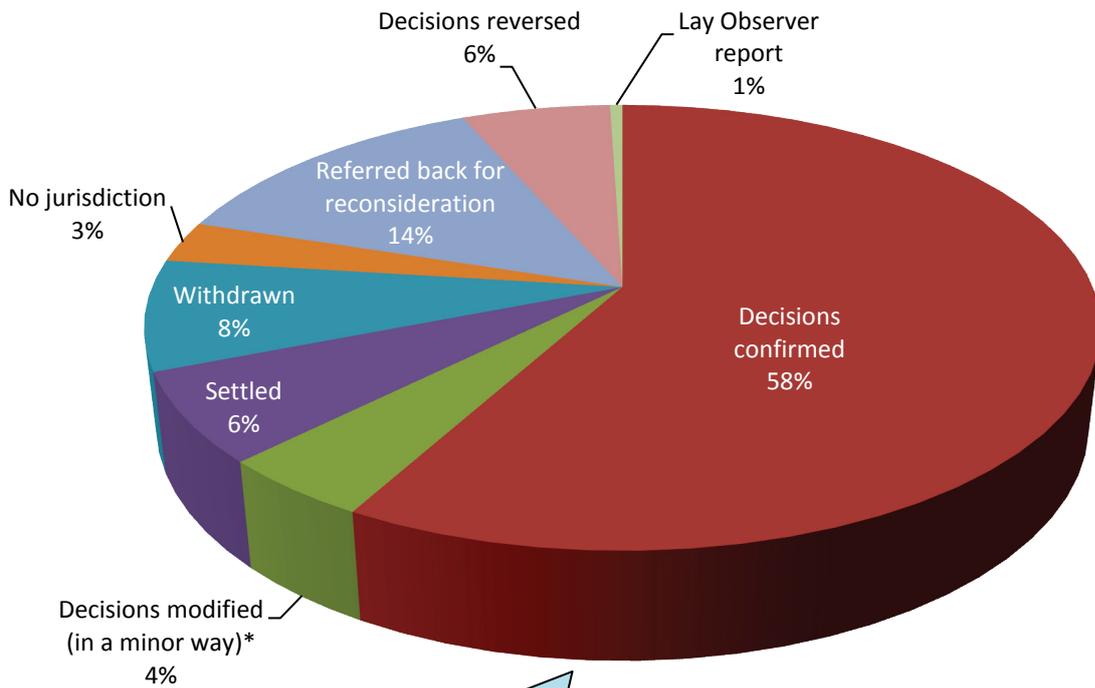
- **116** decisions of Standards Committees were confirmed by the LCRO.
- **9** decisions were modified. The modifications were minor in nature and included changes to fines, orders and/or reasons given, except in one case where was a major modification of an order involving a fine.
- **12** decisions were reversed. Nine of these resulted in the LCRO making a finding of unsatisfactory conduct and reversing the Standards Committee decision to take no action.
- **27** decisions were referred back to the Standards Committee for reconsideration.
 - 6 were referred back due to procedural irregularities in the manner in which the complaint was investigated.
 - 5 were referred back for a costs assessor report.
 - The remaining 16 were referred back as the LCRO found that the Standards Committee had not fully investigated all aspects of the complaint or that reconsideration was required following findings by the LCRO on points of law.
- **6** reviews were declined for lack of jurisdiction to review.
- **29** reviews were withdrawn or settled by way of agreement between the parties.
- **1** decision related to a Lay Observer report.²

Pursuant to Section 212 of the Act, the LCRO may frame an appropriate charge and lay it before the Lawyers and Conveyancers Disciplinary Tribunal. During the reporting year there was one review where the LCRO commenced a prosecution.

The outcomes of reviews are presented by percentage in the graph overleaf.

² Further analysis of the Lay Observer report function is detailed later in this report.

Outcomes of reviews (contd.)



- **62%** of Standards Committee decisions were either confirmed, or confirmed subject to minor modifications (*with one exception, where there was a major modification of an order involving a fine).
- **14%** of review applications were either settled or withdrawn
- **20%** of Standards Committee decisions were reversed or referred back to the

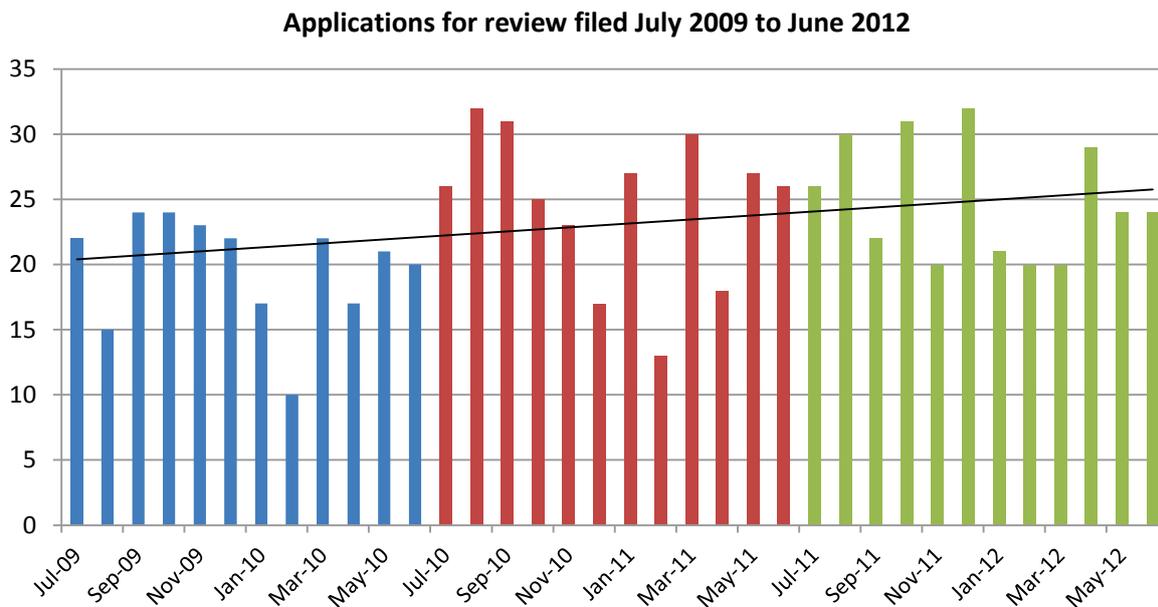
Applications for review still outstanding

Of the 300 applications filed in the reporting period, **255** remained active as at 30 June 2012. 70 of the active reviews were filed in the previous reporting period.

WIDER ANALYSIS

Trends

The following graph shows the number of applications for review received each month over the past two reporting periods. The trend line highlights the steady increase in review applications filed. The average number of applications filed per month has risen from 20 per month in 2009/10 to 25 per month in the reporting period.



Rate of review applications

Information received from the NZLS indicated that Standards Committees disposed of 1,540 complaints in the reporting period. During the same period the LCRO received 300 review applications, meaning 19.5% of Standards Committee decisions proceeded to a review.³ This is a slight decrease (1.5%) on the previous reporting period.

Applicants

Of the 300 applications for review filed during the reporting period, **235** applications were filed by consumers and **65** were filed by lawyers. Of note, 27 applications filed were by a lawyer against another lawyer. 80% of applications filed were made by the original complainant who was dissatisfied with the Standards Committee decision.⁴

Lay Observer Reviews

One application to the Lay Observer was received by the LCRO in the reporting period. No time limit exists for a Lay Observer review application to be submitted. It is possible that such applications will be received in future, but these are expected to be uncommon.

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

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

Jurisdictional Issues

Six applications for review were not considered for jurisdictional reasons mainly resulting from a failure to comply with procedural requirements. In particular, applications to the LCRO for review must be made on a prescribed form, with a prescribed (\$30.67) fee and within a strict 30 working day time limit. Section 139(2) of the Act requires that every Notice of Decision must include information about the right of review. The LCRO has determined that the legislation requires strict compliance with such formalities and that because the statute confers no discretion there is no jurisdiction to relax the requirements or to extend the time for making an application.

In general where an application is sought to be made out of time the Applicant will be informed of this by the registry staff, and have the opportunity of electing to withdraw and receiving a refund of their application fee. In some cases applicants nevertheless wish to have the question of jurisdiction determined by the LCRO. Decisions issued on this point are published on the LCRO's website.

OPERATIONAL MATTERS

The LCRO must conduct any review with as little formality and technicality, and as much expedition, as is permitted by:

- the requirements of the Act;
- a proper consideration of the review; and
- the rules of natural justice.

Hearings and reviews on the papers

The LCRO can either consider matters in a hearing or, with the consent of the parties, deal with matters on the papers. The majority of applications involve a hearing conducted in the presence of both parties. Where the LCRO is of the view that a matter can be adequately determined in the absence of the parties, the parties are invited to consent to a review on the papers. Parties are not obliged to consent and have a right to be heard in person. In cases where the LCRO has assessed that a review could be conducted on the papers, but where the applicant seeks to be personally heard, the LCRO may direct that an applicant-only hearing be held.

In the reporting period:

- **122** reviews were conducted by way of both-party or applicant-only hearing.
- **58** reviews were determined on the papers.

Withdrawn and settled reviews

The remaining **20** reviews were withdrawn or settled prior to a hearing or decision being issued. Where an applicant seeks to withdraw from his or her review application, the consent of the LCRO is required. Such consent is usually granted where no public interest issues are involved. Four reviews were withdrawn as a result of mediated outcomes that were approved by the LCRO.

Costs, fines and compensation orders

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

Where a finding is made against a lawyer or conveyancing practitioner, that practitioner will be expected to pay a contribution towards the costs of conducting the review. Costs orders totalling \$18,275 were made against practitioners in the reporting period. Costs were payable to the NZLS.

In addition to the costs for the review, practitioners were fined a total of \$16,850 during the reporting period, the largest being a fine of \$10,000. These amounts were payable to the NZLS and are taken into account when annual levies are set.

Other monetary orders related to compensation (payable to a party who has suffered loss as a result of a lawyer's professional failure) were made where the LCRO considered it appropriate. In the reporting year these totalled \$7,925.31.

Publication of decisions

The majority but not all decisions issued by the LCRO are published on the LCRO website for interest and educational purposes with all names and identifying details removed. A decision not to publish may be because the case has little interest to the general public, has topics that have been covered in previously published decisions or anonymity cannot be achieved.

Where an adverse finding has been made against a practitioner that the LCRO considers should be published with identifying details, the LCRO Guidelines set out the procedures that will be followed by the LCRO.⁵

Alternative dispute resolution

The Act provides for a review to be postponed for the parties to explore the possibility of resolving the issues by negotiation, conciliation or mediation. Where appropriate these options are offered to the parties.

Where parties embark on a private mediation resulting in a settlement, and then seek to withdraw their review application, the LCRO's consent is required.

Opportunities also arise from time to time in the course of a review hearing during which one or both parties indicate a willingness to explore resolution at that time. Where the parties reach a resolution in such cases, with or without the assistance of the LCRO, the terms of the agreed settlement may be declared by the LCRO, with the parties' consent, to be a final determination of some or all issues involved in the review. This opportunity often arises where the review issues revolve around legal fees. Any agreed settlement between the parties may result in either a full or partial settlement of the review issues, but this does not prevent the LCRO from nevertheless issuing a decision should that be considered appropriate.

In total there were 9 matters that resulted in settlements. In 4 cases the parties consented to the appointment of an external mediator with whose assistance the matter was resolved.

MINISTER OF JUSTICE

The function of the LCRO includes providing advice to the Minister of Justice on any issues identified in the course of carrying out a review. In the reporting period there have no specific matters arising from a review that required dialogue with the Minister.

Judicial resource

The main area of concern for this office in the reporting year, as with previous years, has revolved around workload pressures. The Act limited the number of LCROs that could be appointed, and the number of cases being received was greater than the LCRO and Deputy could resolve in an expedient manner.

However, since the reporting year completed, a legislative amendment has been passed that will allow the appointment of an additional Deputy LCRO. The appointment process is underway, and the LCRO would urge that the appointment be finalised as quickly as possible.

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

Lay Observer

The LCRO is also obliged to provide a report to the Minister of Justice in relation to the discharge of the function of Lay Observer, previously set out in section 97(7) of the Law Practitioners Act 1982. This obligation arises by virtue of Section 355 of the Lawyers and Conveyancers Act which confers on the LCRO all of the duties and powers of a Lay Observer under the Law Practitioners Act as if that Act had not been repealed. This includes providing an annual report to the Minister.

The LCRO's role as Lay Observer is to undertake reviews of decisions made by Complaints Committees under the 1982 Act. The LCRO can review the manner in which a Complaints Committee had dealt with a complaint, but cannot review a Committee's decision on the merits of the complaint. This does not, however, prevent an examination of whether the evidence before the Committee reasonably supported the final decision made.

In the reporting period:

- 1 Lay Observer application was received.
- 1 Lay Observer review was completed, which resulted in a report being issued with an outcome of "no recommendation".
- 1 further review was split into two parts: one part was declined and the other part was dealt with by the LCRO as Lay Observer. This resulted in a report with no recommendation.

NEW ZEALAND LAW SOCIETY

The office of the LCRO interfaces with the NZLS primarily in two ways. One arises by virtue of sections 124(g) and 125(g) of the Act, which require the NZLS and the NZSC to provide the LCRO copies of any complaints that are made about the operations of the Complaints Service of the respective bodies. Such complaints are considered by the LCRO and should they indicate any particular matter that requires attention it is raised with the relevant Society. These complaints do not result in a formal investigation by the LCRO although the LCRO may, where necessary, seek further information from the NZLS or the NZSC. Where any issues arise from such complaints, the practice is that the LCRO will liaise with the relevant Society.

In the reporting period there have been 10 such complaints forwarded to the LCRO. None have required any further attention by this office.

There is usually no direct communication between the LCRO and the complainant. In some instances complainants expect a full investigation of their complaint. An explanation of the LCRO's role has been provided to the complainants in these cases and, following dialogue with the LCRO, the NZLS now provides a full explanation about the process to individuals who lodge such complaints.

The second interface between the LCRO and the NZLS arises through regular (usually quarterly) meetings which provide the forum for discussion of a variety of issues arising in the work of the Complaints Service and the LCRO. Opportunities for improvements are identified and discussed, and it particularly provides an opportunity for the LCRO to provide feedback to the NZLS on observations that are made in the course of reviews in relation to Standards Committee decisions.

EXTRA CURRICULAR/OUTREACH

The LCRO attended the annual Australian Institute of Judicial Administration (AIJA) conference in Melbourne in June 2012, which provided an opportunity to liaise with tribunal members working in a variety of Australian jurisdictions. This provided a useful opportunity for exchanging information on procedures affecting a range of tribunals. Australia also maintains separate pathways for consumer and disciplinary matters.

The LCRO and Deputy LCRO attended and presented at the annual Standards Committee training day held by the New Zealand Law Society, and had the opportunity to provide feedback to Committee members. This is the only opportunity for direct contact between the LCRO and Standards Committee Chairs, and following very positive comments it is proposed that the LCRO becomes a regular attendee.

FINANCIAL MATTERS

The LCRO is administered by the Ministry of Justice and funded through a levy imposed on the NZLS and NZSC pursuant to section 217 of the Act. The Societies recoup their levy through levies on their own members. The LCRO levy on the Societies for the 2011/12 year was \$72.00 (incl GST). All levies were received from both societies.

Revenue Received

- LCRO filing fees: \$ 8,526.40
- LCRO levies: \$ 645,888.00 (incl GST)
- LCRO other: \$916.00

2012-2013 Levies

The levy for 2012/13 is still being finalised, but the same process as previous years has been used, namely that the Ministry, NZLS and NZSC consult together near the end of each financial year to determine whether the levies set were actual and realistic. The estimated annual amount is adjusted in accordance with a recalculation based on a range of income and expenditure criteria that include:

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

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

Under section 222 of the Act the Ministry of Justice is required to report in its own Annual Report in respect of funds received and expended in meeting the cost to the Crown of the performance of the functions of the LCRO.⁶

⁶ The Ministry's Annual Report also outlines the Trust Account information along with the actual costs of the LCRO office. A copy of the Ministry's Annual Report can be accessed from www.justice.govt.nz/publications