NOTE: HIGH COURT ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS OR IDENTIFYING PARTICULARS OF FIRST RESPONDENT REMAINS IN FORCE

IN THE COURT OF APPEAL OF NEW ZEALAND

CA663/2011
[2013] NZCA 156

BETWEEN	THE NEW ZEALAND LAW SOCIETY Appellant
AND	B First Respondent
AND	THE AUCKLAND STANDARDS COMMITTEE NO 1 OF THE NEW ZEALAND LAW SOCIETY Second Respondent
AND	THE LEGAL COMPLAINTS REVIEW OFFICER Third Respondent

Hearing: 20 March 2013

Court: Ellen France, Stevens and White JJ

Counsel: D A Campbell and I L Haynes for Appellant
No appearances for Respondents
F E Geiringer as amicus curiae

Judgment: 16 May 2013 at 2.30 pm

JUDGMENT OF THE COURT

A The appeal is dismissed.

B There is no order as to costs.

REASONS OF THE COURT

(Given by White J)

Introduction

[1] The issue in this appeal is whether a Full Court of the High Court was right to decide that a Standards Committee of the New Zealand Law Society, (the NZLS) and the Legal Complaints Review Officer (the LCRO) on a review, may direct publication of the identity of a lawyer who has been the subject of an adverse finding only when the lawyer has been the subject of a censure order.[1] The question of publication of decisions of a Standards Committee arises when a determination that there has been "unsatisfactory conduct" by a practitioner[2] has been made. In that event, one of the range of orders that a Standards Committee has power to make is an order "censuring or reprimanding" the practitioner.[3]

[2] The NZLS argues that under s 142(2) of the Lawyers and Conveyancers Act 2006 (the Act) a Standards Committee may, subject to the rules of natural justice, direct such publication of its decisions as it considers necessary or desirable in the public interest and that such publication may include the identity of the practitioner concerned, whether or not he or she has been the subject of a censure order. The NZLS submits that the High Court's interpretation of the relevant statutory and regulatory provisions has adverse practical consequences which could not have been intended by Parliament.

[3] Although the NZLS seeks an order reinstating the decisions of the Standards Committee and the LCRO, which directed the publication of B's name, B has not appeared or been represented on the appeal. Instead the Court appointed

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1 *B v The Auckland Standards Committee 1 of the New Zealand Law Society* HC Auckland CIV-2010-404-8451, 9 September 2011.

2 Lawyers and Conveyancers Act 2006, s 152(2)(a). Under s 6 the term "practitioner" includes a lawyer (barrister or barrister and solicitor) and a conveyancing practitioner.

3 Section 156(1)(b).

Mr Geiringer, who with the late Mr Greg King represented B in the High Court, to act as amicus. We are grateful to Mr Geiringer for his written and oral submissions.

[4] As the appeal is concerned solely with the publication issue, we summarise the factual background briefly before turning to the relevant statutory and regulatory provisions.

The Standards Committee decision

[5] After a hearing on the papers as permitted by s 153(1) of the Act, the Standards Committee determined that B, who had been paid $10,000 to advise on the feasibility of an appeal to the Privy Council, had engaged in "unsatisfactory conduct" in terms of s 152 of the Act in overcharging for his services, failing to respond to queries and failing to report adequately to his client. The Committee made orders under s 156(1) of the Act reducing B's fee to $5,000, ordering the refund of $5,000, imposing a fine of $2,000 and ordering B to pay costs of $1,000.

[6] In reaching its decision on penalty, the Committee said that a fine of $2,000 would be "the appropriate penalty" taking into account "all the relevant facts and circumstances". The Committee did not refer in its decision to the possibility of making an order censuring or reprimanding B as permitted by s 156(1)(b) of the Act.

[7] On the issue of publication, the Committee ordered that B's name and the facts of the matter should be published in LawTalk, the NZLS publication, without reference to the names of the other parties involved. The Committee explained its reasons for its publication order as follows:

> Turning to the matter of publication the Committee was mindful of the following considerations:
>
> (a) Disciplinary proceedings were taken in the public interest and public interest factors were of primary importance at each level of decision-making.
>
> (b) The public interest required consideration of the extent to which publication would provide some degree of protection to the public and the profession. See *S v Wellington District Law Society* [2001] NZAR 465, at p 469.

(c) The common law of New Zealand recognises the major interest in openness of proceedings before courts and tribunals. The value of public accountability was one of the values to be imputed by way of parliamentary intention in the absence of clear indications to the contrary and the values of public education and alerting to risk were related and of significance. See *Director of Proceedings v Nursing Council of New Zealand* [1999] 3 NZLR 360 at 378.

(d) The public's right to know when practitioners have infringed the standards of the profession. See *Gill v Wellington District Law Society* (HC Wellington, AP120/93, 7 December 1993, Barker, Ellis and Doogue JJ) at p 9.

(e) The maintenance of the reputation of the legal profession. See *Bolton v Law Society* [1994] 2 All ER 486.

(f) The deterrent and educative value of publication to the legal profession.

[8] As he was entitled to,[4] B applied to the LCRO for a review of all aspects of the Committee's determination including the order that his name should be published.

The LCRO's decision

[9] After a hearing at which the parties were present, the LCRO rejected B's application. In particular, the LCRO upheld the finding of "unsatisfactory conduct" and the orders made. She also found, however, that the Committee had failed to give B a proper opportunity to make submissions on the issue of publication. But having received submissions from B on the issue, she decided that the order for publication of B's name should stand. The LCRO rejected submissions for B that the conduct complained of was at the minor end of the scale, the adverse effects of publication would far outweigh the relative insignificance of such minor conduct, and the Committee had not identified the public interest factors that explained the order. She also rejected a submission for B that publication would encourage a floodgate of minor complaints of this nature.

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4 Lawyers and Conveyancers Act, s 194.

[10] The LCRO then responded to a submission that, as the Committee's proceedings were presumptively private, compelling public interest factors were required to support a departure from the presumption:

> [44] The fact that the statutory provision (section 142(2) of the Act) is made for publication of decisions in otherwise private hearings suggests that publication is not confined only to cases of the most serious wrong doing but may apply to other professional breaches where publication [is] considered "necessary or desirable in the public interest". The relevant principles have been discussed in many cases, some of which are mentioned in the Committee's decision. If it is suggested that the public interest factors justifying publication would need to be more 'compelling' than is normally the case, I do not agree. The majority of cases that are dealt with by Standards Committees involve matters that would not lead to a publication order. Where such an order is considered appropriate I see no reason for not applying the same test that applies to all such cases.
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> [45] I observe that I am reviewing the decision of the Standards Committee (rather than making a decision on a new finding of professional breach), and while the decision of a Standards Committee can be revisited on review, I also recognise the fact that the Standards Committee comprised of fellow lawyers and a lay member has concluded that publication is proper. In this case the Committee's finding of unsatisfactory conduct was based on multiple failures by the Applicant in meeting his professional obligations, and the breaches had a significant impact on the clients.
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> [46] The overriding factor is whether publication will serve the public interest, and whether that interest is greater than opposing interests such as the privacy interests of the lawyer. The relevant principles have been discussed in many cases (including those referred to by the Standards Committee and by counsel) and it is not necessary to set these out in detail. The decision to publish is one that can be made where a Standards Committee considers it appropriate in the public interest.
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> [47] The failures that concerned the Committee in this case were directly relevant to the fundamental purposes of the Lawyers and Conveyancers Act 2006 and the professional rules contained in the Lawyers: Conduct and Client Care Rules. It was open to the Committee to convey to the profession and to the public, by means of publication of the decision, that compliance is expected, and that failure to do so will not be excused by lawyers whose practice fails to comply with the required professional standards. To that I will add that having heard from the Applicant, I had concerns about whether he has a sound appreciation of the application of the Rules to his practice. Having reviewed the Committee's decision to publish in the light of all of the information it is my view that it was open to the Committee to have made the order it did.

> [48] I further note that a publication order is not imposed as a penalty although it would be naive to suppose that publication of a practitioner's name would have no adverse impact. While the overriding factor will be the public interest, this is nevertheless to be weighed against other factors, including the impact on the lawyer or third parties of such publication. I have considered all the submissions made by and for the Applicant in this regard but I do not consider that those interests should prevail in this instance. Having canvassed the same issues as did the Standards Committee I can find no basis for questioning the Committee's [decision] to publish in this case.

The High Court decision

[11] In the High Court Winkelmann and Rodney Hansen JJ rejected B's claim of procedural unfairness, but upheld B's application for review of the decisions on the issue of name publication on the ground that the Committee and the LCRO have no power to direct name publication unless an order censuring the lawyer has been made and the procedures associated with publication of a censure order have been followed. The High Court quashed the name publication decisions of the Committee and the LCRO and remitted the matter to the Committee to enable it to reconsider the orders made under s 156 of the Act and, if necessary, to separately determine the issue of name publication in accordance with reg 30 of the Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008 (the 2008 Regulations).[5]

[12] The High Court's reasons for its decision were based on the relevant statutory and regulatory provisions. In particular, the High Court relied on s 131(f) of the Act which requires the rules governing the operation of a Standards Committee to include rules specifying the circumstances in which the NZLS may publish "the identity of a person who has been censured by a Standards Committee" and reg 30 of the 2008 Regulations which requires a Standards Committee which makes "a censure order" under s 156(1)(b) to obtain the prior approval of the NZLS Board if it wishes to publish the identity of the person who is the subject of the order. In deciding whether to do so, both the Standards Committee and the Board must take into account the public interest and, if appropriate, the impact of publication on the

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5 *B v The Auckland Standards Committee 1 of the New Zealand Law Society* at [44].

interests and privacy of the complainant, other affected persons and the censured person.

[13] The High Court considered that the statutory requirement to make rules governing name publication when the power to censure is exercised shows an intention to permit publication of the practitioner's name in connection with an adverse finding against that practitioner only when the power of censure is exercised.[6] The High Court found that the Committee could not do so when making an order for reprimand.

[14] The High Court distinguished between orders "censuring" and "reprimanding" a practitioner under s 156(1)(b) of the Act on the ground that the terms were not synonyms: "a censure will convey a greater degree of condemnation than a reprimand".[7] The High Court found support for this distinction in the absence of a power to reprimand under the previous Law Practitioners Act 1982 and the more circumscribed nature of the powers of Standards Committees under the new Act, and in dictionary definitions.[8]

[15] The High Court considered that this distinction supported its approach to the interpretation of the Act:

> [38] To censure a practitioner is to harshly criticise his or her conduct. It is the means by which the Committee can most strongly express its condemnation of what a practitioner has done, backed up, if it sees fit, with a fine and remedial orders. It is understandable that when such a response is justified, the legislature should have provided for publication of the practitioner's name, subject to compliance with rules governing the basis on which a decision to publish should be made.

[16] The High Court then rejected an argument (not advanced for the NZLS) that a finding of unsatisfactory conduct, allied with a direction to publish the

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6 At [34].
7 At [36].
8 Bryan A Garner (ed) *Black's Law Dictionary* (9th ed, Thomson Reuters, St Paul, 2009) at 253 and 1417, and *The New Zealand Oxford Dictionary* (online ed) <www.oxfordreference.com>.

practitioner's name, amounts to an order of censure. It did so because it considered that the reasoning in *B v Auckland District Law Society*,[9] which might have supported the argument, related to the very different disciplinary framework under the Law Practitioners Act 1982.

[17] The High Court concluded the reasons for its decision on the name publication issue as follows:

> [41] Having so circumscribed the power of publication in cases of censure, it would be anomalous were s 142(2) interpreted as conferring on the Committee the power to order publication of a practitioner's name in connection with adverse findings against that practitioner, and limited only by consideration of the public interest. Even though the practitioner may thereby be subject to harsh criticism, by simply omitting to make a formal order of censure the procedures under r 30 could be effectively sidestepped.
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> [42] For these reasons we have concluded that, in the absence of an order censuring B, the Committee had no power to publish his name and the Review Officer erred also in confirming the order. We do not see this as creating problems for Standards Committees in practice. As the Law Society recognises in its own practice note, in cases where adverse findings are made against a practitioner and which are serious enough to justify publication of that practitioner's name, a formal order of censure will likely be made. In such circumstances, the r 30 processes will be called into play. Decisions in other cases can still be published as long as steps are taken to anonymise the practitioner's name.
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> (Footnote omitted.)

[18] The NZLS practice note referred to by the High Court states at [12.5]:[10]

> The publication of a censured lawyer's name must first be approved by the NZLS Board. Since a censure is likely to be ordered in most cases where publication is being considered, any publication involving the disclosure of the lawyer's identity is likely to need Board approval.
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> (Footnote omitted.)

The NZLS appeal

[19] The NZLS submits that the High Court erred in deciding that a practitioner's name may be published only when there is a censure order for the following reasons:

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9 *B v Auckland District Law Society* (2008) 19 PRNZ 19 (HC).

10 New Zealand Law Society *Practice Note Concerning the Functions and Operations of Lawyers Standards Committees*.

(a) the power of a Standards Committee under s 142(2) of the Act to direct publication of its decisions, including the name of a practitioner, does not depend on a censure order having been made under s 156(1)(b);

(b) "censure" and "reprimand" are synonyms;

(c) censure is not necessarily a harsh criticism or strongly expressed condemnation;

(d) under reg 31 of the 2008 Regulations a Standards Committee may direct publication of a decision under 142(2) of the Act or under reg 30(1) when a censure order is the only order made;

(e) sections 3, 120(2)(b) and 123(b) of the Act, when read together, emphasise the need for a responsive regulatory regime that is efficient, operates expeditiously, and has regard to the interests of consumers; and

(f) the High Court decision results in a significantly more complex and time-consuming process when publication of the identity of a practitioner is a possibility.

[20] The NZLS submits that its approach is supported by the scheme of the legislation, the structure of s 156(1) and the plain wording of s 142(2) which should not have unnecessary words read into it restricting the power of publication[11] or be disturbed by the words of subordinate legislation appearing in reg 30.[12] The effect of the High Court decision is that it makes s 142(2) redundant insofar as it relates to s 156.

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11 Contrary to *Thompson v Goold* [1910] AC 409 (HL) at 420 and *Reid v Reid* [1982] 1 NZLR 147 (PC) at 150.

12 Contrary to *Hanlon v Law Society* [1981] AC 124 (HL) at 193–194, *Combined State Union v State Services Co-ordinating Committee* [1982] 1 NZLR 742 (CA) at 745; *Interfreight Ltd v Police* [1997] 3 NZLR 688 (CA) at 692; *Zaoui v Attorney-General* [2005] 1 NZLR 577 (SC) at 658; and JF Burrows and RI Carter *Statute Law in New Zealand* (4th ed, LexisNexis, Wellington, 2009) at 25 and 251.

[21] The NZLS supports its submission that "censure" and "reprimand" are synonyms by reference to provisions of the Law Practitioners Act 1982,[13] comparative Australian state legislation,[14] dictionaries,[15] the use of other synonyms in the Act, textbooks,[16] and a number of authorities.[17]

[22] The NZLS argues that the adverse practical consequences of the High Court decision are:

(a) to require Standards Committees to consider in every case where publication of the practitioner's name is a possibility whether a censure order should be made and give the practitioner an opportunity to be heard in relation to the reg 30 criteria;

(b) to require the NZLS Board independently to have regard to all of the same factors; and

(c) to encourage practitioners to argue that they ought to be reprimanded and not censured.

[23] The NZLS submits that it cannot be right that in serious cases there needs to be a censure order, and regard given to reg 30, before complete publication can occur. The reg 30 process is a safeguard to those practitioners who have only been censured. Those who have received a more significant penalty by reason of unsatisfactory conduct do not warrant such protection.

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13 Section 106(4)(b).

14 Legal Profession Act 2004 (NSW), ss 537, 540 and 562; Legal Profession Act 2007 (Qld), ss 456 and 458; and Legal Profession Act 2007 (Tas), ss 454, 456 and 471.

15 Lesley Brown (ed) *New Shorter Oxford Dictionary* (Oxford University Press, Oxford, 1993).

16 Duncan Webb *Ethics, Professional Responsibility and the Lawyer* (2nd ed, LexisNexis, Wellington, 2006) at 143; G E Dal Pont *Lawyers' Professional Responsibility in Australia and New Zealand* (2nd ed, Thompson Reuters, Sydney, 2001) at 591–592, and G E Dal Pont *Lawyers' Professional Responsibility* (5th ed, Thompson Reuters, Sydney, 2010) at [23.95]–[23.110].

17 *Ellis v Auckland District Law Society* [1998] 1 NZLR 750 (HC); *Chamberlain v The Law Society of the Australian Capital Territory* (1992) 43 FCR 148 (FCAFC); *Kaye v Auckland District Law Society* [1998] 1 NZLR 151 (HC).

The interpretation of the statutory and regulatory provisions

[24] The answer to the question whether a Standards Committee, and the LCRO on review, may direct publication of the identity of a practitioner who has been the subject of an adverse finding in any case or only when the practitioner has been the subject of a censure order depends on the interpretation of the relevant statutory and regulatory provisions. This in turn depends on the text and purpose of those provisions interpreted in light of their context and the objectives of the legislation and in a realistic and practical way in order to make them work.[18]

The starting point

[25] As the NZLS submits, the starting point is the text of s 142 which provides:

> **142 Procedure of Standards Committee**
>
> (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.

[26] On the face of it, s 142(2) clearly confers on a Standards Committee a discretionary power to direct the publication of its decisions, including those made under s 156, subject only to complying with the rules of natural justice and considering that it is necessary or desirable to do so in the public interest.[19] As the NZLS points out, no other limitation on this power of publication is mentioned in s 142(2). We note that, at the same time, s 142(3) expresses a limitation that may affect the power of publication.

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[18] Interpretation Act 1999, s 5; *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [22]; *Northland Milk Vendors Assoc Inc v Northern Milk Ltd* [1988] 1 NZLR 530 (CA); and Burrows and Carter at 205.

[19] A similar power is conferred on the LCRO by s 206(4).

The context

[27] The power conferred by s 142(2) cannot, however, be read in isolation. It must be read in the context of the Act and in conjunction with other relevant provisions, including in particular s 131(f) which requires rules to be made:

> specifying the circumstances in which [the NZLS] ... or a Standards Committee may publish the identity of a person who has been censured by a Standards Committee.

[28] And, as required by s 131(f), rules have been made in the form of the 2008 Regulations. Regulations 30 and 31 provide:

> **30 Publication of identity**
>
> (1) If a Standards Committee makes a censure order pursuant to section 156(1)(b) of the Act, the Committee may, with the prior approval of the Board, direct publication of the identity of the person who is the subject of the censure order.
>
> (2) When deciding whether to publish the identity of a person who is the subject of a censure order, a Standards Committee and the Board must take into account the public interest and, if appropriate, the impact of publication on the interests and privacy of –
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> (a) the complainant; and
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> (b) clients of the censured person; and
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> (c) relatives of the censured person; and
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> (d) partners, employers, and associates of the censured person; and
>
> (e) the censured person.
>
> **31 Confidentiality of decisions**
>
> Decisions of Standards Committees must remain confidential, unless the Committee makes a direction under section 142(2) of the Act or regulation 30(1).

[29] Understandably, the NZLS submits that the publication power under s 142(2) means what it says and should not be read down by reg 30.[20] The general statutory power takes precedence over the specific regulatory power which applies only when there is an order for censure.

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[20] The NZLS did not suggest that reg 30 was ultra vires.

[30] We accept that reconciling these provisions is not straightforward. We therefore examine in further detail the purpose and scheme of the Act.

The purpose and scheme of the Act

[31] As the NZLS submits, there is no doubt that the relevant provisions should be interpreted in a manner that achieves the purposes of the Act as stated in s 3, including the maintenance of public confidence in the provision of legal services and the protection of consumers of legal services. As s 3(2)(b) states, a more responsive regulatory regime is contemplated. This is achieved in part by the new complaints and discipline regime in Part 7 of the Act which, as s 120(2)(b) and (3) state, envisages a framework that results in the expeditious resolution of complaints and the prompt hearing and determination of disciplinary charges.

[32] The framework includes a new NZLS complaints service, established under s 121, which must operate under rules designed to ensure, as far as is practicable, that all complaints received by the complaints service are dealt with in a fair, efficient, and effective manner. Section 123(b) requires that the new NZLS complaints service deal with all complaints received in a fair, efficient, and effective manner.

Resolution of complaints

[33] Under the new regime all complaints about lawyers received by the NZLS complaints service are referred to a Lawyers Standards Committee.[21] A Standards Committee may then inquire into the complaint, give a direction that the parties explore the possibility of negotiation, conciliation or mediation, or decide to take no action on the complaint.[22] If a Standards Committee decides to inquire into a complaint it must do so as soon as practicable[23] and give notice to the person to whom the complaint or inquiry relates.[24] In conducting an inquiry, a Standards

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21 Section 135(1).
22 Section 137(1).
23 Section 140.
24 Section 141.

Committee may appoint an investigator[25] and conduct a hearing on the papers or with the parties.[26]

[34] After inquiring into a complaint and conducting a hearing,[27] a Standards Committee may determine that:[28]

(a) the complaint be considered by the New Zealand Lawyers and Conveyancers Disciplinary Tribunal (the Disciplinary Tribunal);

(b) there has been unsatisfactory conduct on the part of the practitioner; or

(c) no further action should be taken.

[35] A Standards Committee will refer a complaint to the Disciplinary Tribunal if it considers that the practitioner may have been guilty of: misconduct; unsatisfactory conduct that is not so gross, wilful or reckless as to amount to misconduct; negligence or incompetence in his or her professional capacity of such a degree or so frequent as to reflect on his or her fitness to practise or as to bring the profession into disrepute; or has been convicted of an offence punishable by imprisonment and the conviction reflects on his or her fitness to practise, or tends to bring the profession into disrepute.[29]

[36] The Disciplinary Tribunal has power to make a range of orders including an order that the name of a lawyer be struck off the roll and any order that a Standards Committee might make under s 156.[30] The issue of publication of a practitioner's name does not arise in the same way in proceedings before the Disciplinary Tribunal. That is because the hearing of such proceedings must be in public with power to hold the hearing or part of it in private.[31]

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25 Section 144(1).
26 Section 153.
27 Which will normally be on the papers and hence in private.
28 Section 152(1) and (2).
29 Section 241.
30 Section 242(1)(a) and (c).
31 Section 238(1) and (2).

[37] As the High Court recognised,[32] a Standards Committee which determines that a practitioner has been guilty of unsatisfactory conduct is empowered by s 156(1) to make a range of orders, namely:

> (a) order that all or some of the terms of an agreed settlement between the person to whom a complaint relates and the complainant are to have effect, by consent, as all or part of a final determination of the complaint:
>
> (b) make an order censuring or reprimanding the person to whom a complaint relates:
>
> (c) order the person to whom a complaint relates to apologise to the complainant:
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> (d) where it appears to the Standards Committee that any person has suffered loss by reason of any act or omission of a practitioner or former practitioner or an incorporated firm or former incorporated firm or an employee or former employee of a practitioner or an incorporated firm, order the practitioner or former practitioner or incorporated firm or former incorporated firm, or employee or former employee of a practitioner or an incorporated firm, to pay to that person such sum by way of compensation as is specified in the order, being a sum not exceeding, as the case may require, the amount that is from time to time prescribed for the purposes of this paragraph by rules made under this Act by the New Zealand Law Society or the New Zealand Society of Conveyancers:
>
> (e) order the practitioner or former practitioner or incorporated firm or former incorporated firm to reduce his, her, or its fees for any work (being work which has been done by the practitioner or former practitioner or incorporated firm and which is the subject of the proceedings before the Standards Committee) by such amount as is specified in the order:
>
> (f) order the practitioner or former practitioner or incorporated firm or former incorporated firm to cancel his, her, or its fees for any work (being work which has been done by the practitioner or former practitioner or incorporated firm or former incorporated firm and which is the subject of the proceedings before the Standards Committee):
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> (g) for the purpose of giving effect to any order made under paragraph (e) or paragraph (f), order the practitioner or former practitioner or incorporated firm or former incorporated firm to refund any specified sum already paid to the practitioner or former practitioner or incorporated firm or former incorporated firm:

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[32] Above at [14].

(h) order the practitioner or former practitioner or incorporated firm or former incorporated firm or employee or former employee of a practitioner or an incorporated firm—

(i) to rectify, at his or her or its own expense, any error or omission; or

(ii) where it is not practicable to rectify the error or omission, to take steps to provide, at his or her or its own expense, relief, in whole or in part, from the consequences of the error or omission:

(i) order the practitioner or former practitioner or incorporated firm or former incorporated firm, or employee or former employee of a practitioner or an incorporated firm, to pay to the New Zealand Law Society or the New Zealand Society of Conveyancers, as the case may require, a fine not exceeding $15,000:

(j) order the practitioner, or any related person or entity, or both to make the practitioner's practice available for inspection at such times and by such persons as are specified in the order:

(k) order the incorporated firm to make its practice available for inspection at such times and by such persons as are specified in the order:

(l) order the practitioner or incorporated firm to take advice in relation to the management of his, her, or its practice from such persons as are specified in the order:

(m) order that the practitioner or any director or shareholder of the incorporated firm undergo practical training or education:

(n) order the practitioner or former practitioner or incorporated firm or former incorporated firm, or any director or shareholder of the incorporated firm or former incorporated firm, or any employee or former employee of the practitioner or incorporated firm, to pay to the New Zealand Law Society or the New Zealand Society of Conveyancers such sum as the Standards Committee thinks fit in respect of the costs and expenses of and incidental to the inquiry or investigation made, and any hearing conducted, by the Standards Committee:

(o) order the practitioner or former practitioner or incorporated firm or former incorporated firm, or any director or shareholder of the incorporated firm or former incorporated firm, or any employee or former employee of the practitioner or incorporated firm, to pay to the complainant any costs or expenses incurred by the complainant in respect of the inquiry, investigation, or hearing by the Standards Committee.

[38] We agree with the High Court that:

> [35] The range of orders available to a Committee under s 156(1)(a)-(o) allow the Committee to tailor its response according to its assessment of the culpability of the practitioner and by reference also to other relevant circumstances such as the impact of the conduct on a client or the risk of repeat offending. It can make orders without punishing the practitioner in any way. Only subparas (b) and (i) specify orders with a punitive effect. The Committee may mark a finding of unsatisfactory conduct by censure or reprimand and/or by imposing a fine of up to $15,000. The other powers provided for in s 156(1) are of a remedial nature, including payment of compensation for loss (subpara (d)); a fee reduction or cancellation (subparas (e) and (f)); and, in subparas (j)-(m), a range of orders for the inspection of a practitioner's practice and for management advice and training or education.

[39] We disagree, however, with the view of the High Court Judges that "censure" and "reprimand" are not synonyms. As the NZLS submits, the two words are largely synonymous in this context. This is apparent from a range of definitions of the two words, including those in *Black's Law Dictionary*,[33] the *Oxford English Dictionary*,[34] the *Oxford Dictionary of Synonyms and Antonyms*[35] and *Roget's Thesaurus*,[36] as well as the interchangeable use of the two words in professional disciplinary legislation.[37] Both words envisage a disciplinary tribunal, here a Standards Committee, making a formal or official statement rebuking a practitioner for his or her unsatisfactory conduct. A censure or reprimand, however expressed, is likely to be of particular significance in this context because it will be taken into account in the event of a further complaint against the practitioner in respect of his or her ongoing conduct. We therefore do not see any distinction between a harsh or soft rebuke: a rebuke of a professional person will inevitably be taken seriously.

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33 Bryan A Garner, above n 8. The definition of "censure" at 253 includes "to reprimand".

34 John Simpson and others (eds) *Oxford Dictionary* (online ed) <www.oed.com>. The definition of "reprimand" includes to "rebuke", "reprove", "censure", and "condemn". The definition of "censure" includes to "pass judgment on", "to criticise" and "to charge with fault".

35 John Pallister (ed) *The Oxford Dictionary of Synonyms and Antonyms* (2nd ed, Oxford University Press, Oxford, 2007) at 66 and 370. Synonyms for "censure" include "condemn", "criticise", "attack", "reprimand", "rebuke", "admonish", "unbraid" and "reproach". Synonyms for "reprimand" include "rebuke", "reproach", "scold" and "admonish". See also <www.thefreedictionary.com>. The definition of "censure" includes "an official rebuke; to express official disapproval; an official reprimand" and "reprimand" includes "a severe, formal or official rebuke or censure".

36 George Davidson (ed) *Roget's Thesaurus of English Words and Phrases (New Revised Edition)* (Penguin Books, London, 2004) at 395. "Disapprobation" at 924 includes both "censure" and "reprimand" and "censure" at 477 includes "reprimand".

37 See footnote 14.

[40] On this basis we read the references in s 131(f) to "censured" and reg 30(1) to "a censure order" as encompassing "an order censuring or reprimanding" a person under s 156(1)(b). This interpretation enables the provisions to be read together so that they work in practice and avoids the concern raised by the NZLS that in order to avoid name publication practitioners might be encouraged to seek a reprimand rather than a censure.

[41] The LCRO is then responsible for reviewing decisions of Standards Committee on the application of the complainant, the person in respect of whom the complaint was made, a related person or entity or the NZLS.[38] The LCRO is empowered to confirm, modify, or reverse any decision of a Standards Committee or exercise any of the powers that could have been exercised by the Standards Committee[39] or lay a charge with the Disciplinary Tribunal.[40]

[42] In exercising their functions and powers, Standards Committees, the LCRO and the Disciplinary Tribunal are all required to comply with the rules of natural justice.[41] In the present context, as the LCRO recognised, those rules require Standards Committees to hear from the practitioner and any other parties involved before making a decision to publish their decisions, particularly a decision identifying the practitioner.

[43] While the purposes of the Act and the new regime are designed in the public interest to achieve the expeditious resolution of complaints in "a fair, efficient, and effective manner", it is clear that the interests of complainants and practitioners about whom complaints are made are recognised and balanced through the express requirements for fairness and compliance with the rules of natural justice. The processes under the Act require care and are potentially time consuming.

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38 Sections 192–198.
39 Section 211.
40 Section 212.
41 Sections 142(1), 206(3) and 236.

Publication of decisions

[44] On the issue of publication of decisions there is a significant contrast between hearings before the Disciplinary Tribunal on the one hand and hearings before Standards Committees and the LCRO on the other. The Act requires Disciplinary Tribunal hearings to be held in public unless the Tribunal is of the opinion that it is proper to hold a hearing or part of a hearing in private.[42] The Disciplinary Tribunal is also empowered to make orders prohibiting the publication of any report or account of any part of any proceeding before it and the name or any particulars of the affairs of the person charged.[43] These provisions mean that, in the absence of any order to the contrary, the name of the person charged before the Tribunal will be known at the hearing and able to be published in the media.

[45] In stark contrast to the position of the Tribunal, there are no similar provisions applicable to Standards Committees or the LCRO. Instead the Act requires a Standards Committee to hold its hearing "on the papers" unless it directs otherwise[44] and LCRO reviews must be conducted in private.[45] The absence of any provisions requiring Standards Committees to hold their hearings in public or enabling them to make orders prohibiting publication of their proceedings confirms Parliament's intention that their hearings should be held in private and that any question of publication of their decisions, with or without the practitioner's name identified, is to be considered separately under s 142(2) and reg 31. The LCRO is similarly empowered to consider the publication of her decisions separately.[46]

[46] In both cases the private nature of their hearings is reinforced by obligations of confidentiality imposed on members of Standards Committees and the LCRO.[47] The obligation of non-disclosure imposed on members of Standards Committees and others by s 188 is subject to a number of exceptions, including when the disclosure is made "in accordance with a direction of publication given under section 142(2) by a

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42 Section 238(1) and (2).
43 Section 240.
44 Section 153(1).
45 Section 206(1).
46 Section 206(4).
47 Sections 188 and 224(2); sch 2, cls 4 and 5; sch 3, cl 10; and reg 31.

Standards Committee".[48] While this exception provides some support for the NZLS view, it is not of itself determinative, particularly as reg 31 refers to the exceptions under both s 142(2) and reg 30.

[47] The different legislative approach on the issue of publication between the Disciplinary Tribunal and Standards Committees and the LCRO no doubt reflects the policy decision that it is the Disciplinary Committee that deals with the more serious matters, which in the public interest should be dealt with openly, whereas the lesser matters dealt with by Standards Committees and the LCRO may or may not justify publication after having been dealt with privately. The legislative history of the Act also confirms that the provisions relating to the publication of decisions of Standards Committees and the LCRO, which were added at the Select Committee stage, were designed to enable "the publication of certain decisions in appropriate cases" in order to enhance public confidence in the complaints and discipline process.[49] There was no suggestion that the names of the practitioners concerned would be published as a matter of course.

[48] This explains why decisions of Standards Committees and the LCRO will not be published unless a positive determination to do so is made by a Standards Committee under s 142(2) or by the LCRO under s 206(4).

[49] The power conferred by s 142(2) enables a Standards Committee to direct publication of its decisions under s 138 (decision to take no action on complaint), s 152 (determination of complaint), s 156 (orders when determination of "unsatisfactory conduct" made) and s 157 (order for payment of costs). It is a discretionary power that is fettered or constrained by the express requirements to exercise the power in a way that is consistent with the rules of natural justice and to consider whether it is necessary or desirable to do so in the public interest.

[50] As already mentioned,[50] however, the power under s 142(2) must be read with the rules required by s 131(f) and the provisions of reg 30.

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48 Section 188(2)(d).
49 Lawyers and Conveyancers Bill 2003 (59–2) (Select Committee) at 11–12.
50 Above at [27]–[28].

Reconciling the provisions

[51] These provisions, s 142(2) permitting the publication of Standards Committee "decisions" and s 131(f) requiring rules specifying the circumstances in which "the identity" of a person who has been censured may be published, as well as reg 30 itself, must be read together and made to work as Parliament intended. To achieve this outcome we consider for the following reasons that the general power of publication under s 142(2) must be read as qualified by and subject to the specific rules made as required by s 131(f). As a consequence, decisions identifying the person concerned may only be made when that person has been censured or reprimanded.

[52] First, we do not agree with the NZLS that the reg 30 process is designed as a safeguard for those practitioners who have only been censured under s 156(1)(b) and that those who have received a more significant penalty by reason of unsatisfactory conduct do not warrant such protection. We see the position as being the other way around. The starting point is to recognise that a determination of "unsatisfactory conduct" under s 152 is a prerequisite to any order under s 156(1). Identifying in a published decision of a Standards Committee the name of a practitioner who has been found guilty of "unsatisfactory conduct" will of itself be of significance regardless of the nature or number of orders made under s 156(1). This supports the view that Parliament would not have intended the name of the practitioner to be identified in a decision published under s 142(2) unless the practitioner had been censured and the reg 30 process followed. In this way the process provides a safeguard for all practitioners found guilty of "unsatisfactory conduct." Such a safeguard is warranted because it follows a hearing in private and reflects the differences between the orders that may be made under s 156(1).

[53] Second, this interpretation is consistent with and implements the policy distinction drawn between the Disciplinary Tribunal's consideration of serious matters at open hearings and a Standards Committee's consideration of lesser matters in private. Decisions of Standards Committees identifying the names of persons should only be published when they have been censured and the procedures required by reg 30 have been followed.

[54] Under reg 30 the identity of a censured person may not be published unless the prior approval of the NZLS Board has been obtained and the public interest and the impact of publication on the privacy interests of the complainant, other parties and the censured person have been taken into account. These requirements, designed to constrain the name-publication decision-making process, reflect not only the private consideration of the complaint by the Standards Committee but also the significance of name-publication for the censured person. For a lawyer, name publication will inevitably be considered a significant, if not the significant, element of the penalty imposed by a Standards Committee, especially when it is recognised that the lawyer will be able to continue in practice after the decision is made.

[55] Third, we do not accept that this approach to the interpretation of the provisions makes s 142(2) redundant insofar as it relates to s 156. On the contrary, we see s 142(2) as a general provision empowering Standards Committees to publish their "decisions" if satisfied that it is necessary or desirable in the public interest to do so. It does not address the point about identifying and publishing the name of the practitioner concerned. As a matter of statutory interpretation, s 142(2) refers broadly to decisions, but it does not deal with the question of how much, or which parts, of a decision might be published. We see that as a separate question.

[56] In the case of decisions of the Disciplinary Tribunal, the public nature of the proceedings would suggest that the starting point would be publication of the whole of the decision. If parts of the decision, including the name of the practitioner concerned, are not to be published that will be addressed by making orders under s 240. In the case of Standards Committees the process is different. The general power to publish decisions still leaves to be considered the further and separate question of the extent of the publication including the confidentiality of the identity of the practitioner concerned. The requirements of s 131(f) underscore the proposition that this is an additional requirement to be addressed separately.

[57] In the case of Standards Committees, after a hearing in private, not all decisions where a determination of "unsatisfactory conduct" is made will justify any publication. If publication of the decision is justified, it may be published under s 142(2) without identifying the name of the person the subject of the determination.

It is only if identification of the name of the practitioner is contemplated in respect of an order of censure or reprimand that the reg 30 process will need to be followed. And, as reg 31 makes clear, unless there is a direction under s 142(2) or reg 30, the decision of the Standards Committee must remain confidential.

[58] Fourth, to interpret the general power to publish decisions in s 142(2) as qualified by the specific provisions of s 131(f) and reg 30 in this way is consistent with the well-established rule of statutory interpretation that a general provision may be presumed not to override a specific provision.[51] As Lord Cooke of Thorndon said in *Effort Shipping Co Ltd v Linden Management SA*:[52]

> The generalia specialibus [non derogant] maxim as its traditional expression in Latin indeed suggests, is not a technical rule peculiar to English statutory interpretation. Rather it represents simple common sense and ordinary usage.

[59] Contrary to the submissions for the NZLS, this approach to the interpretation of the provisions does not involve reading unnecessary words into s 142(2) or allowing its meaning to be disturbed by the words of subordinate legislation. It involves reading s 142(2) in light of the scheme of the legislation, which distinguishes between public Disciplinary Tribunal hearings and private hearings by Standards Committees and the LCRO and between the general power to publish "decisions" of Standards Committees and the specific power imposed by reg 30 as required by s 131(f) to identify the names of practitioners in those decisions only when the practitioner is censured.

[60] Finally, like the High Court, we are not persuaded that there are any significant adverse practical consequences which undermine this interpretation of the provisions.[53] A Standards Committee that wishes to consider publishing a decision involving a determination of "unsatisfactory conduct" and orders under s 156(1), either with or without the name of the practitioner concerned, will first need to comply with the rules of natural justice and give the complainant, the practitioner

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51 Burrows and Carter, above n 12, at 457–461, and FAR Bennion, *Bennion on Statutory Interpretation* (5th ed, LexisNexis, London, 2008) at 1164.

52 *Effort Shipping Co Ltd v Linden Management SA* [1998] AC 605 (HL) at 627; and see *McE v Prison Service of Northland Ireland* [2009] UKHL 15, [2009] 1 AC 908 at [98].

53 *B v The Auckland Standards Committee 1 of the New Zealand Law Society*, above n 1, at [42].

and any other affected parties the opportunity to be heard. The Committee will then need to take into account the public interest and any relevant privacy interests. It is only if the Committee decides that publication is warranted that prior approval from the NZLS Board will be required. This further step will involve further time and consideration, but is justified when the potentially significant consequences of name publication for the practitioner are recognised.

[61] If the NZLS wishes Standards Committees to be able to publish their decisions identifying the names of the practitioners in cases not involving censure, it is open to the NZLS to seek appropriate statutory and regulatory amendments.

Result

[62] For these reasons the appeal is dismissed and the High Court order remitting the matter to the Committee for recommendation stands.

[63] There is no order as to costs.

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