Note:

Please note the following determination is subject to review by the Legal Complaints Review Officer.

Paragraphs 6-9, 30-31 have been redacted at the direction of the National Standards Committee.

The opening line of the quotation at paragraph 27 should read:

This is not an attack on the competence of judges, but on their delusions of omnicompetence.

No.	6446
Concerning	Part 7 of the Lawyers and Conveyancers Act 2006 ("the Act")
And	
Concerning	a complaint by Dr Frank Deliu dated 29 August 2012 regarding the conduct of Dr Tony Molloy QC.

Notice of Determination by the National Standards Committee (NSC)

How the complaint arose

1. Dr Tony Molloy QC, holds a practising certificate as barrister sole and has his chambers in Auckland. Dr Molloy has made statements concerning the introduction of specialist High Court judges and the functioning of the judicial system in various fora. Most recently on 29 August 2012 the National Business Review (NBR) reported on Dr Molloy's comments in relation to the need of New Zealand to introduce specialist judges.

2. On 29 August 2012 Dr Frank Deliu, a barrister of Auckland, complained that Dr Molloy's comments had brought the administration of justice into disrepute. Dr Deliu supplied authority in support of his complaint and highlighted the public nature of Dr Molloy's comments.

3. Dr Deliu by email of 30 August 2012 to illustrate the public nature of Dr Molloy's comments submitted readership statistics from the NBR media kit.

4. On 3 September 2012 Dr Deliu added to his complaint by providing further materials which he was of the view illustrated that there was a pattern of Dr Molloy speaking about the New Zealand judicial system in an unfavourable manner.

5. Dr Deliu also provided materials illustrating how Dr Molloy's comments had been received by the profession (see F Deliu, emails Lawyers Complaints Service (LCS), 3 and 6 September 2012).

Notice of hearing

10. The Notice of Hearing dated 5 November 2012 invited the parties to address the nature of the alleged conduct including the following:

> "1.1 having regard to the Lawyers and Conveyancers Act (Lawyers Conduct and Client Care) Rules 2008, including rules 2 and 13.2, the form, manner and tone in which Mr Molloy QC addressed and/or characterised New Zealand's legal system including:
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> i. the manner in which the judiciary was deployed;
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> ii. the state of the judicial system;
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> iii. the decisions and/or competence of judges generally and/or specifically;
>
> iv. the understanding judges have of their role;
>
> v. the alleged actions and/or inaction of the Law Commission; and
>
> vi. the performance and/or alleged performance of Chief Justice Dame Sian Elias in the exercise of her responsibilities.
>
> 1.2 The comments under review are made or are recorded in the materials already provided including:
>
> i. T Molloy QC, "New Zealand: Cuckoos in the nest in an otherwise promising trust and investment jurisdiction", (November 2009) Offshore Investment.com, 19-23.
>
> ii. T Molloy QC, "Still more on settler control: the 18 September 2008 reserved decision of the New Zealand High Court in Harrison v Harrison CIV 2008-404-001270" (March 2010) 16 Trusts and Trustees 73-83.
>
> iii. T Molloy QC, letter to C Corser, Clerk of Committee, 4 August 2010.
>
> iv. R O'Neill, "Law system a 'laughing stock'", (22 May 2011) Sunday Star Times.
>
> v. P Taylor "Justice in the firing line" (5 May 2012).
>
> vi. R Vaughan, "New Zealanders shafted by fraudulent justice system, says top QC" (29 August 2012) National Business Review.
>
> 1.3 The above materials will be reviewed both individually and collectively"

Responses (summary)

11. Dr Molloy responded to the complaint by a letter dated 28 September 2012. Dr Molloy expressed the view that his challenge was to the "operating principle" of the High Court:

> My challenge is to the operating principle according to which the business of the High Court is administered: namely that every judge is deemed competent, and must sit, in every area of law.

12. Dr Molloy was of the view that nothing he had said should engage the disciplinary function of the New Zealand Law Society:

> For the reasons I shall give, I believe that there is nothing I am quoted as having said, in the materials you have sent me, that engages the disciplinary function of the Society.
>
> Undoubtedly there are some who have claimed that I went too far. I do not think they are correct, because they are almost certainly not fully appraised of the gravity of the situation I have for some time been trying to address.

> Certainly I have at all times tried not to identify any judge personally as the subject of my criticisms. And I have regularly made the point that the problem in the courts is not just judges sitting in areas of law in which they are incompetent, but counsel appearing in cases for which they are incompetent. Nonetheless, the remedy must be to get the court right first. Judges who are confident in their competence then will be able to sort out, and teach, incompetent counsel.

13. Dr Molloy under the following headings and with reference to his area of practice set out the reasons for his challenge to the operating principle:

    i. *Fitness to criticise* – Dr Molloy expanded upon his career, expertise and significant professional milestones (pg 1).

    ii. *Effect of non-specialist counsel* – Dr Molloy described how and when he first "woke up" to the issue of competence (pg 3).

    iii. *Awareness of international criticism of New Zealand's non-specialist trust and equity jurisprudence* – in this section and the one following Dr Molloy described his growing awareness that New Zealand's trust and equity jurisprudence was not highly regarded (pg 6).

    iv. *Awareness of local criticism of New Zealand equity and trust jurisprudence (*pg 7*).*

    v. *My own efforts to draw attention to the problem* – in this section and the one following Dr Molloy set out his efforts to address the issue of judicial competence and the lack of a concrete response (pg 7).

    vi. *Inertia* – in this section the difficulties in progressing this matter are set out (pg 8).

    vii. *Illustrations* – the contemporary nature of the problem was illustrated by reference to a number of cases (pg 12).

    viii. *Economic considerations* – the economic arguments against specialisation were addressed (pg 22).

14. In a section titled *Lord Pannick* (pg 10) Dr Molloy said that the object of his concern, the High Court, did not require him to soften the terms in which he had expressed criticism (see also Dr Molloy, email to LCS, 6 December 2012).

15. Dr Molloy concluded his response by saying that he had an obligation to address the functioning of the High Court by virtue of both his warrant as Queen's Counsel and his role as senior silk.

16. Dr Molloy by emails such as those dated 6 December 2012 and 14 February 2013 made further submissions illustrating the benefits of judicial specialisation and the effects of a lack thereof. By his email of 6 December 2012 Dr Molloy said of his remarks:

> My descriptions were neither "baseless" nor "unwarranted". They are fully reasoned, and the Complainant expressly did not question my reasoning. More importantly, they are attested by others whose remarks I have cited in my Response.

17. Dr Deliu responded to Dr Molloy's responses by email including those dated 17 October 2012, 6 December 2012 and 15 March 2013.

18. Dr Deliu was of the view that the authorities supplied showed that Dr Molloy's alleged conduct should be referred to the New Zealand Lawyers and Conveyancers Disciplinary Tribunal. By his email of 6 December 2012 Dr Deliu set out the issue to be determined as follows:

> Rather though, and with respect, I think the issue in the recent evolution of New Zealand law in *Dorbu*, *Comeskey*, *Orlov*, *FT* et alia is not whether or not the criticism is justified, but instead that lawyers should not be making the criticism per se and especially not in an intemperate or scandalous fashion. If the criticism is false or without sufficient evidential basis (or public), I would think that would be an aggravating factor, but rather the concern of the standards committees seems to be to suppress dissent amongst the legal profession and especially in a public fashion which could cause the administration of justice into disrepute. In other words, lawyers ought not be seen criticizing Judges or else it is per se an ethical breach.
>
> I am not advocating for such a position, rather that is my interpretation of the current evolution of the law in this area and as such the "correctness" of the comments is to that extent a red herring. Otherwise, I think the Committee has all of the evidence it needs to make a determination and is well versed in this area of law so as such no further submissions from me would be required.

19. By his email of 15 March 2013 Dr Deliu said of the alleged conduct:

> As I understand New Zealand law, lawyers such as Dorbu, Comeskey, Orlov and FT (and Hong) all have been taken to the Tribunal for saying naughty words about judges (or lawyers). My personal view is that this is a childish way to operate a legal system and the regulators are not school teachers keeping 1st and 5th graders from fighting. That said, professionally it seems to me that these lawyers from Africa, the Pacific Islands, Europe, America (and Asia) have all been prosecuted for such and accordingly a local Queen's Counsel, no matter how "right" or eminent he may be must be held to the same standards to avoid blatant discrimination. As such, the question is was Mr Molloy QC's language intemperate and/or were his assertions without a proper evidential foundation. If it was, then under a clear line of recent cases he must be taken to the Tribunal or else the administration of justice will fall into grave disrepute for overt racism. If it was not, then of course he should be permitted to continue the open debate about alleged poverty of judicial decision making. Accordingly, it is my submission that the standards committee is not the place to have an academic debate about equity and as such the article is accordingly irrelevant.

Determination

20. The NSC considered all the responses and submissions of the parties.

Was the alleged conduct connected with regulated services?

21. The NSC determined that the alleged conduct was unconnected with the provision of regulated services. Accordingly the alleged conduct was to be assessed pursuant to ss 7(1)(b)(ii) and 12(c) of the Act.[1]

Did the public nature of the comments raise an ethical issue of itself?

22. The NSC determined that the fact that comments of Dr Molloy were made in public of itself did not constitute a breach of the Act or the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (RCCC).

23. Indeed the NSC was of the view that the issue of judicial specialisation was worthy of debate and it accepted that Dr Molloy's views were honestly held and were made in good faith.

24. However any comments should be made in a reasoned and temperate manner (to be adjudged on the individual circumstances in each case), as such conduct may contravene a lawyer's obligations pursuant to s 4 of the Act and rule 2 of the RCCC, namely one of the "fundamental obligations" to "uphold the rule of law and to facilitate the administration of justice in New Zealand".

[1] See *EA v ABO (Ms VY)* [2011] NZLCRO 61 (29 September 2011) LCRO 237/2010.

Were the public comments of Dr Molloy reasoned and temperate?

25. The NSC, in its discretion, was of the view that Dr Molloy's previous conduct and comments made prior to the comments reported in the NBR on 29 August 2012 did not require further action:

    i. because of the length of time that had elapsed; and/or

    ii. the nature and manner of the comments.

26. In relation to the NBR material the NSC was of the view that certain of the reported comments of Dr Molloy were not expressed in a reasoned and temperate manner.

27. The NSC was of the opinion that the comments of Dr Molloy inter alia alleging a fraudulent justice system and alleging that judges were flouting their oaths and were sitting under false pretences were decisive in reaching the view stated at para. 26 above. These comments included the following:

> "This not an attack on the competence of judges, but on their delusions of ominicompetence.
>
> "How would you like your brain surgery done by a gynaecologist or by an orthopaedic surgeon?" Dr Molloy asks.
>
> "You would balk at the stupidity of putting yourself in the hands of someone working outside his field, yet New Zealand lawyers and judges do it all the time.
>
> "For the so-called justice system to charge daily hearing fees for judges so badly mismatched to the cases in hand is fraudulent.
>
> "What judges are doing is very wrong. They take an oath to administer justice according to law.
>
> "If they don't know the law applicable to the case before them, it means that they are already flouting their oath, which is pretty rich when it is considered that they can put witnesses in jail for flouting their oaths"
>
> _____
>
> "But every High Court judge today is out of his or her depth in many fields of the law, and accordingly is sitting under false pretences when he or she is sitting in those fields".
>
> "The law is being corrupted for want of judicial specialisation," Dr Molloy says.
>
> R Vaughan, "New Zealanders shafted by fraudulent justice system, says top QC" (29 August 2012) NBR.

28. The NSC determined pursuant to s 152(2)(b)(i) of the Act that there had been unsatisfactory conduct on the part of Dr Molloy (s 12(c) of the Act). The NSC determined Dr Molloy's conduct had contravened s 4(a) of the Act and rule 2 of the RCCC, by failing to comply with his obligation to uphold the rule of law and to facilitate the administration of justice in New Zealand.

29. Having found that there had been unsatisfactory conduct the NSC made the following orders:

    i. it censured Dr Molloy pursuant to s 156(1)(b) of the Act; and

    ii. it ordered Dr Molloy pursuant to s 156(1)(n) of the Act to pay $1,000 in respect of the costs and expenses of and incidental to the inquiry or investigation made, and the hearing conducted by the NSC.