

HUMAN RIGHTS ACT

DAVID LANDER v COUNCIL OF THE LAW SOCIETY OF THE AUSTRALIAN CAPITAL TERRITORY

[2009] ACTSC 117 (11 September 2009)

APPEAL – Appeal against finding of the Legal Practitioners Disciplinary Tribunal – appeal upheld – orders of the Tribunal set aside

***LEGAL PROFESSION ACT 2006* – unsatisfactory professional conduct – whether non compliance with the *Legal Profession (Solicitors) Rules 2006* necessarily results in ‘unsatisfactory professional conduct’ – discourteous, offensive or provocative conduct – relations with other practitioners – relations with third parties – whether practitioners have an obligation of courtesy to third parties – whether the criticisms made were false or without foundation – knowledge of practitioner – reasonable basis – the effect of the *Human Rights Act 2004* on the Rules**

***Legal Profession (Solicitors) Rules 2006* (ACT), R 25**

***Legal Profession Act 2006* (ACT)**

***Human Rights Act 2004* (ACT), s 8, s 16, s 28**

***Clyne v NSW Bar Association* (1960) 104 CLR 186**

***Law Society of New South Wales re Constantine Karageorge Solicitor’s Statutory Committee* (15 July 1987)**

ON APPEAL FROM THE LEGAL PRACTITIONERS DISCIPLINARY TRIBUNAL

No. SCA 89 of 2008

Judge: Higgins CJ, Gray and Refshauge JJ

Supreme Court of the ACT

Date: 11 September 2009

IN THE SUPREME COURT OF THE)
) No. SCA 89 of 2008
AUSTRALIAN CAPITAL TERRITORY)

ON APPEAL FROM THE LEGAL PRACTITIONERS DISCIPLINARY TRIBUNAL

BETWEEN: DAVID LANDER

Appellant

AND: COUNCIL OF THE LAW SOCIETY OF
THE AUSTRALIAN CAPITAL
TERRITORY

Respondent

AND: ATTORNEY GENERAL FOR THE
AUSTRALIAN CAPITAL TERRITORY

Intervener

O R D E R

Judge: Higgins CJ, Gray and Refshauge JJ
Date: 11 September 2009
Place: Canberra

THE COURT ORDERS THAT:

1. The appeal be upheld with costs.

1. This is an appeal by Mr David Lander (the solicitor) against a finding of the Legal Practitioners Disciplinary Tribunal handed down on 30 July 2008 and of the orders made on 24 September 2008.

2. That decision followed a complaint by Mr Michael Bateman, Director, Human Resources of the ACT Department of Education and Training (the Department) concerning a letter the solicitor had written to the Chief Executive of the Department on 24 October 2006.

3. The solicitor was acting for an officer of the Department in connection with a potential invalidity retirement. The client, Mr Boutsis, was employed as a teacher by the Department, as was the solicitor's wife.

4. The letter written by the solicitor was in the following terms:

...

CONDUCT OF YOUR AGENCY AND MR BOUTSIS

Your Department has a long history of failing to communicate at all or to communicate substantively and honestly.

This has been documented in hundreds of cases and shows no sign of improvement.

I act for Mr Boutsis. In my brief encounters with officers of your agency, they have been rude, unhelpful, obsessive and compulsive in relation to their own ego and their own self-importance and otherwise unresponsive.

This persists to the present time.

Mr Boutsis has been the subject of a recommendation which your Department has that he be promptly medically retired and despite the fact that your Department has had that report for about six weeks, it has not communicated to Mr Boutsis; or, at his specific request, to his solicitor, this firm, what it is doing about having him medically retired or arranging pre-retirement payment or anything else.

This is consistent as we say with years of malpractice and maladministration by your organisation. It appears that nothing will change that conduct and that the Department bears grudges against people who engage lawyers, particularly competent ones.

We ask that you please immediately summons the people in your case management area and ask them why it is that they have refused to correspond with me in accordance with Mr Boutsis' directions and requests, refused to provide reports to me, refused to progress his retirement and otherwise behaved in a shamefully non-communicative and disinterested fashion. The practices of people in your case management area are by and large consistent with Mr Boutsis and my experiences and were documented in several Commonwealth AAT proceedings including that of my wife.

My wife remains a teacher in your system and I ask that no recriminations be taken against her because her husband happens to be a solicitor acting for teachers.

Would you please respond to this correspondence, a copy of which is being forwarded to your Minister who seems to mistakenly believe that there is no cause for any intervention or concern with the conduct of your Department.

Thank you,

Yours sincerely

LANDER & CO

David Lander

c.c. **Minister**

ACT Department of Education, Youth and Family Services

c.c. **Client**

(- by email-)

5. In a reply dated 7 December 2006, Mr Bateman advised as follows:

...

Dear Mr Lander

Thank you for your letter of 24 October 2006 to the Chief Executive, Dr Michele Bruniges about processes surrounding the invalidity retirement of Mr Boutsis. Dr Bruniges has asked me to reply to your letter on her behalf.

The issues raised in your letter have been investigated.

The department received the report of Health Services Australia recommending the invalidity retirement for Mr Boutsis in late September 2006. Relevant Comsuper papers were included which allowed the department to prepare a case for Comsuper, seeking approval for invalidity retirement for Mr Boutsis. The department prepared the submission and forwarded this case to Comsuper on 12 October 2006. Approval for invalidity retirement and pre-assessment payments have been received from Comsuper.

Regarding the issue of providing medical reports to you. Mr Boutsis requested an earlier medical report in June 2006 be sent to you or himself. The department replied to Mr Boutsis that such medical reports were only forwarded to the treating medical practitioner and promised to send the report to the treating specialist. This was promptly sent to the doctor that same day.

I am advised that the invalidity retirement of your client, Mr Boutsis is proceeding through Comsuper.

In your letter you have also made a number of general statements about the Department of Education and Training and its staff failing to communicate, being dishonest, rude, unhelpful, obsessive and compulsive, bearing grudges against people who engage lawyers, as well as general allegations of "malpractice" and "maladministration". Your comments are totally inappropriate and it is impossible to respond in any meaningful way to such generalised and unsubstantiated allegations. Nonetheless, the Department of Education and Training wholly rejects those allegations.

You have also implied that the Department of Education and Training may engage in recriminations towards your wife, who is a teacher in the Territory, an employee of the department, and who has no involvement in Mr Boutsis' case. The department takes your implication very seriously. To suggest that this department or any of its

officers would engage in such behaviour is totally inappropriate and is rejected in the strongest possible terms.

It is my intention to refer your letter to the ACT Law Society for investigation as to whether your conduct has breached the standards expected from a legal practitioner.

Yours sincerely,

Michael Bateman
Director
Human Resources
7 December 2006

6. Mr Bateman's letter of complaint to the Law Society of 15 December 2006 was in the following terms:

Mr Rob Reis
Professional Standards Director
The Law Society of the Australian Capital Territory
GPO Box 1562
Canberra ACT 2601

Dear Mr Reis

I write to draw your attention (sic) a course of conduct by a legal practitioner in a recent matter, and to ask that you investigate whether that conduct breaches the professional standards expected of a legal practitioner in the Territory.

Mr David Lander, acts on behalf of an employee of the Department of Education and Training in relation to his potential invalidity retirement. On 24 October 2006 Mr Lander wrote a letter to the Chief Executive of the Department of Education and Training about his client's retirement. A copy of that correspondence is attached to this letter.

The issues raised in the letter were investigated, and a reply sent to Mr Lander.

In his letter, Mr Lander made a number of general statements about the Department of Education and Training and its staff failing to communicate, being dishonest, rude, unhelpful, obsessive and compulsive, bearing grudges against people who engage lawyers; as well as general allegations of "malpractice" and "maladministration".

Mr Lander also implied that the Department of Education and Training may engage in recriminations against his wife, who is a teacher in the Territory, an employee of the Department, and who has no involvement in the matter addressed in the letter.

In my reply of 7 December 2006 to Mr Lander, I warned him that it was my intention to refer his letter to The Law Society of the Australian Capital Territory for investigation as to whether his conduct has breached the standards expected from a legal practitioner. I have attached a copy of my letter.

Departmental staff have been offended by Mr Lander's accusations and feel that they have been unfairly targeted by his derogatory and slanderous remarks.

Additionally, it is impossible for the Department to respond to any meaningful way to such serious yet non-specific accusations.

I request that you consider the matter, and investigate whether Mr Lander has behaved in a way contrary to that expected of an experienced legal practitioner.

If you require further information about this matter, please contact me.

To ensure the privacy of our employee, Mr Lander's client, I have obscured identifying references to the client.

Thank you for your assistance in this matter.

Yours sincerely

Michael Bateman

Director

Human Resources

15 December 2006

7. To that letter the solicitor responded by letter dated 8 January 2006:

...

Dear Mr Reis

RE: COMPLAINT BY MR MICHAEL BATEMAN OF THE ACT DEPARTMENT OF EDUCATION AND TRAINING

I refer to your correspondence of 22 December 2006 received over the Christmas/New Year holiday period.

I respond as follows.

I enclose some documents which will give the context in which I acted for Mr Tim Boutsis. I identify him with his permission and advise that at all times I acted on his instructions.

The documents enclosed are copies of the following:-

- My letter to Ms Anne Thomas of the Department of Education dated 4 May 2006;**
- My client's email to Ms Martin of 25 May 2006;**
- My letter to Ms Martin of the Department of 28 July 2006;**
- My letter of 8 August 2006 to Ms Elissa Clarke of the ACT Government Solicitor;**
- Her response to that and other letters of 11 September 2006;**
- Medical report on Mr Timothy Boutsis from Dr Peter Smith, consultant psychiatrist dated 11 September 2006;**
- My client's correspondence to me dated 20 December 2006.**

I have the right and the duty as a solicitor to draw on my experience, skill, knowledge and experience when acting for clients. They arise in part because I have had 30 years of experience with ACT Education as a parent, citizen and lawyer. I have acted for many clients, both

students and teachers in respect of ACT Education matters.

I am entitled to draw and am expected to draw on those skills, that knowledge and that experience. To seek to isolate a lawyer's credentials and to seek to tie their hands behind their back as your solicitor recently suggested in advice to the Society's Council is, with respect, improper.

The ACT Government has legislated The Human Rights Act 2004. Section 16 of that Act reads as follows:-

Freedom of Expression

- (1) Everyone has the right to hold opinions without interference.**
- (2) Everyone has the right to freedom of expression. This right includes the freedom to seek, receive and impart information and ideas of all kinds, regardless of borders, whether orally, in writing or in print, by way of art or in any other way chosen by him or her.**

I am a citizen before I am a lawyer. I am 'a person' as defined in The Human Rights Act.

The Human Rights Act (sic) overrides any Rule which may be in conflict with a statutorily prescribed freedom of expression.

Nothing I wrote to the Department was other than based on my knowledge, experience, skills and the facts of the case. I ask you to look at the experience of the client and my own in trying to deal with the Department.

I say as a lawyer and a citizen that my experience, knowledge and skills lead me to believe that the ACT Department of Education systemically engages in maladministration, in cover-ups of wrong doings and in abuses of power. Neither the Department nor the Society can or should prevent citizens or lawyers from expressing such views.

We live in an age where lawyers either stand up against the abuses of the State or we succumb to those abuses. It is not the society's role to censor or to adjudicate on these fundamental freedoms and duties, but to defend them.

Yours sincerely,

LANDER & CO

David Lander

8. There was further correspondence, not presently relevant, and on 10 April 2006, Ms Anne Thomas wrote to the solicitor on behalf of the Department:

Mr David Lander

Lander & Co

Barristers & Solicitors

P O Box 3243

BMDC ACT 2617

Dear Mr Lander

RE: CLAIM FOR COMPENSATION – MR TIM BOUTSIS

(Your Reference – DL:CF: BOUTSIS: L3205)

Thank you for your letter of 31 March concerning your client, Mr Tim Boutsis.

In your letter you formally make a claim for compensation on behalf of Mr Boutsis for discrimination based on gender, ethnicity and age. The Department of Education & Training (the department) does not automatically accept liability in respect of such claims. The Territory meets such claims where there is a legal liability to do so. The department is an agency of the Territory which has insurance arrangements in place in order to meet such liabilities. Your claim for compensation on behalf of Mr Boutsis will therefore be referred to the ACT Insurance Authority (ACTIA) for consideration. I understand ACTIA's usual practice is to seek the advice of the ACT Government Solicitor in relation to such claims.

In your letter you also state that Mr Boutsis is seeking medical retirement on the basis of total incapacity for work. This request has been forwarded to the relevant sections of the department for appropriate action.

Yours sincerely

**Anne Thomas
Executive Director
Resource Management
10 April 2006**

9. The solicitor responded by a letter dated 4 May 2006:

**Ms Anne Thomas
Executive Director
Resource Management
Department of Education & Training
P O Box 1584
TUGGERANONG ACT 2901**

Dear Madam

RE: MR TIM BOUTSIS : MEDICAL RETIREMENT

Thank you for your correspondence of 10 April 2006.

Would you please provide us as soon as possible with a copy of the medical report obtained at the behest of your Department (Ula Martin's letter of 29 March 2006 refers) from a medical officer who examined our client on 18 April 2006 in Melbourne.

It would not be sufficient for someone to write to our client advising of the finding and recommendations and any proposed action. We require a full copy of the report.

Would you please have someone acknowledge receipt of my letter at first instance.

Many thanks.

Yours sincerely

LANDER & CO

David Lander

c.c. Client

(-by email-)

10. Although Mr Bateman had asserted that the Department had taken the action required of it, the solicitor had, at the date of the subject letter (24 October 2006), not received a response to his letter of 4 May 2006 requesting a copy of the medical report following an examination of Mr Boutsis in Melbourne on 18 April 2006.

11. There was further correspondence as follows:

Email of 23 May 2006 by the Solicitor to Mr Boutsis -

Mr Tim Boutsis

(-by email-)

Dear Tim

RE: MEDICAL REPORT

I had a call from Pat Shaw of the Department on 22 May saying that the Department had not received at that time the report from the doctor who examined you although it was "in the mail".

She said she did not wish to release the report to me or to you but only to your GP as the contents may cause harm, as a policy of the Department.

I told her that such policy was a nonsense and that you would send an email saying that you required her to release the report to me as soon as it is received without

reference to your GP.

Would you please promptly send an email to Pat Shaw at the Department (and copy it to me) along those lines if you are happy to do so.

Many thanks

David

12. Next, there was an email of 25 May 2006 from Mr Boutsis to the Department:

Dear Ula,

I am requesting the release of my latest medical report to be sent asap to my solicitor Mr David Lander when it is received without reference to my GP.

Will you please give this request to Pat Shaw today?

His details:

Mr David Lander

....

13. There was a further letter of 28 July 2006 from the Solicitor to the Department which was unanswered.

14. The solicitor copied that last letter to the ACT Government Solicitor. Ms Elissa Clarke of that office responded on 7 August 2006. That letter is not exhibited. The solicitor sent a further letter of 8 August 2006 to the ACT Government Solicitor's office in the following terms:

Ms Elissa Clark
ACT Government Solicitor
DX 5602 CANBERRA

Dear Ms Clark

RE: TIM BOUTSIS

Thank you for your letter of 7 August 2006 and the information it contained. We assume your client is the ACT Department of Education and Training.

With respect, one of the issues I addressed to you in my correspondence of 28 July was seeking your assistance in relation to your derelict client, the ACT Department of Education, in having my client assessed for medical retirement.

I outlined to you the experience I have had with the ACT Department of Education over many years and I am willing to give you further evidence should you need persuading that your client is regularly derelict and uncooperative and in breach of the Territory Model Litigant Guidelines. The Department has ignored my client's request to be referred to the ComSuper Panel for assessment.

You have, with respect, failed to address the issue of medical retirement and I ask you to please seek instructions.

In the interim, I have taken on board your other comments and will seek instructions. It may be that your client will again defeat justice by wearing my client out, given particularly that he has poor health and very little money.

I look forward to hearing from you relation to the issue of having my client medically retired.

Thank you.

Yours sincerely

LANDER & CO

David Lander

c.c. Client

15. Ms Clarke responded on 11 September 2006:

...

Dear Mr Lander

Tim Boutsis – claim for compensation

I refer to your letters dated 28 July (2 letters) and 8 August 2006.

In those letters you asked that I seek my client's instructions about referring Mr Boutsis to a ComSuper panel for an assessment of his suitability for invalidity retirement, as well as in relation to the Territory making an act of grace payment to him under the Financial Management Act 1996.

In relation to Mr Boutsis' retirement, I repeat the comments set out in my letter dated 7 August 2006. This office is instructed to act on behalf of the Territory in relation to Mr Boutsis' claim for compensation only. Any correspondence related to the issue of his retirement should be directed to the Department of Education and Training.

In relation to your request for an act of grace payment, the Territory can see nothing in Mr Boutsis' claim that could be considered "special circumstances" for the purposes of the act of grace payment scheme in the Financial Management Act 1996. Accordingly the Territory declines Mr Boutsis' request that he be paid an act of grace payment.

I look forward to receiving Mr Boutsis' properly particularised claim.

Please contact me if you wish to discuss the matter.

Yours sincerely

ACT Government Solicitor

Elissa Clarke

Solicitor

16. There had in fact been a report dated 1 September 2006 forwarded to the employing Department which had recommended the retirement of Mr Boutsis.

17. The perspective of Mr Boutsis was represented by his letter dated 20 December 2006 to the solicitor on being informed of the complaint:

...

Dear David,

Thank you so much for your letter & receipt.

I was very disturbed to read the communication you received from the ACT Department of Education & Training regarding my invalidity retirement case. I am also shocked that Michael Bateman has declared his intention to approach the ACT Law Society with an alleged breach of standards!

I wish to state emphatically that if you had not legally represented me in such a pro active & fearless manner, I believe I would still be in a state of limbo, waiting for the ACT Department of Education to communicate with me regarding my employment status, bearing in mind that it is now 2 years since I became ill, and my situation has only recently been resolved, thanks, I believe, to your intervention.

The frustration of being persistently ignored and the consequent prolonged financial anxiety, prompted me to authorise you to represent me in the strongest possible terms in order to gain a response and have my situation resolved.

I am relieved that I can now put this behind me. I can only describe the Department's response to my predicament as tardy and neglectful, but I have no way of knowing whether I alone have been treated in this evasive manner or whether invalidity cases are routinely dealt with this way.

I wish to express my gratitude to you for the effectiveness of your legal representations on my behalf and only regret that it has been so unnecessarily protracted and unpleasant. If you require any further testimony of my high opinion of your professional expertise and conduct, I am more than willing to oblige.

With kind regards,

TIMOTHY BOUTISIS

...

18. Mr Bateman was invited by the Law Society of the Australian Capital Territory to respond to the solicitor's reply to his complaint. He did so on 1 February 2007:

...

Dear Mr Reis

Complaint against Mr David Lander

Thank you for the opportunity to respond to Mr Lander's letter to the ACT Law

Society dated 8 January 2006. I will address his comments in the order in which they appear in his letter.

The ACT Department of Education and Training (“the Department”) does not contend that in dealing with Mr Boutsis’ matter, Mr Lander identified Mr Boutsis without his permission or that he acted without instructions.

I have read the documents that you have provided and can see nothing in those documents that could possibly demonstrate any “maladministration, cover-ups of wrong doings and ... abuses of power” of which Mr Lander accuses Departmental staff.

The Department agrees that Mr Lander has “the right and duty as a solicitor to draw on [his] experience, skill, knowledge and experience [sic] when acting for clients”. It is unclear how this is proposed to be a response to the Department’s concerns as set out in my letter dated 15 December 2006.

In relation to Mr Lander’s comments about the Human Rights Act 2004 (“the Human Rights Act”), the Department contends that Mr Lander is incorrect in asserting that “the Human Rights Act overrides any Rule which may be in conflict with a statutorily prescribed freedom of expression”. In this regard I draw your attention to paragraph 6 of the preamble to the Human Rights Act, which provides:

Few rights are absolute. Human rights may be subject only to the reasonable limits in law that can be demonstrably justified in a free and democratic society. One individual’s rights may also need to be weighed against another individual’s rights.

Paragraphs 115(b) and (c) of the Civil Law (Wrongs) Act 2002 provide some of the objects of Chapter 9 of that Act, entitled Defamation: namely, to ensure that the law of defamation does not place unreasonable limits on freedom of expression and, in particular, on the publication and discussion of matters of public interest and importance, as well as to provide effective and fair remedies for persons whose reputations are harmed by the publication of defamatory matter. It is clearly contemplated that the general right to freedom of expression should be balanced against an individual’s right not to have his or her reputation harmed by the publication of defamatory matter.

The Department is genuinely concerned about the welfare of the staff who are the subject of Mr Lander’s allegations, that their reputations may be harmed, and that they may be distressed by such serious yet unsubstantiated allegations. The Department contends that Mr Lander’s right to freedom of expression is not absolute, as he contends, but must be balanced against the rights of Departmental staff to perform their work without fear of having their reputations harmed by repeated serious yet unsubstantiated accusations.

In relation to Mr Lander’s repeated claim that the “ACT Department of Education systemically engages in maladministration, in cover-ups of wrong doings and in abuses of power” I repeat the concerns set out in my earlier letter to you dated 15 December 2006: The Department takes allegations such as these very seriously, but it is impossible to respond to them as they are generalised, vague and unsubstantiated.

Yours sincerely

Michael Bateman

Director

Human Resources

1 February 2007

19. The solicitor's response, unsurprisingly truculent, was dated 9 February 2007:

**Mr Robert Reis
Professional Standards Director
ACT Law Society
DX 5623 CANBERRA**

Dear Mr Reis

RE: COMPLAINT BY ACT DEPARTMENT OF EDUCATION & TRAINING

I refer to your letter of 5 February and the letter attached from Mr Michael Bateman of the ACT Department of Education and Training.

Mr Bateman alleges that I have defamed the Department's staff and that their reputations may be harmed.

The Society is aware and has repeatedly told complainants (except to-date for this complainant) that defamation (matters going to the reputation of people) are not the province of Law Society complaints and that they should seek legal advice.

Mr Bateman, presumably on legal advice, has made a big issue about the reputations of people within his Department but fails to produce an Affidavit or Statutory Declaration from any such person.

As the Society must know, an organisation (government agency) does not have a character or persona and its reputation cannot be defamed.

As I explained to you on the telephone, what I have written to the Department I can write to the Canberra Times, I can say publicly on the airwaves, I can distribute to my friends and colleagues and the Law Society would express no interest in the tone or content of such correspondence and nor should it. Likewise, my client could publish in a newspaper similar complaints alleging the same things, subject to reprisal.

I note that the Department's persistent gripe is that I allegedly fail to produce evidence. The Department's files are full of evidence they refuse to address.

Let me repeat one singular example of that evidence here because the Department does not tell the Society the truth.

The Minister, Mr Andrew Barr, when confronted with a dossier of material recently in the Xirakis case, explained away all the allegations about school-based discipline and the corruption and cover-ups that go under that process as being justified because that is 'the procedure'. In short, Mr Barr and his Department are not interested in examining complaints of the nature made. To then assert that I provide no evidence when the Department and its Minister hold such material is, with respect, hypocritical.

I remind the Society that both the President of the Appeal Court of our Supreme Court and the Chief Judge have repeatedly urged solicitors when entering the

profession to remember to act upon the most solemn duty of all lawyers. That solemn duty as I have brought to the Society's attention before and do so again is to represent people against abuses of power by the State.

The complaint is vexatious, designed to silence a critic and should be dismissed.

Yours sincerely

LANDER & CO

David Lander

20. On 8 May 2007 the solicitor wrote to the Law Society seeking a resolution of the complaint:

...

Dear Mr Reis

RE: COMPLAINT BY ACT DEPARTMENT OF EDUCATION & TRAINING

Thank you for your letter of 7 May 2007.

Would you please have the Council of the Law Society attend to the complaint forthwith as you will appreciate that I have been waiting a long time for this vexacious complaint to be dismissed; were I a solicitor in a large firm, that is what would have happened by now.

Yours sincerely

LANDER & CO

David Lander

21. The next document was an application by the Council of the Law Society of the Australian Capital Territory dated 31 October 2007, filed on 1 November 2007 to the Tribunal.

22. The essence of the complaint about the letter of 24 October 2006 was contained in the following paragraphs of that application:

4. Despite the letter suggesting in the fifth paragraph that the Department was dilatory in responding to the medical recommendation, the Department in fact had acted on the recommendation and was required to and did liaise with ComSuper to provide pre-assessment payments and to otherwise approve invalidity retirement. This was explained to the Respondent in a letter to him dated 7 December 2006 from Mr Michael Bateman, Director, Human Resources of the Department.
5. By letter dated 15 December 2006, Mr Bateman wrote to the Professional Standards Director of the Applicant and complained about the conduct of the Respondent in respect to his letter of 24

October 2006.

- 6. The Respondent was requested, by letter dated 22 October 2006 from the Professional Standards Director on behalf of the Applicant, to provide a response to the Applicant in light of the complaint made by Mr Bateman. In particular, the Professional Standards Director informed the Respondent that the grounds of complaint raised by the Department were:**
 - (i) unsubstantiated statements about the Department and its staff; and**
 - (ii) the tone of the correspondence.**
- 7. The Respondent provided his response by letter dated 8 January 2006 and included copies of various correspondence relating to the case.**
- 8. In summary, the Respondent denied any wrongdoing by him. He submitted that s 16 of the Human Rights Act 2004 in expressing the general principle underlying freedom of expression overrode any rules such as, by implication, any Professional Conduct Rules that may seek to govern legal practitioners. He further stated that the Department “systematically engages in mal-administration, in cover-ups of wrongdoings and in abuses of power”.**

The Applicant relies upon the whole of that letter and enclosures.
- 9. The Applicant provided the Respondent’s response to Mr Bateman for further comment. Mr Bateman did so by letter to the Department dated 1 February 2007 which, in turn, was forwarded to the Respondent for further comment.**
- 10. The Respondent in his further letter of 9 February 2007, by way of reply, did not resile from the response put in his earlier letter of 7 January 2007. He denied any wrongdoing and did not concede that the tone of his correspondence was in any way objectionable. In particular, in neither letter did he assert that any of the subject matter of the correspondence was sent under instructions from his client, although his client had authorised him to “represent me in the strongest possible terms”.**
- 11. The Respondent has not provided any substantive evidence in support of the broad allegations against governmental officials.**

The Legal Profession (Solicitors) Rules

- 12. The Rules were revised and notified on 1 October 2007. The Rules constitute binding obligations under the Act (s.585(1)).**
- 13. The statement of principles prefacing the section headed “Relations With Third Parties” contained in the Rules provides:**

‘Practitioners should, in the course of their practice, conduct their dealings with other members of the community, and the affairs of their clients which affect the rights of others, according to the same principles of honesty and fairness which are required in relations with the courts and other lawyers and in a manner that is consistent with the public interest.’

14. Rule 25 provides:

‘A practitioner, in all of the practitioner’s dealings with other practitioners must take all reasonable care to maintain the integrity of the legal profession by ensuring that the practitioner’s communications are courteous, and that the practitioner avoids offensive or provocative language or conduct’.

The Applicant contends that in light of the recitals set out in paragraph 15 above, Rule 25 has equal application in relation to a practitioner’s communications with other members of the community. The Applicant further contends that there is a fundamental ethical obligation upon a practitioner to maintain due courtesy and civility when dealing with, inter alia, the other party and broader members of the public, particularly in the course of conducting one’s practice.

Charges

15. The Applicant contends that the letter referred to in paragraph 3 above, in respect of its overall tone and, in particular, to the criticism of the departmental officials and the suggestion that there might be recriminations against the Respondent’s wife constitutes:

- (a) discourteous, offensive or provocative conduct; and/or**
- (b) conduct which was capable of bringing the legal profession into disrepute; and/or**
- (c) a breach of the obligation to act with honesty and fairness and in a manner that is consistent with the public interest; and**
- (d) a breach of his ethical duty to act courteously in respect to his dealings with third parties.**

16. The Applicant contends that:

- (a) either all or any one or more of the breaches referred to in paragraph 15 constitutes unsatisfactory professional conduct; and**
- (b) such conduct warrants the Disciplinary Tribunal making one or more orders under s.430 of the Act.**

23. The Tribunal, comprising the Hon J F Gallop AM QC and Messrs R Watch and G Wright, found the appellant guilty of unsatisfactory professional conduct for reasons published on 30 July 2008. Those reasons were expressed as follows:

- 1. The Council of the Law Society of the Australian Capital Territory has applied to the Legal Practitioners Disciplinary Tribunal pursuant to s 419 of the Legal Profession Act 2006 (ACT) regarding the professional conduct of the respondent in the circumstances which we shall set out.**
- 2. The Council contends that in a letter sent by the respondent to the**

Executive Officer of the ACT Department of Education, Youth and Family Services, the respondent, in respect of the terms of that letter and in particular the criticism of the departmental officials and the suggestion that there might be recriminations against the respondent's wife, has been guilty of:

- (a) discourteous, offensive or provocative conduct; and/or**
 - (b) conduct which was capable of bringing the legal profession into disrepute; and/or**
 - (c) a breach of the obligation to act with honesty and fairness and in a manner that is consistent with the public interest; and**
 - (d) a breach of his ethical duty to act courteously in respect to his dealings with third parties.**
- 3. The facts giving rise to the proceedings are that the respondent is, and was at all material times a barrister and solicitor of the Supreme Court of the Australian Capital Territory practising under the name and style of Lander & Co, Solicitors, and was the holder of an unrestricted practising certificate.**
- 4. The respondent acted for a Mr T Boutsis, an employee of the ACT Department of Education, Youth and Family Services (the Department) in relation to a potential invalidity retirement.**
- 5. In the course of representing his client, the respondent wrote to the Chief Executive Officer of the Department on 24 October 2006. The terms of the letter were as [set out in [4] of these reasons].**
- 6. By letter dated 15 December 2006, Mr Michael Bateman, Director, Human Resources of the Department, wrote to the Professional Standards Director of the applicant and complained about the conduct of the respondent in respect his letter of 24 October 2006.**
- 7. By letter dated 22 December 2006, the respondent was requested by the Professional Standards Director on behalf of the applicant to provide a response to the applicant in the light of the complaint made by Mr Bateman. In particular, the Professional Standards Director informed the respondent that the grounds of complaint raised by the Department were:**
- (i) unsubstantiated statements about the Department and its staff; and**
 - (ii) the tone of the correspondence.**
- 8. The respondent provided his response by letter dated 8 January 2007 and included copies of various correspondence relating to the case. In summary, the respondent denied any wrongdoing by him. He submitted that s 16 of the Human Rights Act 2004 (ACT), in expressing the general principle underlying freedom of expression, overrode any rules such as, by implication, any Professional Conduct Rules that may seek to govern legal practitioners. He further stated that the Department "systematically engages in mal-administration, in cover-ups of wrong doings and in abuses of power".**

9. The applicant provided the respondent's response to Mr Bateman in the Department for further comment. Mr Bateman did so by letter dated 1 February 2007 which, in turn, was forwarded to the respondent for further comment.
10. The respondent, in his further letter of 9 February 2007 by way of reply, did not resile from the response put in his earlier letter of 8 January 2007. He denied any wrongdoing and did not concede that the tone of his correspondence was in any way objectionable. In particular, in neither letter did he assert that any of the subject matter of the correspondence was sent under instructions from his client, although his client had authorised him to "represent me in the strongest possible terms".
11. The Legal Profession (Solicitors) Rules (2006) (ACT) were made as part of the Legal Profession Act 2006 (ACT). Those Rules were repealed by r 3 of the Legal Profession (Solicitors) Rules 2007 which commenced on 1 October 2007. However, the 2007 Rules repeated the provisions of the 2006 Rules with respect to "Relations with Third Parties" and "Relations with Other Practitioners". The statement of principles prefacing the category of the Rules headed "Relations With Third Parties" provides:

Practitioners should, in the course of their practice, conduct their dealings with other members of the community, and the affairs of their clients which affect the rights of others, according to the same principles of honesty and fairness which are required in relations with the courts and other lawyers and in a manner that is consistent with the public interest.
12. The Introduction to the 2006 Rules states that the statement of general principle preceding the Rules in the category,

... is not intended to constitute by itself a Rule, but is intended to describe the underlying principles and objectives of the Rules which follow.
13. Rule 24, which is within the category of the Rules headed "Relations with Other Practitioners", provides:

A practitioner, in all of the practitioner's dealings with other practitioners, must take all reasonable care to maintain the integrity and reputation of the legal profession by ensuring that the practitioner's communications are courteous and that the practitioner avoids offensive or provocative language or conduct.
14. The applicant contended that in the light of the recitals set out in the Rules, r 24 has equal application in relation to a practitioner's communications with other members of the community. The applicant contended that there is a fundamental ethical obligation upon a practitioner to maintain due courtesy and civility when dealing with, inter alia, the other party and broader members of the public, particularly in the course of conducting one's practice.
15. We think there is much force in that submission and it should be

adopted. In applying the general principle set out above to r 24, practitioners should, in the course of their practice, conduct their dealings with other members of the community according to the same principles of honesty and fairness which are required in relations with the courts and other lawyers namely, to take all reasonable care to maintain the integrity of the legal profession by ensuring that the practitioner's communications are courteous and that the practitioner avoids offensive or provocative language or conduct.

16. That the language of the respondent's letter of 24 October 2006 contains in several paragraphs discourteous remarks and offensive and provocative language cannot be doubted. This Tribunal has to determine whether, by the terms of the letter and the whole transaction, the respondent has been guilty of unsatisfactory professional conduct or professional misconduct.
17. In *Clyne v NSW Bar Association* (1960) 104 CLR 186, the Full Court of the High Court (Dixon CJ, McTiernan, Fullagar, Menzies and Windeyer JJ) at 199-201:

The rules which govern the conduct of members of a body of professional men, such as the Bar of New South Wales, may (though there is, of course, no logical dichotomy) be divided roughly into two classes. In the one class stand those rules which are mainly conventional in character. To say this is not to deny their importance from the point of view of the client. But they are designed primarily to regulate the conduct of members of the profession in their relations with one another. Many of these rules are reduced to writing, and they are from time to time interpreted, and perhaps modified to fit specific cases, by resolutions of the governing body of the profession. Examples of this class in the case of the Bar are the rule which forbids advertising, the rules with regard to retainers, the rule that one of Her Majesty's counsel must not appear without a junior. A breach of any of these rules is treated seriously, but would not warrant disbarment--at least unless it were shown to be part of a deliberate and persistent system of conduct.

Rules of the other class are not merely conventional in character. They are fundamental. They are, for the most part, not to be found in writing. It is not necessary that they should be reduced to writing, because they rest essentially on nothing more and nothing less than a generally accepted standard of common decency and common fairness. To the Bar in general it is more a matter of "does not" than of "must not". A barrister does not lie to a judge who relies on him for information. He does not deliberately misrepresent the law to an inferior court or to a lay tribunal: cf. *Carr v. Wodonga Shire* (1920) 34 CLR 234, at pp 239, 240. He does not, in cross-examination to credit, ask a witness if he has not been guilty of some evil conduct unless he has reliable information to warrant the suggestion which the question conveys.

As the learned judges of the Supreme Court have said, a member of the Bar enjoys great privileges both de jure and de facto. In particular his privilege in relation to defamatory statements made by him in court is not qualified but absolute. It is perhaps worth while to quote yet again the oft-quoted words of Lopes LJ in *Royal Aquarium and Summer and Winter Garden Society v. Parkinson* (1892) 1 QB 431. His Lordship said: "This 'absolute privilege' has been conceded on the grounds of public policy to ensure freedom of speech where it is essential that freedom of speech should exist, and with the knowledge that Courts of justice are presided over by those who from their high character are not likely to abuse the privilege, and who have the power and ought to have the will to check any abuse of it by those who appear before them" (1892) 1 QB, at 451. The last thing we would wish to do would be to say anything which might be thought to curtail this freedom of speech, which public policy demands. Cases will constantly arise in which it is not merely the right but the duty of counsel to speak out fearlessly, to denounce some person or the conduct of some person, and to use such strong terms as seem to him in his discretion to be appropriate to the occasion. From the point of view of the common law, it is right that the person attacked should have no remedy in the courts. But, from the point of view of a profession which seeks to maintain standards of decency and fairness, it is essential that the privilege, and the power of doing harm which it confers, should not be abused. Otherwise grave and irreparable damage might be unjustly occasioned. The privilege may be abused if damaging irrelevant matter is introduced into a proceeding. It is grossly abused if counsel, in opening a case, makes statements which may have ruinous consequences to the person attacked, and which he cannot substantiate or justify by evidence. It is obviously unfair and improper in the highest degree for counsel, hoping that, where proof is impossible, prejudice may suffice, to make such statements unless he definitely knows that he has, and definitely intends to adduce, evidence to support them. It cannot, of course, be enough that he thinks that he may be able to establish his statements out of the mouth of a witness for the other side.

18. In *Kennedy v The Council of the Incorporated Law Institute of New South Wales* reported in Vol 13 of the *Australian Law Journal* at 563, Rich J said,

... that a charge of misconduct as relating to a solicitor need not fall within any legal definition of wrong doing. It need not amount to an offence under the law. It was enough that it amounted to grave impropriety affecting his professional character and was indicative of a failure either to understand or to practise the precepts of honesty or fair dealing in relation to the courts, his clients or the public. The particular transaction the subject of the charge must be judged as a

whole and the conclusion whether it betokened unfitness to be held out by the court as a member of a profession in whom confidence could be placed, or on the other hand, although a lapse from propriety, was not inconsistent with general professional fitness and habitual adherence to moral standards, was to be reached by a general survey of the whole transaction.

19. **McTiernan J said, at 564,**

... that it was a proposition which admitted of no debate that a solicitor for a party in an action was not at liberty to employ whatever tactics he thought might contribute to his client's success. A solicitor, like anybody else, was liable to be prosecuted if with the object of winning the case he did anything which was a criminal offence. As a solicitor he had an additional and particular responsibility. His professional status, which he derived from being accredited by the court as a fit and proper person to practise, laid upon him the strict obligation not to interfere or attempt to interfere with the course of justice under any pretext. If he violated that duty he was guilty of professional misconduct.

20. **In the Reports of the Solicitors' Statutory Committee (NSW) in respect of one Constantine Karageorge on 15 July 1987,**

It may be that the conduct complained of would merely amount to reprehensible rudeness or churlish discourtesy if it were conduct on the part of someone other than a solicitor. There may be some acts which, although they would not be disgraceful in any other person, yet if they are done by a solicitor in relation to his profession may be fairly considered disgraceful and dishonourable conduct: See Lord Esher MR in *Allinson v General Council of Medical Education and Registration* (1894) 1QB 750 at 760. Clearly, such acts may include acts perpetrated towards members of the public. It has long been the view of the profession that only the very highest conduct is consistent with membership of the profession Clearly, the use of insulting language or behaving offensively towards members of the public is not conducive to the maintenance of the good name of the profession.

21. **In Cordery on Solicitors, 8th Ed at 272-274,**

It is a rule of conduct that a solicitor must act towards other solicitors with complete frankness and good faith consistent with his overriding duty to his client. Another facet of the duty to act with frankness and good faith is that a solicitor should not resort to writing offensive letters to other members of the profession.

The wide ambit of r 1 of the Solicitors Practice Rules 1987 means that a solicitor must not act towards any person in a way which is fraudulent, deceitful or otherwise contrary to his position as a solicitor nor may he use his position as a

solicitor to take unfair advantage of a third party for his own benefit or for the benefit of any other person. Thus, great care has to be exercised when dealing with an unrepresented third party.

22. Counsel for the applicant also relied upon some statements of principle from the Utah Bar Journal,

A lawyer can be firm and tough-minded while being unfailingly courteous. Indeed, there is a real power that comes from maintaining one's dignity in the face of a tantrum, from returning courtesy for rudeness, from treating people respectfully who do not deserve respect, and from refusing to respond in kind to personal insult.

(See Justice Matthew B Durant, Views from the Bench: Civility and Advocacy, (2001) Utah Bar J 35.)

23. As Chief Justice Robert Benham of the Supreme Court of Georgia in *Butts v State* 546 SE 2d 472 (GA 2001) commented,

... civility, which incorporates respect, courtesy, politeness, graciousness, and basic good manners, is an essential part of effective advocacy. Professionalism's main building block is civility and it sets the truly accomplished lawyer apart from the ordinary lawyer.

... Civility is more than just good manners. It is an essential ingredient in an effective adversarial legal system such as ours. The absence of civility would produce a system of justice that would be out of control and impossible to manage: normal disputes would be unnecessarily laced with anger and discord; citizens would become disrespectful of the rights of others: corporations would become irresponsible in conducting their business: governments would become unresponsive to the needs of those they serve; and alternative dispute resolution would be virtually impossible.

24. In applying those principles, we are firmly of the view that the respondent has been guilty of unsatisfactory professional conduct. We turn to consider whether the matters raised by him exculpate him from that conclusion.
25. First, the respondent submitted that there is nothing discourteous or offensive in his letter. He relied upon a letter from his client, Mr Boutsis, in which he said that the respondent had represented him "admirably" and that, accordingly, the terms of the letter were justified in the circumstances. We reject Mr Boutsis' assessment of the respondent's conduct. It is objectively of no value whatever. The whole tone of the respondent's letter is objectively discourteous.
26. Secondly, the applicant relied upon s 16 of the Human Rights Act 2004 (ACT). It reads,

16 Freedom of expression

(1) Everyone has the right to hold opinions without

interference.

- (2) Everyone has the right to freedom of expression. This right includes the freedom to seek, receive and impart information and ideas of all kinds, regardless of borders, whether orally, in writing or in print, by way of art, or in another way chosen by him or her.

27. The respondent contended that the Human Rights Act 2004 is unqualified in preserving freedom of expression subject only to s 28 which reads,

28 Human rights may be limited

- (1) Human rights may be subject only to reasonable limits set by Territory laws that can demonstrably justified in a free and democratic society.
- (2) In deciding whether a limit is reasonable, all relevant factors must be considered, including the following:
 - (a) the nature of the right affected;
 - (b) the importance purpose of the limitation;
 - (c) the nature and extent of the limitation;
 - (d) the relationship between the limitation and its purpose;
 - (e) any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve.

28. He did not refer to paragraph 6 in the preamble to the Act which reads,

Few rights are absolute. Human rights may be subject only to the reasonable limits in law that can be demonstrably justified in a free and democratic society. One individual's rights may also need to be weighed against another individual's rights.

29. In our view, 16 does not avail the respondent to excuse unsatisfactory professional conduct in the circumstances of the subject letter.

30. We confirm our conclusion that he has been guilty of unsatisfactory professional conduct.

31. We shall list the matter for further hearing.

...

Date of decision: 30 July 2008

24. We would support and endorse the general principles that the Tribunal adopted in its consideration of this matter.

25. After submissions with respect to penalty on 11 August 2008, the Tribunal, on 24 September 2008, ordered that:

- 1. The Respondent legal practitioner David Lander pay a fine of \$2,500.00 to the Council of the Applicant Law Society within one month of the date of these Orders.**
- 2. The Respondent be publicly reprimanded.**
- 3. The Respondent pay the costs of the Council of the Law Society of the Australian Capital Territory in these proceedings on a solicitor/client basis as agreed or taxed within three months of agreement or taxation.**
- 4. That the Respondent within six months (or such other period as may be approved by the Professional Standards Director of the Law Society of the Australian Capital Territory, or the Tribunal) undertake at his own expense and successfully complete with a pass mark of not less than 75% a course of education in legal ethics conducted by the Australian National University Legal Workshop or (if such course is discontinued or otherwise becomes unavailable) complete such other course conducted by another body as approved by the Director of Professional Standards of the Law Society of the Australian Capital Territory or the Tribunal.**
- 5. In default of compliance with Orders 1, 3 and 4 the Respondent's Practising Certificate be immediately suspended pursuant to Section 430(4)(b) of the Legal Profession Act 2006 until he complies with the Orders.**

26. It was contended by the Law Society that the Tribunal was correct in finding that the letter of 24 October 2006 was –

- (a) discourteous, offensive or provocative conduct; and/or**
- (b) conduct which was capable of bringing the legal profession into disrepute; and/or**
- (c) a breach of the obligation to act with honesty and fairness and in a manner that is consistent with the public interest; and (sic)**
- (d) a breach of [the Solicitor's] ethical duty to act courteously in respect to his dealings with third parties.**

27. The Tribunal focussed on the provisions of the *Legal Profession (Solicitors) Rules 2006 (ACT)* (the Rules) enacted as part of the *Legal Profession Act 2006 (ACT)*. That Act was in force as from 1 July 2006. The Rules were repealed and re-enacted on 1 October 2007 but relevantly the provisions relating to “Relations with third parties” and “Relations with Other Practitioners” were repeated.

28. Rule 25 was particularly referred to. That rule provides:

A practitioner, in all of the practitioner’s dealings with other practitioners, must take all reasonable care to maintain the integrity and reputation of the legal profession by ensuring that the practitioner’s communications are courteous and that the practitioner avoids offensive or provocative language or conduct.

29. As noted above, the Tribunal concluded at [16]:

That the language of the respondent’s letter of 24 October 2006 contains in several paragraphs discourteous remarks and offensive and provocative language cannot be doubted.

30. The Tribunal then considered whether that constituted unsatisfactory professional conduct or professional misconduct. It concluded that it was the former rather than the latter.

31. The issue thus raised was highlighted in *Clyne v NSW Bar Association* (1960) 104 CLR 186 (*Clyne’s case*), where in considering the conduct of Mr Clyne, who had launched an extravagant and highly defamatory attack on a solicitor accusing Mr Clyne of fraud, perjury and blackmail. It was apparently done for the purpose of persuading the solicitor to cease acting for a lady who was then pursuing divorce proceedings against Mr Clyne’s client. It was apparent that the accusations against the solicitor were baseless, though there was, also, at the time, a view that a solicitor was acting improperly if he or she funded a litigant on a “no win no fee” basis. That was what the solicitor in the case before us is reasonably believed to be doing. The High Court rejected that view which, in any event, could not have justified the accusations made by Mr Clyne. The scope of a legal practitioner’s privilege, even duty, to make defamatory statements in the course of litigation was referred to, as the Tribunal noted, at 200-1 (per Dixon CJ, McTiernan, Fullagar, Menzies and Windeyer JJ):

The last thing we would wish to do would be to say anything which might be thought to curtail this freedom of speech, which public policy demands. Cases will constantly arise in which it is not merely the right but the duty of counsel to speak out fearlessly, to denounce some person or the conduct of some person, and to use such strong terms as seem to him in his discretion to be appropriate to the occasion.

32. But, of course, it is misconduct to abuse that privilege by making unfounded accusations knowing that there was no reasonable basis for them, worse if done gratuitously or even more pertinently, if it were to be shown for a collateral purpose.

33. In the context of rudeness or discourtesy, the respondent made specific reference to a decision of the Solicitor's Statutory Committee (15 July 1987) in *Law Society of New South Wales re Constantine Karageorge (Karageorge)*.

34. The solicitor's comments in that case were undoubtedly gratuitously offensive. For example, he referred to another solicitor in conversation with him about a matter as, "you fucking Arab". He demonstrated even-handed offensiveness referring to another solicitor in conversation with him as "a fucking Jew". He similarly abused members of the public who had dealings with him.

35. Clearly, those comments and other like comments were extraneous to the matters legitimately being pursued and, as the Committee observed "the use of insulting language or behaving offensively towards members of the public is not conducive to the maintenance of the good name of the profession".

36. That view must be supported emphatically. However, it seems to us that that principle in no way diminishes the right, indeed the duty, of a solicitor to represent his or her client's interests forthrightly and without fear or favour. If the conduct of public officials adversely impacting on a client is considered on reasonable grounds to be "rude, unhelpful" or any similar characterisation, it is no breach of the obligation of courtesy to point that out to those in authority, even though those criticised, may consider the criticism unwarranted and offensive. Such communication may well be regarded as discourteous and provocative but, nevertheless, a subject that needs to be raised in the interests of the client as well as generally.

37. It is apparent that Rule 25 of the Rules does, as the Attorney-General submits in his written submission, engage s 16 (freedom of expression) and s 8 (recognition and equality before the law) of the *Human Rights Act 2004 (ACT)* (the HR Act).

38. We accept that it is not inconsistent with those rights to place limits on professional behaviour, provided, such limits are compatible with a solicitor's duty to his or her client, to the Courts and the public and can be justified in a free and democratic society. That is, of course, the effect of s 28, HR Act.

39. It is a relevant matter that the impugned comments were not made in a public forum. They were made to the Department head concerning a matter that was properly the concern of the Department and, indeed, of its Minister. It was the solicitor's contention that the comments were based on reasonable grounds and were a fair comment on a matter that was, or ought to have been, a legitimate concern of the Department and its Minister.

40. Nevertheless, the Tribunal found that the letter, both in tone and content, was "objectively discourteous" and not excused by reference to s 16 of the HR Act.

41. On 24 September 2008, the Tribunal handed down its decision on penalty. On two previous occasions, the solicitor had, admitted to discourtesy in correspondence. The most recent of those occasions resulted in a reprimand given on 28 August 2007. The solicitor had on that occasion apologised in writing to Mr Bateman and to another officer. The terms of that correspondence are not in evidence.

42. The Tribunal rejected a submission that the obligation of courtesy was different when the “other member of the community” was indeed the opponent of the solicitor’s client.

43. The Tribunal noted, correctly in our view, that there is an obligation on a practitioner to deal with all persons, practitioners or not, opponents or not, with honesty and fairness. The question of courtesy is more difficult to assess. Courtesy connotes politeness. That clearly varies depending on the circumstances.

44. In light of the two prior matters, the Tribunal ordered that the solicitor pay a fine of \$2,500, be publicly reprimanded, pay the Law Society’s costs and undertake remedial courses in legal ethics.

45. On 7 October 2008, the solicitor filed a notice of appeal.

46. Mr Burnside QC, for the solicitor, submitted that there was a contrast between the terms of the Rules relating to dealings with other practitioners and those relating to third parties. The difference is that an obligation of courtesy is expressed in relation to dealings with other practitioners, as well as the obligation to act with honesty and fairness and to avoid “offensive or provocative language or conduct”.

47. That there is a difference is, as Mr Burnside QC submitted, not surprising. It may be necessary to write a letter of demand accusing the recipient of fraud or other misconduct. The recipient, particularly if the accusation is untrue, will be offended, even outraged. He or she may well regard it as provocative. Yet, if the solicitor had received apparently reasonable information supporting such an accusation, he or she is bound to put it to the recipient. Nor is the mere fact that the accusation is made robustly a valid cause for complaint.

48. The question of his honesty was not raised, so far as appears, against Mr Lander. In contrast with *Clyne’s* case, he was not alleged to have made any accusation that he knew to be untrue or for which he knew there was no reasonable basis. He was not alleged to have had a collateral purpose to be served by the accusations he made.

49. It is true, as Mr Burnside QC conceded, that the Department had progressed the claim of the solicitor’s client, albeit that it took nearly seven months to do so. However, the relevant officers, despite correspondence seeking action, had not informed the solicitor, or his client, of that fact before the solicitor wrote the letter complained of.

50. That conduct in itself, could have no other consequence than to provoke the solicitor into writing under the influence of a belief that his client's claim was being contemptuously ignored. Out of that context that could not justify a response that made unfounded accusations of misconduct against departmental officers.

51. However, Mr Burnside's submission is that the complaint concerning the past conduct of departmental officers, including allegations of reprisals against the solicitor's wife were not disputed by the Department save in terms of a general denial. In particular, Mr Bateman's affidavit makes it plain that the Department had not, in fact, been as dilatory as it permitted the solicitor to believe that it had been. His affidavit did not address the allegation of failure to inform the solicitor of the action it had taken.

52. The essence of the respondent's contention, which must be rejected, is that there is a general obligation on a solicitor to refrain from that which the recipient might find to be discourteous, offensive or provocative statements. That is too broad and a sweeping proposition.

53. If the criticisms the solicitor levelled at the Department were true or, at least, fair comment as understood in defamation law, it could not be misconduct or unsatisfactory conduct to draw them to the attention of the relevant officers of the Department and its Minister. That is not an issue which those considering the statements should have to concern themselves. The fact that it was perceived as discourteous and offensive, even provocative, to parties to whom it is directed, is beside the point. In contrast with *Karageorge* (supra) the terms of the solicitor's complaint were not, if the allegations were soundly based, gratuitously insulting or offensive.

54. It may well be the case that the choice of confrontation rather than persuasion was not effective advocacy on the part of the solicitor. That is not for us to say. What is important is that it is not unsatisfactory professional conduct to choose a less effective option in representing a client to one which others might choose. Clearly, as the client's response shows, he approved of the solicitor's mode of representation, although the Tribunal rightly observed, that could not excuse, for example, the making of false and defamatory statements without a reasonable basis for doing so.

55. It is also true, as Mr Burnside QC submitted, that Mr Bateman could have sought further details of what he described as the 'general statements' about the Department to enable him better to respond and overcome the disadvantage of which he complained. He would have been entitled to be provided with those details, though it may not have been at a cost that the solicitor's client should have to bear.

56. Of course, the fact that Rule 25 requires that practitioners ensure courtesy and the avoidance of offensive or provocative language does not of itself make an apparent non-compliance unsatisfactory professional conduct. To make it so, however, it is not sufficient that the client did not specifically instruct the solicitor to make those comments. The question is whether the solicitor had a reasonable basis for them. He said there was. That was not a contention that was examined.

57. If the HR Act, s 16(2) has a role to play, it super imposes itself on the Statement of Principles to be found in the Rules and it is to allow lawful criticism by a solicitor of the performance of public officials.

58. In our view, the real issue was not that the solicitor made the comments complained of in the course of correspondence concerning his client's claim, but whether the accusations and criticisms he made were false or without foundation, to his knowledge. If that were to be made out, then the finding of unsatisfactory professional conduct should be upheld. However, it seems to me that particular issue was not addressed by the Tribunal.

59. In other words, the true complaint should have been in terms of the kind of misconduct alleged in *Clyne's* case, not in terms of a breach of Rule 25 which was, on its face, inapplicable.

60. The hearing did not address the correct issue. The finding of unsatisfactory professional conduct was, therefore, based on an erroneous assumption and must be set aside as must be the consequential orders on penalty.

61. The appeal should be upheld with costs.

I certify that the preceding sixty-one (61) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Court.

Associate:

Date: 11 September 2009

Counsel for the Appellant:	Mr J W K Burnside QC with Mr T Crispin
Solicitor for the Appellant:	Lander & Co
Counsel for the Respondent:	Mr D J C Mossop
Solicitor for the Respondent:	Dibbs Abbott Stillman
Counsel for the Intervener:	Mr P Garrison
Solicitor for the Intervener:	ACT Government Solicitor
Date of hearing:	13 February 2009
Date of judgment:	11 September 2009