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Tēnā koe

Proposed Amendments to the Lawyers and Conveyancers Act 2006

The New Zealand Bar Association | Ngā Ahorangi Motuhake o Te Ture has reviewed the New Zealand Law Society's Consultation Document.

While we support efforts to improve regulatory efficiency, we have significant concerns regarding the scope, detail, and implications of the proposed changes.

We consider that the proposed changes are potentially controversial. For such changes, an omnibus bill may not be an appropriate legislative vehicle. We are also concerned that the proposed approach will result in fragmented changes to legislation without a cohesive framework, which may risk undermining the integrity of the legal profession's regulatory environment.

1. Lack of Detail and Justification

Overall, the Consultation Document provides insufficient detail to enable meaningful engagement on the proposed changes. Specific wording of proposed amendments is not always provided. The rationale for the changes is not supported by data or evidence demonstrating the scale or nature of the problems they aim to address. Several of the proposed changes are significant and substantive and need to be fully detailed and supported.

2. Scope and Impact of Amendments

Contrary to the assertion that the amendments are "relatively confined," the proposals expand the powers of the Regulator and/or decrease the protections for practitioners to a material degree.

3. Standards Committee Powers

This proposal expands the powers of Standards Committees to:

- make fee adjustments without any finding of unsatisfactory conduct; and
- order that apologies be made to people who are not complainants.

The Bar Association has concerns with both proposals.

Complaints about fees can already be resolved directly with practitioners or through mediation. The proposed power would only apply where agreement is not reached, in which case either:

(a) there has been unsatisfactory conduct, which should be properly determined; or

(b) there has not been unsatisfactory conduct, in which case forcing a fee reduction penalises practitioners who have done nothing wrong.

If there has been unsatisfactory conduct, then the suggestion is that the new power could be used to avoid making a finding that should, in fact, be made. This does not seem consistent with the Regulator's consumer protection duties, nor a change that is likely to "better protect consumers of legal services and lawyers."

If there has not been any unsatisfactory conduct (including no overcharging), then the suggestion appears to be that the Regulator could use this power to force a practitioner who has done nothing wrong and who is not willing to adjust their fee to nonetheless lower their fee for the good of the profession. In addition to forcing the practitioner to accept a lower fee in circumstances where there is nothing wrong with the existing fee, such a decision can have other consequences for the practitioner. It can imply fault and lead to collateral challenges against the practitioner. It can impact the practitioner's insurance.

The introduction of the new power does not appear to be justified.

With respect to the other proposed power, there are significant due process issues. If someone believes they are entitled to an apology, they can lodge a complaint. If such a person is not a complainant, then it is unclear how the Regulator will protect the practitioner's right to have the question aired and tested of whether an apology is due to that person.

There is no detail in the proposal as to how someone who has not laid a complaint will be identified as someone requiring an apology. Without this detail, the Bar Association believes that this proposal is procedurally problematic.

4. Removal of LCRO Review Rights:

We have had the benefit of reviewing the submissions of the Law Association and agree that the Standards Committees' decisions to lay charges in the Tribunal and decisions to appoint an investigator are "gateway determinations of determinative significance".

The courts have placed strict limits on the review of prosecutorial decisions which would apply to applications to review decisions to lay charges before the Tribunal. However, the courts have upheld the appropriateness of review within those strict limits. The grounds on which such reviews can be made are distinct from those that apply to applications for strike out. It is therefore not correct, as suggested in the Consultation Document, that permitting such reviews merely allows practitioners to have two bites at the cherry. The availability of review within the strict limits that apply is an important safeguard against prosecutorial misconduct.

The option of an application to the Tribunal for strike out does not allow practitioners to resolve matters at an early stage. It also increases the Tribunal's workload, creating delay further along the process and potentially at greater cost to the practitioner. An early opportunity for review may result in fewer cases progressing and a chance for the practitioner (and the complainant) to consider whether there is sufficient merit in their case to proceed.

Eliminating early review options for practitioners facing charges or investigations also removes important procedural safeguards. Disciplinary matters can place extreme stress and practical demands on practitioners. Decisions to instigate investigations can be based on significant errors of fact and law. It is therefore essential for practitioners to have an early opportunity to have such decisions reviewed. The justification of reducing LCRO workload is not sufficient to override practitioner protections.

5. Amendments to section 188

The Bar Association opposed changes to section 188 LCA when the Law Society undertook consultation in 2021 and 2022. The Bar Association still believes that changes to this section are significant and involve difficult balances in rights and should not be addressed in an Omnibus Bill.

We are concerned about lack of detail in the proposals to broaden the scope of s188. For example, there is a lack of detail around the definition of an “affected person”. Without these details, this proposal is not ready for consultation or implementation.

The proposal also provides no detail on how the Regulator will be able to protect confidentiality after it releases information to an “affected person”.

We have referred to the FAQs released by the Regulator, which state that the proposed changes to s188 of the Act “will not increase the public sharing of complaint information. The purpose of these amendments is to improve transparency and consistency for a small group of people who have a legitimate need to be kept informed." Whether the proposals will achieve this limited sharing of complaint information is uncertain in the absence of more detailed information or the inclusion of mechanisms that would enable the Regulator to safeguard the released information.

These details are of significance. The information to be released may be highly prejudicial to a practitioner. Release may do major damage to a practitioner’s career. We are also aware of cases where released information has been used to target practitioners and their families. The possible release may be made in circumstances where no determination has been made on a complaint.

The Consultation Document also does not define the range of agencies or a means of identifying those that have a legitimate interest in interacting with, in respect of regulatory matters. The Consultation Document states that it is intended to leave this open, "[a]s it is difficult to predict which regulatory agencies will have a genuine need to receive complaints information in the future…”.

Practitioners are entitled to certainty in their regulatory framework. This proposal requests additional power without specifying how it would be utilised.

On these grounds, we consider this a significant proposed amendment that should not be progressed without greater consideration and with significantly fuller details being provided for consultation.

6. Practise on own account – minimum practice requirements

The proposed changes should not be incorporated in an omnibus bill. In particular, the Bar Association opposes changes that would make it more difficult for lawyers to become barristers at a reasonable stage and build their career at the bar. Having a wide range of independent barristers available to conduct litigation in our courts at reasonable cost is important for the overall working of our system and access to justice.

Rather than enhancing consumer protection, the proposal may restrict entry to the bar and reduce access to justice, particularly in provincial areas where representation is already scarce.

The proposal does not specify:

1. The actual (current) problems and their scale. There is a vague reference to feedback, but no figures are provided, nor is the nature of that feedback clearly identified.
2. The nature and extent of any identified risks.
3. The identity of the groups which are said to be disproportionately affected and how the proposed change will remove barriers to practising on their own account.
4. The risk levels for the groups identified as sole practitioner with a trust account, sole practitioner without a trust account, partner or director, or barrister sole, or how these risks have been identified.
5. How the proposed change will interact with such things as the Stepping Up course, which we note still requires a trust accounting component for all practitioners.

The example given is that:

> "… a practitioner who is approved to POOA as a barrister would be required to practise in that mode for sufficient time before changing to practise as a sole practitioner with a trust account to meet the experience requirements of that new mode of practice."

Our position remains that anyone intending to operate a trust account should undergo specific training immediately before doing so. The current situation requires a barrister to learn the intricacies of trust accounting, even if they may not become a barrister and solicitor for several years, or ever become one. That is unsafe (and likely inefficient). Trust accounting procedures may have evolved over time. The training should be provided when and if a practitioner wishes to practice on their own account with a trust account.

7. Bespoke Conditions on Practising Certificates

The proposal to allow the Regulator to impose "bespoke" conditions on practising certificates without practitioner consent is premature. Bespoke conditions risk creating inconsistencies in how lawyers are regulated.

The types of conditions and their implications are not defined, nor are the circumstances which would permit the imposition of such conditions. Tailoring conditions to individuals might lead to perceived or actual bias, especially if the rationale for conditions is not clearly disclosed or uniformly applied. There may also be a chilling effect on professional independence.

Without clear criteria for imposing conditions, and preferably only in exceptional cases, it is impossible to assess the appropriateness of granting this power to the Regulator.

All practitioners are required to act competently and to ensure that they have an adequate level of knowledge and competence to act within their fields of practice. This restricts lawyers from acting on cases for which they lack sufficient expertise, and these rules apply without the need for conditions on practising certificates. The need for these proposed changes is therefore unclear.

8. Conclusion and Recommendation

In our view, the proposed amendments are under-developed, in some cases controversial, and unsuited for inclusion in an omnibus bill. We consider that the Law Society should advocate instead for comprehensive reform, including the establishment of an independent regulator, as recommended in the 2023 Independent Review.

We welcome further dialogue and remain committed to supporting a regulatory framework that upholds the integrity, professionalism, and safety of the legal community.

Nāku noa, nā

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