

Consultation on changes to the Lawyers and Conveyancers Act 2006

The New Zealand Law Society | Te Kāhui Ture o Aotearoa is seeking feedback on potential amendments to the Lawyers and Conveyancers Act 2006 (the Act) which would improve the transparency and efficiency of the lawyers complaints process. We also want to resolve the long-standing issue of undertakings by a conveyancing practitioner.

The potential changes relate to four key amendments to the Act, which would:

1. **Maintain public confidence in the complaints process** – Allow for some flexibility to the disclosure of information about our complaints process, particularly in relation to parties who are personally affected, and in cases of high public interest, where we need to provide assurances that complaints have been received and are being dealt with appropriately.
2. **Free up resources to focus on the right complaints** – Enable the Law Society to administratively triage certain types of complaints where no further action is required.
3. **Ensure that technical complaints with no merit do not impact resources** – Remove the ability to lodge frivolous technical complaints about the employees and officers of the Lawyers Complaints Service, and Standards Committee members, when they are carrying out duties relating to the Lawyers Complaints Service.
4. **Ensure that conveyancer undertakings are enforceable** – Provide that an undertaking given by a conveyancing practitioner (or incorporated conveyancing firm) can be enforced summarily by a Court in the same manner as an undertaking given by a lawyer.

How to provide feedback

Your feedback on these potential changes is important, and will ensure that any amendments are workable, and that any issues have been identified.

To provide your feedback, **please complete the survey by 13 February 2022**. Any feedback you provide will be treated as confidential, and a consultation summary will be prepared which does not identify individual contributors.

Why we are proposing these amendments

More information about each proposed amendment is set out below.

1. Maintain public confidence in the complaints process – Section 188 (confidentiality)

These proposed changes will enable the Lawyers Complaints Service to confirm, when it is in the public interest to do so, that a complaint has been received. This change will allow the Law Society, like other regulators, to confirm that proper procedure is being followed. It is aimed at increasing trust and minimising public speculation.

Since 2018, the legal profession has been subject to increased scrutiny. Section 188 of the Act currently prohibits employees and officers of the Lawyers Complaints Service from disclosing **any** information relating to complaints, including the process being undertaken and the fact a complaint has been made. It is effectively a "hermetic seal" on any disclosure of information regarding a complaint against a lawyer. This has caused misunderstanding and mistrust in the Lawyers Complaints Service and the Law Society.

In 2018, the New Zealand Law Society Working Group identified that section 188 had been "problematic" and "inflexible" in respect of complaints about bullying, harassment, discrimination, and sexual violence,¹ and had "contributed to concerns about a lack of transparency and accountability."² It prevented the Law Society from providing assurances that serious complaints, involving matters of high public interest, had been received and were being processed.

The Working Group made recommendations to strengthen the regulatory approach to unacceptable conduct. In addition to the updated Rules of Conduct and Client Care for Lawyers, an amendment to section 188 would be an important step towards implementing those recommendations.

What's the problem, in a nutshell? The Law Society is now frequently approached by the profession and media about the conduct of lawyers, but cannot respond, or even confirm a complaint has been received. This has led to the impression that the Law Society is not progressing complaints, the complaints process is delayed or unduly slow, or that the Law Society is obstructive and protecting perpetrators. It can also prolong public speculation as the Law Society cannot provide assurances the complaint is proceeding in accordance with proper process. This includes being able to encourage fairness in any public discourse by reminding everyone that until an investigation is complete, and a finding made, the allegations are not proven.

Section 188 also prevents providing information to affected parties:

- ▶ Individuals who are personally impacted by a practitioner's conduct but do not feel able to make a complaint. Instead, they or a witness may make a confidential report which leads the Standards

¹ New Zealand Law Society Working Group Report, page 12.

² New Zealand Law Society Working Group Report, page 83.

Committee to commence an own motion investigation. Because there is no "complainant", these individuals are not "parties", and have limited rights under the Act to receive information about the investigation.

- ▶ Former partners or employers of a practitioner who is the subject of a complaint can make submissions on the complaint, however they have no right to receive a copy of the Standards Committee's decision. If the decision is not published, the former partners or employers may not learn the outcome of the matter, despite having made submissions to the Standards Committee.

Furthermore, section 188 is unusual in terms of modern regulatory procedure. It is common for regulators and complaints bodies to have a statutory discretion to disclose information about the existence and progress of a complaint or investigation. For example, Rule 64(1)(a) Teaching Council Rules 2016 provides the Teaching Council '*may advise that a person is before the Complaints Assessment Committee or is subject to an investigation into his or her competence.*'

We also propose a new subsection is added to clarify that all complaints and own motion investigations are confidential, subject to the exception in section 188. This follows case law,³ which made it clear that the Standards Committee processes are confidential, and would clarify for parties involved that they cannot disclose details about the actual inquiry or process, e.g., an interview or documents they had received as part of the process.

The current situation is untenable and will continue to undermine public confidence in the Law Society as an effective regulator.

2. Free up resource to focus on the right complaints – triage function

This proposed change is also aimed at bringing the Act into line with other modern regulatory regimes. It will allow the Lawyers Complaints Service to triage certain complaints without first referring them to a Lawyers Standards Committee. This will ensure a more timely response to complaints and prioritisation of resources.

Under section 135 of the Act, complaints about a lawyer, former lawyer, or a law firm **must** be referred by the Lawyers Complaints Service to a Lawyers Standards Committee. Unlike other modern regulatory settings, there is no provision for an interim assessment to be carried out to determine whether the complaint –

- ▶ discloses only an inconsequential matter, or
- ▶ is frivolous or vexatious or entirely without merit, or
- ▶ is potentially more relevant for another agency to consider, or
- ▶ the length of time that has elapsed between the date when the subject matter of the complaint arose and the date when the complaint was made is such that an investigation of the complaint is no longer practicable or desirable, or

³ The New Zealand Law Society v B [2013] NZCA 156

▶ has been resolved to the satisfaction of the complainant.

While a Standards Committee can decide to dismiss a complaint without any further action,⁴ many of these assessments could be undertaken in the first instance by the Lawyers Complaints Service without taking up committee resource.

Again, the current position under the Act is inconsistent with other regulatory regimes⁵ and is not sustainable long-term. Over 80% of complaints result in findings of no further action yet they require a significant amount of Standards Committees' time and resource.

It is not intended that this amendment would reduce the number of complaints that are received. Rather, expert volunteers on the Standards Committees would be able to concentrate on the timely consideration of serious complaints requiring proper investigation, and the timeframes for completion of complaints would be reduced.

Put simply, a triaging function would enable Standards Committees to focus their attention on ensuring complaints which need full investigation and decision are completed in a timely manner.

3. Ensure frivolous technical complaints against staff and committee members do not take up resource

This proposed change will mean complaints against Lawyers Complaints Service employees and Standards Committee members who have practising certificates are dealt with as complaints about the Lawyers Complaints Service, rather than as complaints about the provision of legal services. This will correct a technical issue that results in the time and resource of Standards Committees being tied up by complaints that should in fact be dealt with as complaints about the Lawyers Complaints Service.

The Legal Complaints Review Officer (LCRO) has confirmed⁶ that members of Standards Committees do not provide legal advice, but instead sit in a quasi-judicial fashion, and as such do not provide regulated services⁷ while acting in their role as a member of the Committee. Consistent with this, the Law Society considers that lawyers who support the committees do not provide regulated services while carrying out their functions in supporting a Standards Committee or acting under the delegated authority of the Committee.

However, without a legislative provision which clarifies this, these types of strategic or frivolous complaints have to go through the formal process of being dismissed by a Standards Committee every time. This is a pointless exercise and waste of resource for Standards Committees.

⁴ For example, on the basis that it is trivial, frivolous, vexatious, not made in good faith, out of time, or the complainant has an adequate alternative remedy to pursue.

⁵ See for instance, s65 of the Health Practitioners Competence Assurance Act 2003, s74 of the Real Estate Agents Act 2008.

⁶ *AB v DE & Ors* LCRO75/2014, 11 July 2016, at [54].

⁷ As defined in section 6 of the Act.

That is not to say that appropriate complaints can never be made of lawyers engaged to support the complaints service or Standards Committee members. We acknowledge that complaints about lawyers in the context of their work for or on behalf of a Standards Committee can raise important issues and provide valuable feedback. However, the complaints process for lawyers is not the appropriate vehicle for considering this. It is more appropriate for such matters to be dealt with by the Lawyers Complaints Service and the Law Society.

4. Conveyancer undertakings

This proposed change will make the undertakings of conveyancers enforceable, in the same way as a lawyer's undertaking is enforceable. It will simplify and secure the process for consumers and practitioners.

Since the Act came into force, there have been questions around the enforceability of conveyancing practitioners' undertakings. This has caused issues for consumers entering into property transactions as well as those practising in this area of law. It has also led to complaints due to the inability of the parties to resolve the issue. It can cause delay, uncertainty, and increased cost for consumers in what may be the largest transaction they will ever undertake.

Until 25 June 2021, the New Zealand Law Society's Property Law Section Guidelines (PLS Guidelines) provided that settlements between lawyers and conveyancers should be carried out by way of "reverse undertaking". Where an agreement around undertakings could not be reached between the lawyer and conveyancer then a settlement in person (using a bank cheque) was available as a fall back. This is no longer a viable option because banks have phased out the use of cheques.

An interim arrangement is currently in place, whereby conveyancers acting for vendor clients give their undertakings to lawyers in the form of a deed. However, in the longer term, having enforceable undertakings for conveyancers will benefit both the legal and conveyancing professions, and the consumers of property conveyancing services. If a conveyancer breaches an undertaking, a lawyer will have the machinery to put the matter before the High Court in its inherent jurisdiction quickly, as they do where a lawyer or incorporated law firm breaches an undertaking.

The Law Society's Property Law Section and New Zealand Society of Conveyancers jointly support an amendment to the Act to make conveyancers' undertakings summarily enforceable in the High Court, in the same way as those of a lawyer.

Details of the proposed changes

1. Section 188 (confidentiality)

1. *A new subsection confirming that complaints received under Part 7 and own motion investigations commenced by a Standards Committee are confidential, subject to the exceptions set out in a new s188(3) and the remainder of the Act (such as s142(2), which enables the Standards Committee to direct publication of certain decisions).*

This position is confirmed by case law (*The New Zealand Law Society v B* [2013] NZCA 156), but it would be helpful for it to be incorporated in statute as well, to avoid confusion or misunderstanding among practitioners, complainants, and counsel.

2. *A new exception to the presumption of confidentiality, enabling the complaints service, if it is in the public interest, to:*
 - a. Advise about the existence of a complaint or an own motion investigation.
 - b. Provide procedural information about the status of a complaint that has been received by the Lawyers Complaints Service or is before a Standards Committee, or an own-motion investigation commenced by a Standards Committee to interested persons (who are not themselves parties), or the public.

Applying a "public interest" test is consistent with the use of this test in other areas of Part 7, including in relation to the publication of decisions.⁸ The individual who is the subject of the complaint or investigation would be advised in advance of any information being disclosed.

The amendment would only enable the Lawyers Complaints Service to advise that a complaint about a practitioner has been received, or that an own motion investigation had been commenced, and/or procedural information about the status of the complaint or investigation, including the outcome if that stage has been reached. No other information or commentary about the complaint would be disclosed.

The Lawyers Complaints Service would publish a policy outlining the factors it must take into account when determining if disclosure is necessary or desirable in the public interest, including:

- ▶ the interests of the lawyer subject to the complaint or investigation;
- ▶ the interests of the complainant, or victim of the conduct;
- ▶ risk of prejudice to the fair handling of the complaint or investigation;
- ▶ promoting confidence in the Lawyers Complaints Service amongst the public and the legal profession;
- ▶ protecting members of the public, clients, or other practitioners;

⁸ See ss 142, 143, 201, 206, 238, 240 of Part 7 of the Act and Regulation 30 of the LCA (Lawyers: Complaints Service and Standards Committees) Regulations 2008.

- ▶ enabling the Lawyers Complaints Service to provide information to affected individuals and other interested parties who are not, for the purpose of the specified complaint or investigation, currently entitled to information under the Act as 'parties' to the complaint.

And consider any other relevant circumstances, including:

- ▶ the seriousness of the conduct that is the subject of the complaint or investigation;
- ▶ the extent to which the information proposed for disclosure is already publicly known; and
- ▶ the views of the person who is the subject of the complaint or investigation.

The Lawyers Complaints Service would be under no obligation to disclose any such information. It is anticipated it would only confirm the receipt of a complaint or the commencement of an own motion investigation in response to a specific query (from specific individuals or the media) or provide this information to interested parties such as affected individuals in relation to a complaint or own motion investigation. It would not expect to proactively volunteer such information.

3. *A new exception confirming that a Standards Committee may disclose, or may direct or delegate the disclosure of, procedural information about the status of a complaint to interested persons (not party to the complaint) or the public.*

Only procedural information about the status of the complaint/own motion investigation could be disclosed. This would be discretionary, and there would be no obligation on a Standards Committee to disclose (or direct or delegate the disclosure of) information. Factors to be taken into account could be included in the Act or the Lawyers Complaints Service Regulations.

This provision would not alter the existing provisions of the Act and Regulations that permit the Standards Committee to decide whether to publish a decision about a particular complaint or own motion investigation (section 142(2)) and whether to publish the name of a person who is the subject of a censure order (regulation 30(1)).

4. *Additional clarifications*

The opportunity should also be taken to amend section 188 to clarify that:

- ▶ It applies to all officers and employees of the Law Society.
- ▶ Those who are subject to it may disclose information relating to complaints and own motion investigations for the purpose of carrying out other regulatory functions of the Law Society (such as to the Law Society Inspectorate, Registry, and Practice Approval Committees).

2. Administrative triage of complaints

The Law Society suggests that a triage process could be introduced by including provisions in the Act which:

- ▶ Allow the Lawyers Complaints Service to triage complaints that are received.
- ▶ Specify circumstances under which a complaint need not be referred by the Lawyers Complaints Service to a Standards Committee.

- ▶ Provide that those complaints that do not fall within those specified circumstances must be referred to a Standards Committee.

3. Complaints against Professional Standards Officers and Standards Committee members who hold practising certificates

The Law Society proposes a new section 272A of the Act, which would:

1. Specify that employees and officers of the Lawyers Complaints Service who hold a practising certificate are not providing regulated services when assisting a Standards Committee or acting under delegation of a Standards Committee.
2. Stipulate complaints received about Lawyers Complaints Service employees and officers (which will include those with practising certificates) in relation to their work in assisting or acting under delegation of a Standards Committee are to be treated as a complaint about the Lawyers Complaints Service itself, and addressed by the Lawyers Complaints Service.
3. Confirm that the LCRO's view in *AB* is correct, and Standards Committee members are not providing regulated services when carrying out their role as members of the Committee.

This would not prevent complaints from being made about the conduct of Standards Committee members and professional standards officers outside of their work for the Lawyers Complaints Service.

4. Enforceability of conveyancers' undertakings

The Law Society proposes a new section 38A of the Act, which would provide that an undertaking given by a conveyancing practitioner or incorporated conveyancing firm in the course of practice may be enforced summarily by a Court in the same manner as an undertaking given by a lawyer.

Provide feedback

The Law Society looks forward to receiving your feedback. Please provide your feedback via the survey <https://bit.ly/3Kz6pO6>, by **13 February 2022**.