



NEW ZEALAND  
LAW SOCIETY

NZLS EST 1869

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# Electronic Interactions Reform Bill

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## Electronic Interactions Reform Bill

### 1 Introduction and summary

1.1 The New Zealand Law Society welcomes the opportunity to comment on the Electronic Interactions Reform Bill (Bill).

1.2 The Law Society has reservations regarding amendments proposed by the Ministry of Business, Innovation, and Employment in Part 3 of the Bill, specifically in relation to those provisions intended to facilitate sending documents by email. In summary:

- a. The amendments would enable documents to be sent by email without the consent of the recipient. There are good reasons for retaining a requirement for consent for receipt of information in electronic form, as currently provided in the Electronic Transactions Act 2002.<sup>1</sup>
- b. The amendments would enable documents to be sent to a person by email under various statutes “at an address used by the person”. This phrase is problematic because it is unclear whether:
  - (i) documents sent to non-current email addresses are valid for this purpose; or
  - (ii) documents sent to addresses used by individuals within a corporate entity, or to addresses designated for specialist or limited purposes, are valid.

These provisions may also raise privacy concerns and are not technology-neutral compared with other methods of communication.

- c. In the absence of proof to the contrary, a notice or other document is deemed to be served on, or received by, the recipient on the second working day after the date on which it is emailed, irrespective of whether or not it is actually delivered. This effectively requires the intended recipient to prove a failure of delivery, which in most circumstances would be difficult for the intended recipient to do.
- d. The provisions in the Bill regarding service of electronic communications used for the purpose of proceedings are inconsistent with the corresponding provisions in the High Court Rules 2016.<sup>2</sup>

### 2 Consent

2.1 The General Policy Statement in the Explanatory Note to the Bill states at page 3:

*A government agency will sometimes be required to send information and notices to individuals or businesses either in response to a communication from an individual or business or on the agency’s own initiative.*

*Although the Electronic Transactions Act 2002 allows for email communication if the recipient consents, individuals or businesses may unreasonably refuse consent to the communication being in electronic form; for example, the person may refuse consent to avoid receiving a notice. At other times, it may be difficult for a government agency to find a physical or postal address for the intended recipient of a document or notice.*

2.2 The Law Society understands that government agencies may experience practical difficulties sending information and notices, although no information has been provided as to the extent to which

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<sup>1</sup> Section 16.

<sup>2</sup> There are corresponding provisions regarding service of electronic communications in the District Court Rules 2014 which are identical to the provisions in the High Court Rules 2016. References to the latter in this submission therefore also include references to the former.

unreasonable refusals of consent to receipt of email communications or unavailability of physical or postal addresses are a problem for government agencies in practice. However, there are good reasons for retaining a requirement for consent for receipt of information in electronic form (discussed below). The Law Society considers that these reasons outweigh the likely difficulties experienced by government agencies and recommends that a requirement for consent not be removed.

2.3 The requirement for consent was considered by the Law Commission in a report produced prior to the enactment of the Electronic Transactions Act 2002 (ET Act).<sup>3</sup> The Law Commission noted<sup>4</sup> that email differs from other communications because receipt of an email does not necessarily mean that an attachment to the email, which may be generated through a different application, can be read by the recipient. To accommodate this peculiarity, the Law Commission recommended that a person who wishes to give a notice or to serve documents by email, in lieu of ordinary post, should be able to establish to the satisfaction of the court both:

- that the intended recipient actually agreed to receipt of the notice by email; and
- that the particular form of email used can be read by the intended recipient.<sup>5</sup>

2.4 This approach was subsequently reflected in section 16 of the ET Act. Section 16(1) states:

*Nothing in this Part requires a person to use, provide or accept information in an electronic form without that person's consent.*

2.5 Section 16(2)(a) states:

*A person may consent to accept information in an electronic form subject to conditions regarding the form of the information or the means by which the information is produced, sent, received, processed, stored, or displayed.*

2.6 Although the Law Commission's report and the ET Act are over ten years old and technology has developed considerably over this time, these issues remain current. If the requirement for consent is removed, the recipient has no choice as to the format in which the email or an email attachment is sent. There is also no redress if a format is used, or if the information is corrupted, such that the information is unreadable by the recipient.

2.7 The requirement for consent is tempered by section 16(2)(b), which provides that consent may be inferred from a person's conduct.

2.8 Significantly, retention of the consent requirement would not prejudice the ability of government agencies to send information and give notices, because a range of alternative means of service are available if a recipient does not consent to receive service by email under each of the statutes that would be amended by the Bill.

2.9 For example, section 139 of the Copyright Act 1994 (proposed to be amended by clause 53 of the Bill to also include notice by email) allows a written notice of determination to be given by:

- a. personal delivery to the claimant or other person; or
- b. posting it to the last known address of the claimant or other person; or
- c. faxing it to the last known fax number of the claimant or other person.

2.10 Preservation of the requirement for consent to receipt of electronic notices would be consistent with the choice principle which guided the Law Commission in its recommendations and which was

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<sup>3</sup> Law Commission, *Electronic Commerce Part Two: A Basic Legal Framework* (NZLC R58, 1999).

<sup>4</sup> Note 3 above, at [87].

<sup>5</sup> Note 3, at [88].

subsequently reflected in the Act.<sup>6</sup> This is “the right to choose whether to do business through the use of paper documentation or by electronic means without avoidable uncertainty arising out of the use of electronic means of communication”.

## **Recommendation**

2.11 That a requirement to obtain consent for receipt of information in electronic form be retained.

### **3 Email address used by the person**

3.1 Under the amendments made by the Bill to the various statutes, sending a document by email generally involves “emailing it to an email address used by the person”.<sup>7</sup> The use of this phrase is undesirable as it is uncertain and does not ensure that emails are correctly delivered to the intended recipient. This is an important issue because non-delivery could have serious consequences for the intended recipient, particularly in the case where the amended statutes provide for service of a summons for attendance at legal proceedings.<sup>8</sup> In some cases non-attendance constitutes a punishable offence.<sup>9</sup> The provisions for sending documents by email also raise privacy concerns and are not technology-neutral compared with other methods of communication. These issues are discussed below.

#### ***Non-current email addresses***

3.2 The use of the word “used” leaves open the possibility that a document could validly be sent by sending it to an email address previously used by the recipient that is no longer current. Email accounts, particularly those provided free of charge, may still be open but no longer monitored.

#### ***Multiple email addresses***

- 3.3 The intended recipient may have multiple email addresses or they may use addresses for specific persons or specialist purposes. For example, a large corporation may have hundreds of email addresses, some assigned for use by nominated employees using individual employee names (e.g. [jane.smith@abc.co.nz](mailto:jane.smith@abc.co.nz)) with other addresses used for specific purposes, such as provision of sales or marketing information (e.g. [sales@abc.co.nz](mailto:sales@abc.co.nz) or [info@abc.co.nz](mailto:info@abc.co.nz)) or for legal compliance purposes (e.g. the privacy officer’s address may be [privacy@abc.co.nz](mailto:privacy@abc.co.nz)).
- 3.4 It would be inappropriate to assume that delivery of an email to any email address used by a corporation would give effective notice to the organisation, particularly where the organisation neither designated that address for that purpose nor consented to receive email at that address.
- 3.5 Further, a specific individual whose address is “used” by the organisation may have left the organisation or be on leave, or the organisation might have changed its internal structure so that that individual is no longer the appropriate recipient of the document.

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<sup>6</sup> Note 3, at Executive Summary paragraph E2 and [88].

<sup>7</sup> See, for example the amendment to section 102(1)(d) (Service of notices) Commerce Act 1986. A slightly different formulation is used in some statutes: section 217 of the Copyright Act 1994 is amended (by clause 56) to enable service of a summons by emailing it to an email address used by the person summoned; section 37 of the Corporations (Investigation and Management) Act 1989 is amended (by clause 58) to enable a notice to a corporation or an associated person to be emailed to an email address used by the corporation or associated person.

<sup>8</sup> Section 388 of the Companies Act is an exception because it excludes documents in any legal proceedings from the provisions permitting service by email.

<sup>9</sup> For example, a failure to attend in accordance with a witness summons issued under section 110 of the Financial Advisers Act 2008 is an offence punishable by a fine of up to \$5,000 under section 137 of that Act.

### **Privacy Act 1993**

- 3.6 An “email address used by the person” need not be used uniquely by the person to whom the document is sent. A document sent to a shared email address of an individual recipient without his or her consent could breach the limits on disclosure of personal information in Principle 11, section 6 of the Privacy Act 1993.

### **Designation of email address recommended**

- 3.7 As indicated above, the provisions in the Bill enabling delivery by email do not ensure that emails are correctly delivered to the intended recipient. This contrasts with some of the Bill’s provisions for other methods of communication.

- 3.8 For example, the proposed amendment to section 217 of the Copyright Act 1994 in clause 56 of the Bill enables a witness summons to also be served:

*by sending it to the person summoned **at that person’s usual place of residence**, by a postal or courier service **that provides a system of recorded delivery**. (Emphasis added)*

- 3.9 This formulation provides greater assurance of delivery because it requires both delivery to a current address and evidence of delivery. However, email addresses are not analogous to physical addresses in this regard because email recipients typically do not have a single address but instead use different email addresses for different purposes. Moreover, email systems in general use do not provide an assured means of recorded delivery.

- 3.10 The proposed amendment to section 102 of the Commerce Act 1986 in clause 45 of the Bill provides a different formulation for delivery by post, which enables a notice to be served or given by:

*sending it by post to the person’s usual or last known place of residence or business or to the address **specified by the person** in any notice, application or other document given to the Commission under this Act. (Emphasis added)*

- 3.11 This formulation is consistent with the choice principle and provides greater certainty than a method permitting delivery to any email address previously used by the intended recipient. The provisions of the Bill should also be technology-neutral to ensure that recipients are not disadvantaged depending on the method of communication used by government agencies.

- 3.12 The ability of intended recipients to designate an email address would be equivalent to the provision in section 102 of the Commerce Act that enables a person to specify a postal address for the purpose of delivery of documents. The designation of an email address would reduce the risk of delivery to a non-current or non-monitored address and would also avoid the privacy problem outlined above.

### **Recommendation**

- 3.13 That the provisions of the Bill for sending documents by email be amended so that a document is not deemed to be received for a particular purpose if it is not sent to an email address designated by the intended recipient for that purpose.

## **4 Deemed receipt and onus of proof**

- 4.1 Under the amendments proposed by the Bill, a notice or other document would be deemed to be served on, or received by, the intended recipient on the second working day after the date on which it is emailed,<sup>10</sup> irrespective of whether or not the notice is actually delivered, in the absence of proof to the contrary.

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<sup>10</sup> Cf section 392(1)(ca) of the Companies Act 1993 which provides that ‘a document sent by email is deemed to have been

- 4.2 This formulation effectively places the onus of proof of non-delivery upon the intended recipient rather than the sender. In order to rebut the presumption of delivery after two working days, the recipient would need to demonstrate on the balance of probabilities that the email message had not been received. In most real-world scenarios, emails are delivered near-instantaneously or not at all and the recipient has no knowledge of non-delivery. Proving non-delivery is likely to be a difficult task for intended recipients in most circumstances.
- 4.3 The Law Society considers that the onus of proof of delivery should be on the sender rather than the recipient. The sender is likely to be better informed than the intended recipient concerning the transmission of the email, the address to which it was sent, and whether or not it has “bounced”. A provision should be included in the Bill that the sender can prove delivery of a document by email by proving that the email was properly addressed and sent to the email address. A provision of this kind can be found in section 392(1)(f) of the Companies Act 1993:
- in proving service of a document by email, it is sufficient to prove that—*
- (i) *the document was properly addressed; and*
- (ii) *the document was properly sent to the email address.*
- 4.4 The Law Society notes that a corresponding requirement appears in the Bill in relation to notices sent by post under section 102 of the Commerce Act 1986 (clause 45) and section 139 of the Copyright Act 1994 (clause 53).
- 4.5 If the Law Society’s recommendation in paragraph 3.13 above is accepted, an email sent to an address designated for the purpose by the intended recipient could be deemed to be properly addressed. If the email is not sent to a designated address, or if the designated address is incorrect, for example because it is misspelt by the sender, the email would not be properly addressed.

## **Recommendation**

- 4.6 That the Bill be amended to provide for proof of delivery by email, including that the sender can prove delivery of a document by email by proving that the email was properly addressed and sent to the email address.

## **5 Inconsistency with High Court Rules 2016**

- 5.1 Clauses 56 and 64 of the Bill provide for the service of summons by email for the purpose of proceedings. These provisions should be consistent with the corresponding provisions in the High Court Rules 2016.
- 5.2 The proposed default delivery rule for service of documents by email in the Bill may be contrasted with Rule 6.6 of the High Court Rules 2016, which set out the following deeming provisions for documents served by email:

- (2) *A document served on a party or person in accordance with rule 6.1(1)(d)(iii) must—*
- (a) *be treated as dispatched at the time the electronic communication first enters an information system outside the control of its originator; and*
- (b) *be treated as received,—*
- (i) *in the case of a party who has designated an information system for the purpose of receiving electronic communications, at the time the electronic communication enters that information system; or*

(ii) *in any other case, at the time the electronic communication comes to the attention of the party or person being served, or the solicitor or other agent of that party or person.*

(3) *When a document is transmitted electronically on a day that is not a working day, or after 5 pm on a working day, it must be treated as served on the first subsequent working day.*

5.3 Other clauses in the Bill indirectly relate to proceedings, such as where the government agency is exercising an enforcement or inquiry power to obtain evidence, for example:

- clause 54 amends section 144A of the Copyright Act 1994 and provides that the Chief Executive may require a person to produce documents concerning goods in control of Customs;
- clause 55 amends section 144B of the Copyright Act 1994 and provides that the Chief Executive may require a person to appear and answer questions concerning goods in control of Customs.

5.4 Because there are consequences for failure to comply, addressees should be subject to the same provisions as those provided in the High Court Rules.

5.5 The above High Court Rules broadly reflect the default rules regarding the time of receipt of an electronic communication set out in section 11 of the Electronic Transactions Act 2002.

5.6 Sub-clause 79(2) inserts a new subclause 197(1)(d) into the Trade Marks Act 2002 which provides that a document that is required or authorised by the Act to be served on or given to a person may be served or given by:

*emailing it to the person at an email address used by the person summoned.*

5.7 However, unlike the Copyright Act 1994, the Trade Marks Act 2002 does not provide any process by which a person may be summoned.

## **Recommendations**

5.8 That clauses 54, 55, 56, 64, 77 and 78 of the Bill be amended so that they are consistent with the provisions of Rule 6.6 of the High Court Rules 2016.

5.9 That clause 79(2), which relates to deemed service of a summons, be deleted.

5.10 That clause 79 be amended so that the provisions concerning service of a notice are consistent with the provisions of Rule 6.6 of the High Court Rules 2016 in cases where there are consequences for failure to comply with the notice.

## **6 Conclusion**

6.1 The Law Society does not wish to be heard, but is available to meet with the officials advising on the Bill if the Committee considers that this would be of assistance.



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