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By email: aml@justice.govt.nz

Tēnā koe Keeley,

Infringement fees for infringement offences under the Anti-Money Laundering and Countering Financing of Terrorism Act 2009

1. The New Zealand Law Society Te Kāhui Ture o Aotearoa is grateful for the opportunity to provide feedback on the Ministry of Justice's discussion document regarding the setting of infringement fees for specific infringement offences under the Anti-Money Laundering and Countering Financing of Terrorism Act 2009.

2. This submission has been prepared with input from internal Law Society staff and members of the legal profession. It provides some general comments regarding the proposed infringement regime, and responds to the four consultation questions in the Ministry's discussion document.

General comments

3. The Law Society generally supports the operation of the infringement fee regime in circumstances where criminal prosecution for a minor matter would not be in the public interest.

4. However, the new regime should not encourage the issuance of infringement notices for serious misconduct simply because it is administratively easier to do so rather than pursuing criminal or civil proceedings. We consider some of the types of conduct in proposed new section 115H to be of a higher level of seriousness and therefore inappropriate for the infringement fee regime – these include the failure to:

   a. designate an appointed AML/CFT compliance officer (section 115H(1)(d));

   b. undertake a written risk assessment (section 115H(1)(e));

   c. have an AML/CFT programme in writing (section 115H(2)); and

   d. provide information that the Department of Internal Affairs (**DIA**) reasonably requires for the purposes of an on-site inspection (section 115H(1)(l)).

5. Lawyers have also observed that in other infringement fee regimes (including the infringement regime set out in the Financial Markets Conduct Act 2013), strict liability often results in clients accepting infringement notices because the relevant infringement fee is not worth challenging. It is important to ensure this does not motivate the over-issuance of infringement notices in circumstances where other regulatory responses are more appropriate.

6. Some practitioners have also expressed concerns that the discussion document understates the effectiveness of public formal warnings as an enforcement tool. Public warnings are generally an effective deterrent and punishment. However, given the reputational effect of public warnings, we suggest clarifying whether, and on what basis, DIA intends to publish information regarding the issuance of infringement notices. Publishing them could in practice amount to a further penalty beyond the fee itself.

7. Finally, we note that issuing an infringement notice for failing to provide information requested for an on-site inspection could be of concern for lawyers in the context of privilege. It should be made clear that a good faith claim of privilege cannot form the basis of an infringement notice. The Law Society is also of the view that a dispute about whether information is privileged should not be resolved through the infringement process.

Q1. Do you agree with the assessment criteria for the fee matrix in Appendix One? Are there any factors that should be included or weighted differently from the matrix in Appendix One?

8. The Law Society does not agree that the projected volume of offending is an appropriate criterion for determining infringement fee levels, and it is unclear why the projected frequency with which an offence will be committed across the regulated population should affect the appropriate fee for an individual instance of that offence. In our view, the fee should principally reflect:

    a. the seriousness of the particular type of non-compliance;

    b. the harm or regulatory risk associated with it; and

    c. the amount necessary to provide an appropriate deterrent.

9. A high projected incidence of an offence does not necessarily make an individual breach more serious. Indeed, in some cases, a high incidence of non-compliance may indicate that an obligation is difficult to understand or comply with, rather than that a higher fee is warranted. We therefore consider the Ministry should either explain more clearly the rationale for, and intended operation of, the volume criterion, or reconsider whether it should affect the tier assigned to an offence.

10. Another factor that seems difficult to justify as a rationale for determining the amount of the infringement fee is the ease of establishing the offence. In our view, this is a factor that should go to whether or not the offence is in the infringements regime as a good subject for strict liability, rather than being used as an indicator of the actual amount of the penalty.

11. The methodology description also mentions the complexity of complying with each requirement as a contextual factor. It is unclear what impact that this had on the analysis

(noting it is not captured in the Infringement Scheme Decisions Matrix in Appendix One of the discussion document). We would expect this to be a factor that goes to decreasing the penalty, but weighed up against the severity of non-compliance.

Q2. Given the offences involved, do you think the proposed fees are proportionate to the seriousness of the conduct?

12. We consider that the proposed fee levels are generally proportionate. However, proportionality also requires that each offence is allocated to the appropriate fee tier. The seriousness and potential regulatory harm associated with the particular offence should be the primary determinant of that allocation. As noted in our response to Question 1, we do not agree that the projected volume of offending should materially increase the fee imposed for an individual infringement.

13. On that basis, we recommend reconsidering some of the proposed tier allocations. In particular, it is not clear why the record-production offences in sections 115H(1)(h) to (j), which are assessed as medium severity, are allocated to Tier 1, while other medium-severity offences are allocated to Tier 2 (see, for example, section 115H(1)(l)). Conversely, the proposed Tier 2 treatment of a failure to provide an annual report appears to be materially influenced by the projected high volume of that offence despite its low-medium severity. If seriousness and regulatory harm are given greater weight, that offence may more appropriately fall within Tier 1.

Q3. Do the proposed fees provide an effective deterrent for the offences they are attached to? Please explain why or why not.

14. Yes. However, it is important to recognise the considerable diversity in the size and resources of reporting entities. Reporting entities vary widely in size and resources, and range from sole practitioners and small accounting or real estate practices to large financial institutions. A fixed infringement fee will therefore be of different financial significance for different reporting entities, and will likely have a more disproportionate impact on smaller entities. We therefore recommend considering whether the infringement fees should be scaled by entity type or size, or whether lower fees should apply to first-time breaches.

Q4. What is your preferred option? Why?

15. Given the large number of small businesses that will be affected by the regime, the Law Society supports the lower level of fees in Option Two as a basis for setting infringement fees.

Next steps

16. The Law Society would welcome the publication of enforcement guidance to assist reporting entities with understanding how the enforcement regime operates, and to enable the consistent and transparent application of the infringement regime. This guidance should set out, among other things, the factors DIA will consider when choosing between an infringement notice, a formal warning, a public warning, an enforceable undertaking and civil or criminal proceedings.

17. We would also be happy to meet with you to discuss this feedback, or to answer any questions, if that would be helpful. Please feel free to get in touch via the Acting Manager Law Reform and Advocacy, Nilu Ariyaratne (Nilu.Ariyaratne@lawsociety.org.nz).

Nāku noa, nā



David Campbell
President