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Employment Standards Policy Team
Discussion document submissions
Ministry of Business, Innovation and Employment
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Strengthening Enforcement of Employment Standards

The New Zealand Law Society (Law Society) welcomes the opportunity to comment on the Ministry of Business, Innovation and Employment's discussion document *Strengthening Enforcement of Employment Standards* (discussion document).

The discussion document has been considered by the Law Society's national Employment Law Committee, and the Committee has answered specific questions where it has relevant information and expertise to contribute. The principal concern relates to Option 11 (permitting mediators to raise concerns about breaches of employment standards), as outlined in the response to question 26.

Sanctions for breaches of employment standards (Qs 9 – 17)

9. What is working well with the current sanctions regime? What is not working well?

The comparatively low number of prosecutions – against the relatively high number of reported breaches – suggests that the sanctions available are difficult to impose (presumably because of the time and resources involved). This results in the majority of those who breach minimum requirements having no realistic fear of suffering sanction. To remedy this, either the threshold for imposing sanctions should be lowered, or there should be other incentives to encourage compliance.

11. Should we extend the range of financial penalties available for breaches of the legislation? If so, what penalties do you think are appropriate?

As stated in the discussion document, the main aim of financial penalties is to deter unlawful behaviour and ensure there is no financial gain from non-compliance. The current maximum penalty levels are very low, and extending the range of available penalties should better achieve the purpose of the penalty regime.

12. Should other parties be able to seek penalties directly from the Employment Relations Authority, without needing to go through a labour inspector? If so, in what circumstances should this apply?

As a general rule, this would not be appropriate as it would entail individuals taking on the punishment and deterrence role that properly belongs to the state/regulator. There is a risk that some corporations or individuals would abuse an ability to commence penalty actions and would conduct such proceedings in an unreasonable or anti-competitive way or to pursue individual goals or grudges.

Identifying and investigating breaches of employment standards (Qs 18 – 27)

18. Should the requirements for record keeping be aligned across the different pieces of employment legislation?

Yes. The current position, with overlapping but different requirements (for example, in section 81 of the Holidays Act and section 130 of the Employment Relations Act) is confusing.

20. Do you have any additional suggestions for, or comments on, improving record keeping requirements?

Some simplification of the requirements would be desirable. It would also be useful to consider (and consult payroll companies about) how the requirements might align with computerised payroll systems. The experience of members of the Law Society's Employment Law Committee is that employers have the information about each employee but it is not kept in one place and cannot easily be produced upon request. (This is relevant also to Q33.)

26. Do you think that mediators should be able to raise breaches of employment standards with enforcement agencies if these breaches come to their attention in a confidential mediation? If yes, in what circumstances and how could the possible risks to the mediation process be managed?

Over the past 10 years, mediation has developed in New Zealand as a principal alternative to proceeding to trial.¹ There are an increasing number of statutory forms of mediation, and parties and lawyers are increasingly comfortable using mediation to resolve disputes.

Strict mediation confidentiality is afforded to parties in statutory mediation, in recognition that such protection plays an important part in encouraging disputants to engage in effective dispute resolution. It is important for litigants, lawyers and mediators engaging in mediation to do so with certainty and with the assurance that the rules of engagement in mediation will not result in satellite litigation or exposure to prosecution.

In New Zealand, Parliament has indicated on numerous occasions that the protection of confidentiality in mediation is an important principle – see for example:

- Family Proceedings Act 1980 (s 18 provides for only very limited exceptions to the bar on admissibility in court proceedings of information disclosed in the course of a mediation conference, including only evidence as to judges' records or a consent order);
- Residential Tenancies Act 1986 (s 89);
- Human Rights Act 1993 (s 88);
- Health and Disability Commissioner Act 1994 (s 61(5));
- Weathertight Homes Resolution Services Act 2002 (s 16) and 2006 (s 84);
- Lawyers and Conveyancers Act 2006 (s 143(5)); and
- Judicature (High Court Rules) Amendment Act 2008, Schedule 2, Part 7, R7.79 (although it is noted that at R7.79(7) there is express provision that this rule must be read with subpart 8 of Part 2 of the Evidence Act 2006 (privilege)).

This statutory background highlights the intention of Parliament to maintain the integrity of mediation. In a statutory mediation context, the public interest balance has already been clearly

¹ Indeed, lawyers assisting clients with the resolution of disputes now have a positive obligation to keep them advised of alternatives to litigation at any stage of the dispute: R 13.4, Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

struck in favour of maintaining mediation confidentiality, subject only to limited statutory exceptions such as consent of the parties, non-identifiable data for research purposes or disclosure to prevent danger to any person or property.

There are potentially many mediations in which parties may make admissions about actual or potential breaches of employment standards in the course of resolving an employment dispute. If the legislation is amended to permit an exception for breaches of employment standards, this will have the potential to undo the three cornerstones of mediation:

- confidentiality;
- without prejudice privilege; and
- mediator independence and neutrality.

This would undermine the value of mediation as well as increasing the likelihood of employers being reluctant to participate in the process, as is acknowledged in the discussion document at [28].

The Law Society submits that the overriding public interest is in the settlement of disputes by maintaining public confidence in the integrity of mediation as an effective dispute resolution process. There are other means by which enforcement agencies and parties can deal with breaches of employment standards and so there is no compelling public interest in using mediators for this purpose; certainly not sufficient to justify risking the strong public interest in settlement of disputes.

There is a real risk that the integrity of mediation would be fundamentally undermined by the proposal if it were to be enacted.

Improving compliance with employment standards (Qs 28 – 37)

33. Do you have any further comments on the provision of information, advice and education in the employment standards system?

The experience of members of the Law Society's Employment Law Committee is that employers (even large employers) are often unaware of their obligations under section 81 of the Holidays Act and section 130 of the Employment Relations Act. Most very seldom receive a request for a wage and time record and when they do, they do not have the information in one easily accessed place. It seems that their payroll suppliers (again often big providers of that service) also are unaware of the need to have the information in one readily accessible place. The Law Society considers that consultation and education would be useful.

We hope you find these comments helpful. If you wish to discuss the submission, the committee convenor, Michael Quigg, can be contacted through the committee secretary, Jo Holland (ph (04 463 2967/ jo.holland@lawsociety.org.nz).

Yours sincerely



Chris Moore
President