NEW ZEALAND LAW SOCIETY
NZLS EST 1869

Law Society Building, 26 Waring Taylor Street, Wellington,
DX SP20202, Wellington or PO Box 5041, Lambton Quay,
Wellington 6145, New Zealand

TEL +64 4 472 7837 • FAX +64 4 473 7909
E inquiries@lawsociety.org.nz
www.lawsociety.org.nz • my.lawsociety.org.nz

24 July 2015

Mutual Recognition Schemes
Productivity Commission
Locked Bag 2, Collins Street East
Melbourne Vic 8003
Australia

By email: mutual.recognition@pc.gov.au

Mutual Recognition Schemes – submissions re Commission's draft report

1. The New Zealand Law Society (**NZLS**) welcomed the opportunity to participate in the Mutual Recognition Schemes Roundtable in Wellington on 14 July 2015. As with our meeting with the Commission on 17 February 2015, we found the Roundtable to be a fruitful discussion.

2. Following on from the issues discussed at the Roundtable, the submissions below are made in response to selected aspects of the Commission's draft report of June 2015 which are relevant to the legal professions in Australia and New Zealand. In particular, our submissions respond to the Commission's draft position on:

   Mutual recognition of occupational registration
   a. 'shopping and hopping';

   b. background checks;

   c. applying continuing professional development requirements to everyone renewing their registration;

   Governance arrangements
   d. systems for ensuring that Ministerial Declarations are regularly updated;

   Facilitating cross-border service provision
   e. expanding automatic mutual recognition (**AMR**) to more jurisdictions and occupations;

   f. regulators' concerns about enforcement under AMR; and

   g. loss of revenue for regulators under AMR and possible need for new funding models.

3. In light of the prominence given to AMR in the Commission's draft report, our submissions address AMR-related issues not only under that separate heading but also in other areas of our submissions.

Shopping and hopping

4. Page 120 of the Commission's draft report defines 'shopping and hopping' as *"the practice of registering in the jurisdiction with the least stringent requirements and then using the MRA or TTMRA to move to a preferred jurisdiction, either within Australia or between Australia and New Zealand".*

5. For the reasons outlined in the submission of the New Zealand Council of Legal Education dated 24 February 2015, NZLS does not consider that this is a significant issue with regard to lawyers qualified in either Australia or New Zealand. NZLS is not aware of any evidence of shopping and hopping in this context and shares the view of the New Zealand Council of Legal Education that both Australia and New Zealand have similar standards for the registration of lawyers.

Background checks

6. As you would expect, thorough background checks are required before a person can practise as a lawyer in Australia or New Zealand. For Australian-qualified lawyers seeking to practise in New Zealand under the current regime pursuant to New Zealand's Trans-Tasman Mutual Recognition Act 1997, background checks are carried out by NZLS following an applicant's admission to the High Court of New Zealand and as part of any subsequent application for a practising certificate from NZLS. When seeking admission to the High Court, we note that applicants are required to make a statutory declaration that they are not the subject of any preliminary investigations or action that might lead to disciplinary proceedings nor the subject of any disciplinary proceedings.

7. If a "pure" form of trans-Tasman AMR were to be implemented, we assume the current two step registration process would be removed. This would affect the ability of the NZLS to carry out background checks. Any proposal for trans-Tasman AMR must ensure that thorough background checks have been carried out by a lawyer's home jurisdiction so that the host jurisdiction has confidence in the suitability of the visiting lawyer. This proved to be an issue in a recent decision of the Supreme Court of New South Wales in Comeskey v The NSW Bar Association[1].

8. If the concept of trans-Tasman AMR in relation to the respective legal professions of Australia and New Zealand were to develop further, consideration would also have to be given to whether a practitioner seeking to work on a temporary basis in either Australia or New Zealand ought to have a positive obligation to disclose to the applicable regulator in the host jurisdiction whether the practitioner had been the subject of any disciplinary proceedings post admission.

9. As noted in our submissions of 27 February 2015, New Zealand's Criminal Records (Clean Slate) Act 2004 prevents the disclosure of convictions in most circumstances if the individual satisfies the relevant eligibility criteria. The effect is that an individual is deemed to have no criminal record for the purposes of any question asked of them about their criminal record. NZLS is subject to this legislation. This would obviously have an impact for Australian regulators and consumers were New Zealand-qualified lawyers to practise in Australia under any trans-Tasman AMR regime. If trans-Tasman AMR with respect to the legal profession were to gain further traction, consideration may have to be given to the merits of legislative amendment of New Zealand's Clean Slate legislation with regard to persons seeking certificates of character and/or practising certificates from the NZLS. The relationship between the lawyer and client involves a high level of trust and often a client is vulnerable.

10. From 1 July 2015 there was a change to New Zealand's 'intervention rule' in relation to barristers sole. Previously, the position was that other than in very limited specified circumstances a barrister sole could not accept direct instructions from a member of the public but rather had to obtain instructions from an instructing solicitor. The new position is that a barrister sole may apply to the NZLS for approval to accept instructions directly from clients without an instructing barrister and solicitor, so long as that is not precluded by the particular forum or type of work. The application form requires the applying barrister sole to disclose any pending complaints or disciplinary matters, as well as any upheld complaints or

---

[1] *Comeskey v The New South Wales Bar Association [2015] NSWSC 824, 25 June 2015*

disciplinary matters. This process represents an additional layer of background checks. Australian-qualified lawyers practising in New Zealand as barristers sole are subject to the same requirements in this regard and would likely remain so if an applicable form of trans-Tasman AMR were to be implemented in the future.

Applying continuing professional development requirements to everyone renewing their registration

11. The NZLS continuing professional development (**CPD**) rules require lawyers practising in New Zealand to develop and maintain a written CPD plan and record, and to undertake the required hours of CPD activities (currently 10 hours per year). We understand that lawyers practising in Australia must likewise undertake 10 hours' CPD per annum, but are not currently required to develop and maintain a written CPD plan and record. The NZLS considers that if in the future Australian-qualified lawyers were able to practise in New Zealand pursuant to trans-Tasman AMR, they ought to have the same on-going CPD obligations as other lawyers practising in New Zealand. As the Commission notes at page 133 of its draft report, there is not a good argument for exempting people who gain registration under mutual recognition from ongoing requirements for CPD. Pages 132 and 133 of the Commission's draft report suggest that this issue is more applicable in Australia rather than New Zealand, given the draft report's observation at page 133 that New Zealand's mutual recognition legislation (apparently unlike the Australian equivalent) is clear that on-going CPD requirements can be imposed on renewal of a registration.

12. The position outlined above is consistent with page 165 of the Commission's draft report, which provides that *"The model of AMR described above is based on the principle that individuals comply with the requirements for carrying on an occupation in the jurisdiction where they are working, irrespective of where they gained occupational registration. This is also the case under the MRA and TTMRA"*. In the present context, that means that Australian-qualified lawyers practising in New Zealand pursuant to trans-Tasman AMR would have to comply with the regulatory regime that applies to all lawyers providing New Zealand legal services in this country such as the Lawyers and Conveyancers Act 2006 and the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

13. The NZLS notes the 'key point' contained at page 145 of the Commission's draft report, which provides that AMR *"is a more cost effective regulatory model for individuals who provide services across borders on a temporary or occasional basis than the current mutual recognition schemes. Where people are moving permanently to a new jurisdiction, however, it is reasonable to expect people to transfer their registration to their new place of residence"*.

14. The NZLS agrees with the latter statement. With respect to AMR and CPD, that might mean that Australian-qualified lawyers could practise in New Zealand on a temporary or occasional basis (upon notifying the NZLS and as long as they were compliant with their own jurisdiction's requirements[2]) without triggering New Zealand CPD obligations. But if an Australian-qualified lawyer were to practise in New Zealand on a more permanent basis, they ought to have to apply and obtain a practising certificate from the NZLS and comply with all local CPD requirements. The cost of relying on self-reporting can be high as demonstrated by the Comeskey case mentioned above.

Systems for ensuring that Ministerial Declarations are regularly updated

15. 'Ministerial Declaration' is defined in the Commission's draft report as *"A statutory instrument currently used in Australia to prescribe the equivalence of particular occupations. Ministers from two or more jurisdictions may jointly declare that occupations are equivalent, and may also specify or describe the conditions required to achieve equivalence"*.

16. New Zealand's Trans-Tasman Mutual Recognition Admission Regulations 2008 (**Trans-Tasman Admission Regulations**) provides a schedule recording equivalency of occupations for the purposes of Australian-

[2] See paragraph 26 (a).

qualified lawyers seeking admission to the High Court of New Zealand and practising certificates from the NZLS either as barristers or as barristers and solicitors. The Trans-Tasman Admission Regulations were prescribed by the New Zealand Council of Legal Education pursuant to section 274 (f) (ii) of New Zealand's Lawyers and Conveyancers Act 2006.

17. Schedule 3 of the Trans-Tasman Admission Regulations provides that, for the purposes of admission to the New Zealand High Court, lawyers admitted in each of the respective jurisdictions of Australia have equivalent occupations as their New Zealand-qualified counterparts. Regulation 15 of the Lawyers and Conveyancers Act (Lawyers: Practice Rules) Regulations 2008 provides for equivalency in relation to mode of practice – *Special rules for legal profession in Australia.*

18. Section 31 of New Zealand's Trans-Tasman Mutual Recognition Act 1997 provides for New Zealand's Minister of Commerce and a Minister(s) from an Australian jurisdiction to jointly declare that specified occupations are equivalent.

19. In relation to equivalent trades and professions generally, the NZLS notes the potential benefits recorded at pages 129 to 132 of the Commission's draft report of Ministerial Declarations being made and recorded in a central website. However, the NZLS also recognises the issues that can arise following such declarations becoming outdated due to a lack of regular updating (being an issue identified by the Commission in its draft report).

20. In relation to Australian-qualified lawyers seeking to practise in New Zealand, the NZLS considers that the New Zealand Council of Legal Education is well-placed to make on-going and timely assessments of equivalency for the legal profession.

Expanding AMR to more jurisdictions and occupations

21. The NZLS will follow with interest the possible expansion of trans-Tasman AMR and will be considering further the appropriateness of including the legal professions of Australia and New Zealand within any such framework.

22. We have not come across evidence of any difficulties with the present regime such as to justify a change. In relation to page 172 of the Commission's draft report, the NZLS considers that research will first need to be undertaken to identify whether or not:

    a. the existing regime in relation to the registration and licensing of lawyers seeking to practise on the other side of the Tasman gives rise to barriers to entry which have a material impact on the number and nature of lawyers seeking to practise outside of their home jurisdiction and in the host jurisdiction of either Australia or New Zealand; and

    b. there is sufficient demand by the respective legal professions in Australia and New Zealand for trans-Tasman AMR.

23. As noted in our submissions of 27 February 2015, to date there is more of a tendency for lawyers to move from New Zealand to Australia rather than the other way around. Our records indicate that in the period June 2002 to December 2014 the NZLS was notified that approximately 158 Australian-qualified lawyers were admitted in New Zealand pursuant to New Zealand's Trans-Tasman Mutual Recognition Act 1997. On average, that equates to approximately 13 lawyers per year.

24. Research may also be required to determine to what extent additional Australian lawyers might be likely to seek to practise in New Zealand (and vice versa) if a trans-Tasman AMR framework were in operation and what fields of work those lawyers would seek to practise in. The NZLS is unaware of evidence suggesting that the current two-step process is an impediment to Australian-qualified lawyers seeking to practise in New Zealand. The requirement for applicants to obtain a Certificate of Standing from the

applicable regulator in each State in which the practitioner has been admitted may be costly and time-consuming.

25. The NZLS notes the statement at page 145 of the Commission's draft report that a staged implementation of AMR is preferred. One possibility for a staged implementation would be to consider the necessity of the requirement for Australian-qualified lawyers to be admitted in the High Court of New Zealand, but to retain the requirement for Australian-qualified lawyers to seek and obtain a practising certificate from NZLS.

Regulators' concerns about enforcement under AMR

26. The NZLS identifies the following non-exhaustive list of issues (and potential solutions) that would need to be addressed prior to the formulation of any trans-Tasman AMR scheme for the legal professions of Australia and New Zealand:[3]

    a. The NZLS would have concerns if Australian-qualified lawyers were able to practise New Zealand law in New Zealand pursuant to AMR without the knowledge of the NZLS. Amongst other things, we consider that this could increase the risk to consumers of legal services; lead to consumer confusion; and impede the ability of the NZLS to investigate any complaints in relation to such service providers. In effect the privileges of a lawyer, and the special relationship with a client, the courts and the administration of justice requires some degree of oversight.

       Expanding on page 161 of the Commission's draft report, a requirement for Australian-qualified lawyers to provide notice to the NZLS that they are about to practise New Zealand law within New Zealand would deal with the issue of the NZLS being unaware of their presence. Equivalent obligations could be imposed on New Zealand-qualified lawyers seeking to practise in Australia.

       As an aside, we note that a person who is a member of the legal profession of a country outside of New Zealand may nevertheless provide in New Zealand legal services that concern either international law or the law of a country outside of New Zealand. This is permitted by section 25 of New Zealand's Lawyers and Conveyancers Act 2006. Such persons have no obligation to advise the NZLS of their practice in New Zealand. Australian-qualified lawyers may utilise the provisions of section 25 in relation to other than New Zealand law.

    b. Consideration would have to be given as to which regulator would be responsible for investigating complaints against lawyers providing legal services outside of their home jurisdiction. In circumstances where a lawyer has physically moved to the host jurisdiction to provide legal services, it seems appropriate that the regulator in the host territory ought to have jurisdiction. For example, if an Australian-qualified lawyer were to relocate to New Zealand (even if only on a temporary basis) to provide New Zealand legal services to New Zealand-based consumers pursuant to trans-Tasman AMR, the NZLS would likely be the appropriate regulator to investigate complaints against the visiting lawyer.

       The position is arguably less clear in circumstances where a lawyer is providing legal services remotely. For example, if an Australian-qualified lawyer were to provide New Zealand legal services to New Zealand-based consumers pursuant to trans-Tasman AMR while remaining physically present in Australia throughout, would the appropriate regulator in respect of complaints be the NZLS or rather the regulator from the jurisdiction in which the lawyer had been admitted and was physically based? The preliminary view of the NZLS is that, in such circumstances, the NZLS would be the appropriate regulator given that the consumers would be based in New Zealand and that compliance with New Zealand laws and regulatory requirements

[3] See also paragraphs 7-10, 11-14 and 24-25.

would be at issue.[4] This would be consistent with current practice. However, there needs to be clarity about this point.

The NZLS considers that disciplinary decisions of NZLS Lawyers Standards Committees (together with the other disciplinary bodies in New Zealand in relation to the legal profession) would have to be easily enforceable in Australia. This is because a disciplinary decision in New Zealand would have little force if a lawyer were to return or relocate to Australia without the New Zealand disciplinary decision being capable of ready enforcement in Australia. The same issue potentially arises in relation to lawyers practising in Australia who might return or relocate to New Zealand. Were the case to be otherwise, consumers of legal services in both Australia and New Zealand would be placed at undue risk. NZLS Standards Committees (and other disciplinary bodies) may have to be specified in Australian regulations as recognised tribunals with adjudicative functions so that their decisions can be readily enforced in Australia.

c. The ability to enforce disciplinary sanctions on either side of the Tasman ought to be more straightforward given the coming into effect in October 2013 of the Agreement on Trans-Tasman Court Proceedings and Regulatory Enforcement. The New Zealand legislation that gives effect to this agreement (the Trans-Tasman Court Proceedings Act 2010) is administered by New Zealand's Ministry of Justice. It was noted at the Roundtable meeting the interest of the Commission in that Act. The Commission may wish to discuss the frequency of use of that Act with the New Zealand Ministry of Justice. We understand that the appropriate person to contact is David King in the Policy Division of the Ministry.

Loss of revenue for regulators under AMR and possible need for new funding models

27. The NZLS notes that there may be a financial impact for regulators on both sides of the Tasman if regulators in the host jurisdiction were responsible for investigating complaints against visiting lawyers practising under trans-Tasman AMR. This is because under a pure form of AMR the foreign-qualified lawyer would not have to pay for a practising certificate from the regulator in the host territory. The extent of this financial impact would depend on the level of uptake by lawyers of any future trans-Tasman AMR arrangements and the number and nature of complaints against lawyers practising outside of their home jurisdiction. The cost of intervention where a practitioner does cause difficulty can be very high and in most cases there is little chance of recovery from the lawyer involved. The state provides no funding to the regulation of the New Zealand legal profession.

Patent Attorneys

28. A small percentage of New Zealand-qualified lawyers are also patent attorneys registered with the Intellectual Property Office of New Zealand. NZLS made submissions on the trans-Tasman regulation of Patent Attorneys in June 2011 to the former Ministry of Economic Development and remains willing to address this issue further if required.

Concluding comments

29. The NZLS thanks the Commission for its work in reviewing the operation of the Trans-Tasman Mutual Recognition Arrangement between Australia and New Zealand. If required, we are happy to clarify any aspect of our submissions and to provide further details. We look forward to reviewing and considering the Commission's final report in due course.

Yours faithfully

Mary Ollivier
General Manager - Regulatory

[4] See also paragraph 12.