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Dear Ross

Employment mediation services change proposal

Thank you for giving the New Zealand Law Society (Law Society) the opportunity to comment on MBIE's *Employment mediation services change* proposal (proposal). The extension of time to review the MartinJenkins report, released to us on 26 January 2016 under the Official Information Act 1982, is also appreciated.

The Law Society sought input on this matter from its members via its national Employment Law Committee and Branches in regions throughout New Zealand, and through the *LawPoints* weekly e-bulletin that goes to approximately 12,000 lawyers nationwide.

The Law Society supports proposals to improve consistency and the extension of the mediation services to locations where mediation services are not currently provided. Prompt, locally provided mediation services are fundamental to resolving employment disputes effectively and efficiently and ensuring equitable access to justice.

A number of practitioners, particularly those practising in Otago, Manawatu, Bay of Plenty, Gisborne and Hawke's Bay, are concerned at the proposed loss of local offices and permanent mediators in these areas. Practitioners advise that mediators provide excellent services and consider that the mixed-model contracting proposal risks reducing mediation services rather than enhancing them.

The Law Society understands the detailed design of the service is still to be developed. Fit for purpose design, together with robust service delivery and quality standards, and contract management are vital to ensure quality of service and availability of staff. The following comments are provided to assist in the development process, should the proposal go ahead.

MartinJenkins Report

A review of the MartinJenkins Report suggests that some of the base information relied upon is at odds with practitioners' experiences. The methodology relied on understandably has limitations, for example the calculation of *"half day equivalent mediations"*. These limitations may account for some of the differences of view. It is important to avoid putting too much weight on some of the extrapolations of information relied on in the MartinJenkins Report. This is not a criticism of MartinJenkins. But the absence of sound, accurate up-to-date data means there is a need to move carefully to ensure the problems have been accurately identified prior to seeking solutions.

Use and availability of specialised mediators

Question 7 of the Questions and Answers (Q&A) document states that "MBIE's research has shown there are skilled, locally based practitioners that may be interested in delivering employment mediation services". However, it also acknowledges that the "quality, along with the supply of contractors needs to be further tested."

The Law Society is keen to ensure that contracted mediators with skills, knowledge and experience of employment mediations and legal principles are utilised, particularly in the centres that will not be serviced by permanent MBIE employees.[1] Practitioners' experience is that mediators without such skills and experience struggle to be effective. This may result in fewer settlements and lead to greater expense, both for MBIE and the parties, as more cases will be pursued before the Employment Relations Authority.

This may be addressed through the use of minimum requirements for appointment to a contracting panel and ongoing monitoring against performance standards. Care must be taken to ensure that the contracting and funding model encourages sufficient numbers of contract mediators in each region. The model must guard against real and perceived conflicts of interest, which may be an issue if there is a limited pool of local contractors. Parties may not have confidence in the mediator's independence if they are to be permitted to operate as both advocates/representatives and mediators in any particular region. The model must also enable *effective* mediation. Practitioners advise that currently mediators routinely work out of hours and office to reach settlement, often in difficult circumstances.

There is a real risk that moving away from employed mediators may result in a reduced level of service, particularly if contractors are incentivised (e.g. through the use of flat fees) to conclude mediations quickly.

High profile / complex mediations

The Law Society has concerns that contracting mediators from outside the region to deliver high profile/complex employment mediations may negatively impact availability, cost and quality for local clients. A significant number of matters dealt with by regional centres could be categorised as "complex" including those dealing with sleepover allowances, urgent reinstatement claims, medical termination cases, and restraint of trade disputes, in addition to the industrial action and collective

[1] As an example, technical provisions relating to minimum entitlements, certification, written recommendations and binding decisions under ss 148A, 149, 149A and 150 of the Employment Relations Act 2000 can have significant effect and mediators must be well-trained in their use, particularly where parties are not legally represented.

bargaining matters mentioned in the Q&A document. Allocation of work along these lines may lead to a two-tier central/regional system as local contractors will not be viewed as having sufficient experience of complex mediations and they would be unable subsequently to gain such experience.

Consistency of process and practice

The Law Society supports proposals to ensure consistency of process and scheduling practices across the country. It would be helpful if this could include the practice of mediators signing off Records of Settlement which have already been signed by the parties prior to submitting to the mediation service, to avoid settlements 'falling over' due to delays in completion. It is also important to ensure consistency in mediation practices, particularly if the number of mediators increases as a result of the proposal. Developing robust service delivery and quality standards for the mediation service and mediator training will be vital.

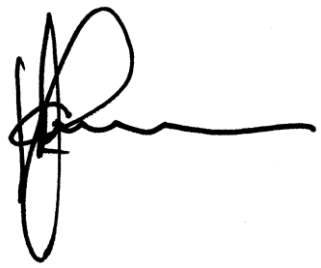
Timeframe

In light of the issues identified, the proposed timeframe of decision-making by mid-March 2016 with a phase-in period of up to 12 months may not be sufficient to include robust testing of the model before implementation. The Law Society recommends trialling the model in one or more regional centres prior to a national roll-out.

Conclusion

The Law Society hopes these comments are of assistance. The national Employment Law Committee would be available to provide further assistance as the review progresses. The convenor, Michael Quigg, can be contacted via Karen Yates, Legal Officer, on 04 463 2962, karen.yates@lawsociety.org.nz.

Yours faithfully



Chris Moore
President