

# Lawyers and Conveyancers Bill

23 May 2003

Attorney-General

## **Lawyers and Conveyancers Bill, [PCO 3840/25] Our Ref: ATT114/1048(21)**

1. I have considered the above Bill for consistency with the New Zealand Bill of Rights Act 1990 ("BORA") and can advise that in my view none of its provisions appear to be inconsistent. I understand that the Bill is to go before the legislation Cabinet Committee on 12 June 2003.
2. In considering the BORA-consistency of the Bill two issues arose which I thought it desirable to draw to your attention:

2.1 Limitation as to members or business entities entitled "Legal and/or Conveyancing Services".

2.2 Certain restrictions on spouses and relatives to practitioners.

### **Limitation as to members of business entities entitled "Legal and/or Conveyancing Services"**

3. Under the Bill lawyers and conveyancers will be able to provide their professional services through a number of different business entities. But restrictions are placed on the persons with whom they can associate in order to be able to provide those services. In particular:

3.1 Clause 7(3) provides that a lawyer is guilty of misconduct if he or she shares with any person other than another lawyer the income from any business involving the provision of regulated services to the public;

3.2 Clause 7(4) provides a conveyancing practitioner is guilty of misconduct if he or she shares with any other person other than a conveyancer the income from any business involving the provision of regulated services to the public;

3.3 Clause 8(2) provides that a lawyer-employee is guilty of misconduct who provides regulated services other than in a number of partly circumscribed employment relationships (under which being an employee of a conveyancing practitioner is not allowed); and,

3.4 Clause 8(3) provides that a conveyancer-employee is guilty of misconduct if he or she provides regulated services to the public other than as an employee for a conveyancing firm, a law firm, a trustee company, Public Trust, etc.

It is important to note that under the Bill it will not be possible for either lawyers or conveyancers to provide regulated professional services to the public through multi-disciplinary partnerships ("MDPs").

4. Section 17 BORA provides that "everyone has the right to freedom of association." On one view of it, s 17 might be interpreted as not applying to the ability of persons to pursue their professional trade in association with persons of a different professional trade: see eg *Lewis v Real Estate Institute of New Zealand* (1995) 3 HRNZ 436, 446 (CA). However, for the purposes of this advice I have assumed that the prohibitions on lawyers and conveyancers being able to form business relationships and enterprises with non-lawyers and non-conveyancers is a *prima facie* infringement of s 17 BORA, because, in any event, it is my view that the restrictions imposed are reasonable in terms of s 5 BORA.

5. Section 5 BORA provides as follows:

### **"5 Justified limitations**

Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

6. While the proper approach to s 5 BORA is somewhat unsettled, this office has consistently taken the view that the essence of the s 5 analysis is to be found in the judgment of Richardson J in *MOT v Noort* [1992] 3 NZLR 260, 283 (CA):

"In the end an abridging inquiry under s 5 is a matter of weighing:

1. The significance in the particular case of the values underlying the Bill of Rights Act;
2. The importance in the public interest of the intrusion on the particular right protected by the Bill of Rights Act;
3. The limits sought to be placed on the application of the Bill of Rights Act provision in the particular case; and
4. The effectiveness of the intrusion in protecting the interests put forward to justify those limits."

This passage emphasises that the assessment under s 5 BORA must be a nuanced and context-specific one.

7. Ministry of Justice officials have indicated that the Government considers that a move to legalising the ability of lawyers and conveyancers to participate in MDPs would be inappropriate and contrary to the public interest at this time. Officials have noted that recent accounting and other scandals have emphasised the importance of effective professional regulation and the need

for clarity in how regulatory control is to be asserted. In the particular context of lawyers and conveyancers the Government is concerned about the risks that MDPs might pose to the ability of lawyers to provide clients with the usual protections that are an essential part of the lawyer-client relationship. In particular, there are concerns relating to the influence that could be exercised by persons who are not subject to the same professional obligations within a firm in which lawyers or conveyancers are operating. For this reason, Government has decided that regardless of the business form adopted by lawyers and conveyancers as the means through which to practice their profession (eg partnership, incorporated law firm, company), control of the business entity must lie with lawyers/conveyancers as the case may be.

8. The services provided by lawyers and conveyancers are intimately connected with the administration of justice and involve the undertaking of work on behalf of clients where utmost loyalty, confidence and disinterest are required. The law on lawyers and conveyancers' fiduciary duties have consistently emphasised this. In the circumstances, and bearing in mind the recent experience of other jurisdictions where concerns have arisen in respect of the effective regulation of MDPs, it seems to me to be reasonable to allow Government a margin of appreciation that reflects a precautionary approach to how lawyers and conveyancers practice their professions.
9. In this regard, I note the recent decision of the European Court of Justice in *Wouters v Algemene Raad Van de Nederlandse Orde van Advocaten*, case C-309/99, 19 February 2002. In that case, a challenge was brought by members of the Dutch Bar against a prohibition on multi-disciplinary partnerships between members of the Bar and members of the accountancy profession. The basis for the challenge was that the prohibition was contrary to provisions protecting the association of undertakings and was a restriction on competition. In the course of its judgment upholding the prohibition, the European Court of Justice considered submissions that would be similar in nature to those that will be advanced as freedom of association-inspired submissions. The Court concluded that prohibitions on MDPs could be reasonably considered to be necessary in order to ensure the proper practice of the legal profession, where the legal obligations on a legal professional include duties to act for clients in complete independence and in their sole interest and to avoid all risk of conflict of interest and observe strict professional secrecy. In addition, I would note that the prohibition on lawyers and conveyancers outlined above do not prohibit lawyers and conveyancers from associating with other professionals through other means such as project teams and so on; all that is prohibited are integrated structures involving the sharing of profits, decision-making power and final responsibilities.

### **Certain Restrictions on Spouses and Relatives to Practitioners**

10. Clause 102 of the Bill allows the Governor-General to make regulations relating to trust accounts. Those regulations may prohibit or regulate the collection of money of a client by a class of person connected to the lawyer or regulating the lending of money of a client by a class of person connected with a practitioner as well as borrowing, etc (see eg clause 102(b)-(d)). In turn,

clause 103(1)(a)(i) defines the term "class of person connected with a practitioner or incorporated firm" to include, in relation to a practitioner, "a spouse or child of the practitioner". In short, clause 102 read together with clause 103(2)(a)(i) empowers regulations to be made that may place restrictions on the ability of a practitioner's spouse or children to borrow, receive or lend money to the practitioners' client. In this way the Bill would allow persons to be treated differently from others by reason of their family status. However, bearing in mind the clear purpose of such regulations, ie protecting clients against behaviour by practitioners that may put the interests of the practitioners' family ahead of those of the client, in principle the power to make such regulations appears to be justified. I would observe, however, that any regulations made under clause 102 would have to be made in such a way as not to unreasonably discriminate against a practitioner's family members (see *Drew v Attorney-General* [2002] 1 NZLR 58 (CA)).

Yours sincerely

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