

**PUBLIC ISSUES COMMITTEE  
LAWYERS AND CONVEYANCERS ACT 2006  
CLIENT CARE REGIME**

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The Committee was formed to encourage its members to consider and comment on public issues, for the public benefit, it is hoped, particularly public issues with a legal element. The Committee’s standing must stem solely from the quality of the papers it releases and the comments it makes.

If a précis or abstract of this paper is published, or reference made to its content, please advise your readers that the full text of the paper issued by this Committee will be available at the Auckland District Law Society’s Internet website:

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**Discussion Paper – Overview**

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*The recent reforms of the Lawyers and Conveyancers Act and the role(s) of the Law Society raises issues of public importance. The new system seems to provide a regime for the perfect lawyer acting for the perfect client. This is not reality. The Auckland District Law Society's Public Issues Committee has identified aspects of the Lawyers and Conveyancers Act and the Client Care Rules which practitioners are urged to consider. The Public Issues Committee would like feedback from practitioners as to whether they believe any of the provisions of the LCA or Client Care Rules are unworkable or unfair to clients, lawyers, or members of the public generally, and may discriminate unjustly between members of the Society.*

*The Public Issues Committee is particularly interested in hearing the opinions (both positive and negative) of practitioners on the merits of the new client care regime.*

*All practitioners are urged to consider the issues raised in that list as a matter of some priority. If you want to voice your opinion please do so as soon as you can. You may communicate to the ADLS Public Issues Committee at c/- P O Box 58, Auckland or by email to [Melissa.Perkin@adls.org.nz](mailto:Melissa.Perkin@adls.org.nz).*

## **BEST PRACTICE STANDARDS OF CLIENT CARE – BOON OR BURDEN FOR LAWYERS AND THEIR CLIENTS?**

### **(1) Benefits of adopting a best practice approach to client care:**

- **Focuses lawyers' minds on:**
  - The benefits of ensuring that their services meet their clients' needs and expectations;
  - The need to explain their client care obligations/terms of engagement to clients (rr 3.4-3.5 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 ("CCC") and s 94(j) of the Lawyers and Conveyancers Act 2006 ("LCA");
  - The need to clearly explain to their clients the nature of the services that will be provided to them;
  - How fees will be charged;
  - The need to communicate regularly with their clients.
  
- **Development of best practice management systems – the new regime gives lawyers the opportunity to:**
  - Monitor in-house practices to ensure that all staff fully comply with the client care regime in the LCA and CCC;
  - Make changes to practice if any lawyer/law firm is non-compliant;
  - Conduct regular "in-house" risk assessments;
  - Ensure that they adapt to changing nature of risk – especially if new legislation is passed – new case law imposes new risks/responsibilities on lawyers (i.e. the upcoming money laundering legislation is a case in point);
  - Monitor changes to the law which impact on precedent documents (e.g. precedent documents will need to be monitored and updated to take law changes into account);
  - Develop document/file management systems to ensure that client documents are retained, that proper track is kept of the progress of the client's case/matter, and that documents are not distributed in breach of the Privacy Act;
  - Develop detailed bills of costs precedents (a lack of precision and detail in bills of costs/invoices may render lawyers vulnerable to disciplinary proceedings especially if a complaint on this issue is coupled with an unsatisfactory conduct/misconduct allegation under ss 7 or 12 LCA – eg, overcharging or failure to communicate nature of bill/services to client).
  - Ensure that all disbursements are itemised in detail;
  - Strictly monitor client debt levels – (credit management policies may have to be introduced aimed at ensuring that unpaid fees are collected in an efficient and timely fashion –

especially to ensure that outstanding fees do not exceed the \$2,000 threshold which, when reached, confers jurisdiction on the Standards Committee to deal with complaints over bills of costs: reg 29 Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standard Committees) Regulations 2008);

- Develop an internal complaints system (r 3.8 of the CCC) for the purpose of enabling lawyers to resolve problems with their clients before they escalate into complaints to the Standards Committees;
- Train and upskill staff by:
  - Developing office procedure manuals (checklists for compliance may need to be developed and updated as necessary);
  - (If it has not already been done), training existing staff to comply with the new regime;
  - Providing necessary ongoing staff training as the nature of the regime and the circumstances in which the LCA and CCC can be breached become clearer;
  - Providing induction programmes for new staff to ensure that those staff are familiar with the LCA and CCC and the in-house procedures for complying with the LCA and CCC (it may be that a recent graduate will need to be upskilled as part of a new staff induction programme – eg, the training provided by professional legal studies courses, may not be sufficient to ensure compliance with the new regime – there may be a need to introduce compulsory pupillage for new barristers and to introduce articulated clerkships for new solicitors);
  - Training and monitoring of staff at all levels (in-house Continuing Legal Education (“CLE”) programmes may need to be developed and tailored to meet the needs of lawyers, legal executives and support staff in particular law firms - existing CLE courses provided by the Law Societies may not meet the needs of law firms and may not be available when needed).

**(2) The costs of a best practice approach:**

**• The above practice management systems will take time and money to develop and implement:**

➤ **Increase in overheads**

- Paper costs (need to print Client care/terms of engagement documents);

- More time taken to explain the CCC regime to clients;
- More CLE costs;
- More staff training;
- More staff supervision time.
- **lawyers forced to pass those costs on to their clients**
  - Compliance costs will need to be built into lawyer's fees – it may be difficult for small firms to absorb these costs – they may be forced to pass on the costs to their clients – the result may be an increase in lawyers fees;
- **Disincentive to undertake legal aid work**
  - Legal aid is already a bone of contention – the extra time/costs imposed by the client care regime will not be reflected in legal aid payments – a further disincentive to take legal aid cases.
- **Costs of determining what is a reasonable fee:**
  - Gauging what is a reasonable fee – careful costing of the components of a fee may have to be done – this will take time – there is no benchmarking of "reasonable fees" at present.
- **Costs of Internal complaints procedure:**
  - Internal complaints procedure – lawyers will need to develop one (if they have not done so already) – and spend time implementing it – cost of time spent in attempting to resolve complaints this way could be considerable;
  - One lawyer paying another to be a complaint resolving body – conflict of interest issues raised (even if the lawyer is not paid) – potential problem even greater if the lawyer is paid;
  - Will lawyers be willing to give up their own time to assist colleagues with internal dispute resolution?;
  - Insurers - danger that admissions made during internal complaints procedure may infringe the terms of a lawyer's professional indemnity insurance ("PI insurance") – care may need to be taken to avoid this potential problem;
  - Insurers may want some control over the way an internal dispute resolution system is operated and the way in which complaints are handled – lawyers may need to consult their PI insurers on this issue.

### **(3) The consequences of failing to comply with best practice standards**

- It will not be difficult to be found guilty of unsatisfactory conduct – even minor breaches of the LCA and CCC can be unsatisfactory conduct under r 12 of the LCA;
- Double jeopardy in cases where fines/compensation awarded – note s 156(4) of the LCA, which enables complainants to pursue

- complaints in the Courts in addition to the complaints that they have made to the Standards Committee;
- Section 156(4) may allow fines or compensation awards to be used to fund Court litigation against lawyers;
  - It will be possible for lawyers to breach the CCC when dealing with non-clients – eg, r 2.3 can be breached if documents are served “in a way that causes unnecessary embarrassment or damage to the person's reputation, interests, or occupation”;
  - Provision of PI insurance to some lawyers may be affected if clients use complaints to the Standards Committees as a dry run for later successful Court action;
  - The lack of an effective costs revision provision in the LCA and CCC may encourage some clients to bring misconduct or unsatisfactory conduct complaints on the basis of overcharging against lawyers as a pretext for seeking an order for the reduction, cancellation or refunding of their lawyers’ fees;
  - Costs can be imposed on the lawyer regardless of the merit or otherwise of the complainant’s case - s 157(2) of the LCA;
  - Potentially serious consequences of unsatisfactory conduct finding – (eg, some lawyers may find it difficult to meet the cost of fines, costs awards or compensation awards);
  - Other orders may cause difficulty (eg, practical training/education requirements (s 156(1)(m) LCA) may be difficult to readily comply with);
  - The Standards Committees have inquisitorial powers – this may enable them to require lawyers to make admissions that breach the terms of their professional indemnity insurance policies;
  - Professional indemnity policies may not cover the cost of fines and professional disciplinary sanctions;
  - Potential impact on availability/amount of excess in relation to professional indemnity insurance if findings of unsatisfactory conduct/misconduct made.

**(4) Do the LCA and CCC provide lawyers with adequate/effective protection from frivolous or vexatious complaints – potentially difficult types of client?**

- Section 138 of the LCA enables the Standards Committees to decline to consider complaints if they are trivial or frivolous or vexatious or not made in good faith;
- Some lawyers may be particularly vulnerable – (eg, mental health lawyers; Police Detention Legal Assistance Lawyers (PDLA); Duty Lawyers; Lawyers who do pro-bono and “one off” work for clients or who give advice over the telephone (however r 3.7 of the CCC may afford these lawyers with limited protection from claims that they have failed to comply with rr 3.4 and 3.5 of the CCC);
- The efficacy of these protections may be limited because:

- It may be difficult for Standards Committees to be certain whether a complaint is frivolous/vexatious until they have had time to consider the complaint and the lawyer's response to it – resulting in much time wasting;
- Some clients may be peculiarly disposed to making complaints – eg, prison inmates with time on their hands; mental health patients;
- Lawyers will have no way of knowing whether certain new clients are prone to attack their lawyers if they do not get the exact result that they are looking for, or if new clients are unreliable but will blame their lawyers if deadlines/limitation periods are missed;
- It may be difficult for lawyers to tell whether some clients (a) have understood the nature of the new terms of engagement/code of client care documents, or (b) have taken the time to read them – especially the elderly, those who do not speak English, or who do so as a second language, the illiterate;
- It may be difficult for Standards Committees to be certain whether a lawyer's actions fall within r 3.7 until they have had time to consider a complaint and the lawyer's response to it.

**(5) Some lawyers may be discouraged from taking on certain kinds of work or dealing with certain types of client**

- It may well be that lawyers will be reluctant to undertake voluntary/pro bono work (e.g. Citizens Advice Bureau work) or to give emergency advice to casual clients over the telephone – if pro bono clients start to lodge complaints with the Standards Committees, lawyers are unlikely to have much enthusiasm for providing “public services” – the viability of this branch of legal service may become threatened.

**(6) Falling foul of the new regime – will all lawyers be equally vulnerable?**

- Large and wealthy firms will have the resources to provide the best practice standard of client care service envisaged by the LCA and CCC – many small firms and sole practitioners will not;
- Large and wealthy law firms are less likely to deal with the mentally ill, criminals, pro-bono clients - and even if they do deal with such clients, they are likely to be able to easily absorb the cost of fines and compensation orders that may result from complaints made by such clients – small firms or sole practitioners may not be able to absorb such costs;
- Large firms will be able to afford professional indemnity insurance that protects them from the full impact of complaints;

- The cost of PI insurance is set to rise – this is likely to put financial pressure on some small firms/sole practitioners/barristers;
- Some legal aid lawyers/small firms/sole practitioners may not be able to afford professional indemnity insurance – this is a serious issue;
- Orders to undertake practical training/further education –if the amount of remedial training will take a significant amount of time/cost a significant amount of money - how will a small practitioner comply without having to shut up shop? – employ a locum?;
- In this difficult economic climate an order from a Standards Committee may well drive some smaller lawyers out of business.

**(7) Development of a “have and have not” legal profession – and “have and have not” clients?**

- The result may well be the development of a two tier legal profession, for example:
  - elite and well resourced firms which are easily able to adopt a best practice approach to client care – they will also be able to absorb the cost of any fines imposed on them or compensation orders made against them;
  - less well resourced lawyers who may struggle to comply with the LCA and CCC due to insufficient resources – they may struggle to pay fines/compensation orders;
- Some competent lawyers may be unable or unwilling to practice if they become uninsurable as a result of their being unable to harness the resources needed to protect themselves from the risk of client complaints;
- Some lawyers may be unable to pay for PI insurance if premiums rise as a result of the increased risk of lawyer liability under the LCA and CCC;
- Smaller firms and sole practitioners may well be forced to become risk averse - a climate of distrust between such lawyers and some of their clients may develop;
- Whether or not the drafters of the LCA and CCC intended the new regime to have this effect, it may be that the LCA and CCC will operate as a sorting mechanism that will weed out small operators;
- Some clients may find it difficult to access legal advice if smaller operators are forced out of business – clients who are not wealthy will not be able to pay for the services of elite law firms.

**(8) Who will monitor the impact of the LCA and CCC on the profession and the public and provide lawyers with support to ensure that they are readily able to comply with the LCA and CCC?**

- The new representative arm of the New Zealand Law Society (“NZLS”) and the Auckland District Law Society (“ADLS”)?;
- Given the fact that membership of the representative arm of the NZLS and the ADLS will be voluntary, it would be in the interests of these bodies to offer services and support to potential members that would give them an incentive to “join up”;
- These organisations already supply CLE programmes and other benefits to their members;
- Should the range of services that they provide be expanded – and, if so, what expanded services could/should be provided? - for example:
  - greater CLE availability; advice and support that goes beyond that provided by informal “friends panels”;
  - providing guidance to lawyers on charging of “reasonable fees”;
  - providing fee benchmarking;
  - monitoring of the positive/negative impact that the LCA and CCC may have on lawyers’ ability to continue to practice and the positive/negative impact that the LCA and CCC may have on lawyer-client relationships;
  - lobby the Government if aspects of the LCA and CCC prove to be impractical/counterproductive/difficult or impossible to comply with;
  - provide support and resources for the introduction of pupillage and articled clerkships;
  - provide lawyers with information about clients who make a habit of defaulting on bill payments/make frivolous or vexatious complaints to the Standards Committees.

**(9) Conclusion**

- This paper has identified aspects of the LCA and the CCC which are arguably unworkable or unfair to clients and the public generally, and of course which might discriminate unjustly between and for members of the ADLS. For this reason the efficacy of the LCA and CCC is an important issue that should be of concern to the lawyer and the public alike.