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Business Law
Building, Resources and Markets
Ministry of Business, Innovation & Employment
Wellington

By email: corporate.law@mbie.govt.nz

Increasing the Transparency of the Beneficial Ownership of New Zealand Companies and Limited Partnerships – Discussion Document

The New Zealand Law Society welcomes the opportunity to comment on MBIE's June 2018 Discussion Document: *Increasing the Transparency of the Beneficial Ownership of New Zealand Companies and Limited Partnerships* (Discussion Document). The Law Society's responses to the Discussion Document questions are set out below.

1. *Do you agree with the nature of the problem? Do you have any views on the size of the problem? Do you have any evidence to support these views?*

Yes. The Law Society agrees with the problem identification set out in parts 2 and 3 of the Discussion Document, namely that the absence of a requirement for transparency about the ultimate owners/controllers of companies in New Zealand could assist criminal activity such as money-laundering, and that the existing tools to access beneficial ownership information are insufficient. The Law Society has no information about the size of the problem.

2. *What do you think are the benefits from increased transparency of beneficial ownership information?*

As stated in the Discussion Document,¹ the benefits of increased transparency of this information are criminal deterrence, meeting international standards and (in the case of option 3) supporting the AML/CFT system.

3. *Do you have any information on your organisation's current compliance costs to supply or collect beneficial ownership information? Do you think your compliance costs would increase, decrease or stay the same under the different options? Would the change be significant?*

The Law Society has no direct information, but assumes that for the significant majority of organisations it is likely compliance costs would be only marginally increased.

¹ See Discussion Document at paragraph 101.

4. *What impact do you think the options would have on businesses deciding whether to register as a company or limited partnership?*

It is likely there would be minimal impact. There are usually a number of business reasons for using a particular form of organisation, and the benefits derived from doing so would likely outweigh any potential drawbacks associated with increased requirements around disclosure of beneficial ownership information.

5. *Do you have any comments on our preliminary assessment of the options?*

The assessment of the three options, set out in part 4 of the Discussion Document, seems accurate.

6. *What is your preferred option?*

The Law Society does not express a preference, but notes that Option 3 would likely be the most effective of the three options. Under option 3, corporate entities would be required to identify their beneficial owners, keep that information up-to-date and provide it to the Registrar of Companies. The information would be publicly available on the companies and limited partnership registers.²

7. *What are your views on who should be captured as a beneficial owner of a corporate entity?*

The Law Society considers that the UK's "person with significant control" test and terminology should be used if this regime is to be implemented.³ It is clear, and the term "person with significant control" is easier to understand and more accurately reflects the concept than the term "beneficial owner". Preferably, the AML/CFT Act and other legislation and regulation that uses the term "beneficial owner" would be replaced with "person with significant control" as part of any change in this area of law. Consideration may also need to be given to whether the thresholds in this regime, the AML/CFT regime and the Takeovers Code (20%) ought to be aligned.

8. *What information do you think should be collected about beneficial owners?*

The list proposed in the Discussion Document seems appropriate:⁴

- a. full legal name
- b. residential address
- c. address for service
- d. email address
- e. date and place of birth
- f. the basis on which they are a beneficial owner (eg owns/controls more than a certain percentage of the shares; right to appoint and remove directors).

² Ibid, at paragraphs 73 and 74.

³ Annex 1, at paragraphs 4 – 16.

⁴ At paragraph 111.

9. *What information about beneficial owners do you think should not be publicly available, and in what circumstances?*

The Law Society suggests that the following information should be kept private: residential address, email address, and date and place of birth.

We agree that there should be circumstances where all of a person's information is kept private, including the example given in the Discussion Document (a serious risk of violence or intimidation).⁵ A useful addition would be to have a general provision, where information can be kept private where its disclosure would present a serious risk to personal safety (as determined by the Registrar on review of submissions from the person).

There are existing precedents for this approach. Several New Zealand public registers allow for suppression of details from online publication where there is a protection order in place (for instance the electoral roll, and the motor vehicle register). Under section 115 of the Electoral Act 1993, the name and certain other details of a person may be exempted from publication on the roll, or from inspection, if the Electoral Commission is satisfied, on the application of any person, that the publication of that person's name would be prejudicial to the personal safety of that person or his or her family. Evidence that may be provided in support of such an application expressly includes (without limitation):

- a copy of a protection order that is in force under the Domestic Violence Act 1995, or
- a copy of a restraining order that is in force under the Harassment Act 1997, or
- a statutory declaration from a member of the Police to the effect that he or she believes that an individual's personal safety, or that of the individual's family, could be prejudiced by the publication of the person's name.

10. *What are your thoughts on the obligations that should be placed on beneficial owners? Do you have any views on how these obligations should be enforced?*

We agree with the proposed notification obligations,⁶ and the UK approach to enforcement may be appropriate (imposing restrictions on share rights for a failure to respond to a request for information).⁷

11. *When do you think corporate entities should update the beneficial ownership information that they hold?*

Within a specified period of being notified or otherwise becoming aware of a change – within 20 working days seems appropriate.

12. *What are your views on the enforcement mechanisms that should be available to the Registrar?*

The proposals to use the Registrar of Companies' existing enforcement tools (removal from the register, prosecution, disqualification), and the possible use of other tools such as infringement notices, seem appropriate.⁸

⁵ Paragraph 115.

⁶ Paragraphs 116 – 118.

⁷ Paragraph 119.

⁸ Paragraphs 124 and 125.

13. *Do you think there are any types of corporate entities that should be excluded from the options?*

The existing regime in place for listed companies is adequate. However, one advantage of having the proposed regime apply to listed companies may be that the information will be easier to find (rather than having to look back through annual reports/NZX filings).

The Law Society agrees that corporate entities that are likely to be at low risk of being used by criminals should not be excluded from the options, because the disadvantages of excluding them would likely outweigh any compliance cost savings, as explained in the Discussion Document.⁹

The Law Society does not have any information about the extent to which it would deter investment in New Zealand if the regime were to apply to limited partnerships. However, absent strong evidence that this would be the case, and a clear assessment that this ought to outweigh the reasons for the regime in the first place, the regime ought to apply to limited partnerships in the same manner as it would apply to companies.

14. *What are your thoughts on how frequently, and in what circumstances, the registers should be updated?*

See the response to question 11.

15. *What are your views on what verification should be undertaken?*

Identity verification technology is subject to rapid change, so it seems unnecessary to develop an additional set of requirements in this area. They would soon be superseded by the technology solutions currently under development (e.g. Kauri ID). The risk-based approach suggested for the Companies Office seems appropriate.

16. *What are your views on having a unique identification number for beneficial owners?*

This would be a worthwhile feature of the regime for the reasons indicated in the Discussion Document (including the ability to link a beneficial owner with all relevant corporate entities, fraud prevention, distinguishing between different beneficial owners who have the same name).¹⁰ With a sufficiently sophisticated technology solution, the practical difficulties identified in the Discussion Document (arising from large numbers of beneficial owners and manual verification required as a result of beneficial owners being located overseas)¹¹ may be surmountable.

17. *Do you have any views on whether any changes are needed to the requirements for company share registers?*

No changes are required. It is important to maintain a clear list of the legal owners of a company's shares, current and historic.

18. *Are there any other factors that MBIE should consider?*

A one-year lead-in or transition period would seem appropriate.

⁹ Paragraphs 131 to 133

¹⁰ Paragraphs 148 and 149.

¹¹ Paragraph 150.

19. *Do you have any thoughts on any additional measures that could be taken to combat the misuse of corporate entities?*
20. *Are there legitimate purposes for using a nominee director? What would the implications be if nominee directors were expressly prohibited?*
21. *Do you have any information about problems with companies or limited partnerships on the overseas registers?*

The Law Society does not have sufficient knowledge of the matters discussed at questions 19 – 21 to provide a response.

22. *Do you think there should be obligations on companies and limited partnerships on the overseas registers to provide information about their beneficial owners?*

Companies and limited partnerships on the overseas registers should be required to provide information about their beneficial owners, to prevent any risk of the public being misled about their registration status.¹²

23. *Do you have any information about problems related to TCSPs [trust and company service providers]?*

The Law Society has no information on this issue.

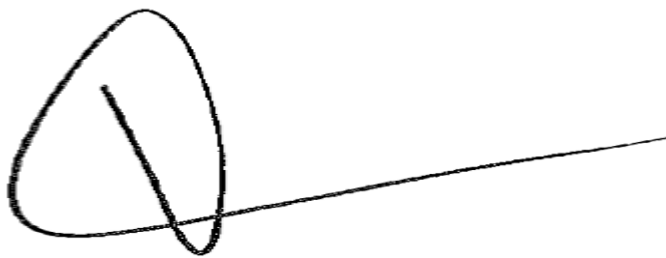
24. *Are there any other areas of concern?*

There is nothing further that the Law Society wishes to raise at this time.

Further information

This submission has been prepared with the assistance of the Law Society's Commercial and Business Law Committee. If you wish to discuss the submission further, please contact the committee's convenor, Rebecca Sellers, via the committee secretary, Jo Holland at jo.holland@lawsociety.org.nz / (04) 463 2967.

Yours faithfully

A handwritten signature in black ink, consisting of a large, stylized loop followed by a long horizontal stroke extending to the right.

Andrew Logan
Vice President

¹² Paragraph 171.