Ombudsman

Fairness for all

Opinion

Complaints by Mr Wal Gordon against the Plumbers, Gasfitters and Drainlayers Board relating to a disciplinary levy, continuing professional development and refusal of licensing for non-payment of fee or levy

Ombudsman's opinion

Legislation:	Ombudsmen Act 1975
Agency:	Plumbers, Gasfitters and Drainlayers Board
Ombudsman:	David McGee
Reference numbers:	311862, 313316, 327952
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Complaints

Mr Wal Gordon complained to the Ombudsman on 14 July 2011 that the licensing conditions imposed by the Plumbers, Gasfitters and Drainlayers Board regarding continuing professional development were illegal. He asked that the scheme be stopped immediately.

Mr Gordon further complained on 4 August 2011 that the Board had unlawfully collected a disciplinary levy from him. He asked that: the practice cease immediately, a written apology for wrongdoing be made, and he be refunded the disciplinary levy he had paid since October 2010.

On 20 March 2012 Mr Gordon made a further complaint about the Board imposing a "mandatory system" as a condition of licensing preventing applicants having their applications reviewed by the Board if they have not paid the prescribed fee and levy.

I issued a provisional opinion on these complaints to Mr Gordon and the Board on 14 September 2012. I also sent a copy of that opinion to the Ministry of Business, Innovation and Employment. I received and considered responses from Mr Gordon, the Board and the Ministry before finalising this opinion.

Ombudsman jurisdiction

The Ombudsmen are authorised to investigate the decisions, recommendations, acts or omissions of specified agencies that relate to a matter of administration and affect any person or body of persons in a personal capacity (Ombudsmen Act 1975, section 13(1)).

The Plumbers, Gasfitters and Drainlayers Board (the Board) is an agency that is subject to the Ombudsmen Act. The act or acts of the Board in question are the notices issued by the Board specifying a disciplinary levy, collecting levy from registered persons pursuant to that notice, imposing requirements relating to continuing professional development as a condition of licensing, and rejecting applications to relicense where fees or levy remain unpaid. Mr Gordon and a number of other registered persons are affected by those actions.

The Ombudsmen Act does not prescribe the terms in which an Ombudsman makes findings as a result of an investigation. However, in section 22 it sets out the conditions which could justify the Ombudsman making a recommendation and these can be taken to give a frame of reference for any investigation.

Section 22(1) identifies the following circumstances: where the Ombudsman is of the opinion that the act, etc -

a. "appears to have been contrary to law; or
b. was unreasonable, unjust, oppressive, or improperly discriminatory, or was in accordance with a rule of law or a provision of any Act, regulation, or bylaw or a practice that is or may be unreasonable, unjust, oppressive, or improperly discriminatory; or
c. was based wholly or partly on a mistake of law or fact; or
d. was wrong."

Section 22(2) contains other conditions that are not relevant to these investigations.

1. Disciplinary levy

Statutory obligations

The Board is established by the Plumbers, Gasfitters and Drainlayers Act 2006 (the 2006 Act) with extensive functions concerning the regulation of plumbing, gasfitting and drainlaying services. These relate to registering persons to perform those services, prescribing and monitoring standards for such services, and enforcing the Act's requirements by disciplinary or prosecutorial actions.

Clearly the performance of its functions requires the Board to be adequately funded. The Board is not currently funded by appropriation or grant out of general taxation but it is given powers in section 142 of the 2006 Act to prescribe fees for the functions it performs. I will come back to section 142 later.

Section 143 of the 2006 Act has been central to Mr Gordon's complaint regarding the disciplinary levy. This section empowers the Board to impose a levy (in contradistinction to a "fee"):

> *"...on every registered person for the purpose of funding costs arising out of:*
> *a. investigations into allegations or complaints against registered persons; and*
> *b. proceedings concerning discipline under Part 3."*

Acting pursuant to its powers the Board prescribed fees (for registration, licence and notification, examination and re-audit) and a disciplinary levy of $266 per annum for each licensed plumber, gasfitter and drainlayer, by means of the Plumbers, Gasfitters and Drainlayers Board (Fees) Notice 2010 (the Fees Notice). The notice came into force on 31 July 2010.

Parliamentary complaints

In July 2010, following the making of the Fees Notice, Mr Gordon laid a complaint with the parliamentary select committee concerned with regulations (the Regulations Review Committee) about the setting of the disciplinary levy.

There were two aspects to Mr Gordon's complaint about the disciplinary levy. The first was that the levy of $266 per person was payable irrespective of the number of licenses held by that person. In the event, the committee appears not to have pursued this aspect. But Mr Gordon's second complaint was that the $266 annual levy included amounts for costs that did not arise out of the matters contemplated by section 143. Specifically, the levy had been calculated on the basis of costs of prosecuting persons for offences under the Act and on other general costs that did not directly arise out of investigating the matters that section 143 authorised a levy to be raised for.

The committee substantially agreed with Mr Gordon on this latter point. It considered that the disciplinary levy was limited to costs arising out of investigations into registered persons and to disciplinary proceedings against such persons (or against persons who had been registered at the time). But the disciplinary levy could not be used to fund the Board's wider prosecutorial

functions. These were statutory functions of the Board, but the costs of them could not be passed on exclusively to registered persons by means of the disciplinary levy. As regards what could be termed "overheads", the committee did not fully agree with Mr Gordon. It did consider that a proportion of the Board's general running costs could be attributed to supporting its investigatory and disciplinary functions, and so fall within section 143. However, some of the specific overhead costs included in calculating the levy could not fairly be said to arise out of the Board's investigatory or disciplinary proceedings.

The committee recommended that the provisions of the Fees Notice relating to the disciplinary levy be disallowed.

Disallowance of a regulation or a provision of a regulation was provided for at the time by the Regulations (Disallowance) Act 1989 (it is now contained in the Legislation Act 2012 but without substantive change in the respects discussed here). Disallowance is the legal revocation of the provision in question. When a regulation is disallowed, the regulation ceases to have effect and any previous regulation that was replaced by the disallowed regulation is revived (sections 7 and 8 of the 1989 Act). Disallowance is effected by the House of Representatives passing a resolution (section 5) and can take effect automatically in certain circumstances (section 6). Disallowance is not the same thing as Parliament using its power to legislate.

In this case it is unnecessary to discuss the application of these provisions in any detail because on 15 May 2011 the House considered a motion moved by the chairperson of the committee to disallow the Fees Notice and did not agree to it. Consequently, the Fees Notice remained in force in its original form. However, the fact that the House did not exercise its power to disallow the Fees Notice does not determine the question of the notice's validity. If the notice was not valid when it was made the fact that the House did not disallow it does not make it valid.

Amendment of the Fees Notice

At some point after the select committee's report (in February 2011) the Minister of Building and Construction and the Board agreed to amend the "Accountability Agreement" which sets out the Minister's expectations of performance by the Board as an entity falling within the Minister's area of responsibility. One of the amendments related to resetting the disciplinary levy to meet the parliamentary criticism of it. This was subsequently effected by an amendment to the Fees Notice made by the Board – the Plumbers, Gasfitters and Drainlayers Board (Fees) Amendment Notice 2011. Under this notice the disciplinary levy is reduced to $175 to remove, it is said, the misallocated costs of prosecutions. In its place an offences fee of $90 is imposed under section 142 of the 2006 Act.

I am not concerned with the validity of the amendment to the Fees Notice (though I need to refer to its provisions later). Mr Gordon has challenged the amendment before the Regulations Review Committee and I understand that his complaint is presently under consideration by the Committee. That is Mr Gordon's right. But I note that the amendment came into force only on 12 January 2012. Thus the disciplinary levy imposed by the original Fees Notice remained in

operation from 31 July 2010 to 11 January 2012. It is with the levying of the disciplinary levy during this period that I am concerned.

Legality of the Fees Notice

The Board did defend the Fees Notice before the Regulations Review Committee (which, of course, was assessing the notice against the criteria set out in the House's Standing Orders, not its legal validity) but it now accepts that the notice was not lawful. The disciplinary levy was not calculated correctly. In particular, the power to levy did not extend to covering the costs of taking proceedings against non-registered persons.

While the Board concedes that (in this respect) the Fees Notice was unlawful, it maintains that it did have another power in the 2006 Act to charge registered persons fees for this purpose. This is under the Board's general powers in section 142 of the 2006 Act. That section allows the Board, by notice in the *Gazette*, to prescribe fees (not a levy) for discharging a number of functions under the Act (such as processing applications, making additions or alterations to the register, issuing certificates, etc).

Prescribing "fees" for the taking of proceedings against unregistered persons is not specified in section 142. However, paragraph (i) of subsection (1) permits the Board to prescribe fees in respect of *"any other matter that relates to anything the Board is required to do in order to carry out its business"*. As I understand the Board's position, it is that one of its functions is to take enforcement action (against unregistered as well as registered persons) for breaches of the Act or regulations. Consequently, it believes that the general fee-making provision set out in section 142(1)(i) is available to it to raise the money needed to discharge this function.

It is certainly the case that the Board has the function of initiating prosecutions for breaches of the Act or regulations (section 137(p)). The disciplinary levy provisions of section 143 are admittedly not able to be used for this purpose, at least where unregistered persons are concerned. The only other self-generating source of income conceivably identified in the 2006 Act, is the power to charge fees under section 142. In effect, this is what the Board has now done in the amendment it made in 2012 when it created an "offences fee".

Whether section 142(1)(i) authorises the offences fee is not something that I am here concerned with. But when it made the Fees Notice in July 2010 that was not the course taken by the Board. What the Board did in that notice is now acknowledged to have been wrong. In these circumstances it seems clear that, in terms of section 22(1)(c) of the Ombudsmen Act, the Board's action in imposing such a levy and collecting moneys under it was "based wholly or partly on a mistake of law".

Mr Gordon's complaint is upheld.

Redress

Mr Gordon asked for three things: that the levying stop, that there be an apology, and that he be refunded the money unlawfully levied. I intend to concentrate on the latter point but I will first say something briefly on his first two desired outcomes.

The disciplinary levy was challenged by Mr Gordon when it was imposed. It was not removed until some 18 months later. For a good part of this time the Board's position was that the levy was lawful. This is the position that it took while matters were before the Regulations Review Committee (which reported in February 2011). The Board has told me that after the Committee's report it entered into discussions with the Government about how to resolve the issues raised by the report. It seems likely, and I accept, that the Board's and the Government's response to those issues became associated with the proposal to disallow the Fees Notice. Once the motion to disallow had been defeated, the Board agreed with the Minister to review and reset the disciplinary levy by 31 March 2012. As noted above, this was done with effect on 12 January 2012.

I do not doubt that the Board thought it was acting properly in awaiting the outcome of the parliamentary moves to disallow and then in agreeing a timeframe for amendment with the Minister. It is clear too that there was a misunderstanding of what was the legal effect of a decision against disallowance.

While these factors may explain why no action ensued until January 2012, I do not consider that they can excuse it.

What is in issue here is an unlawful levy, a tax, that the Board was not authorised to impose. In these circumstances I think that Mr Gordon was justified if he felt that the matter that he had correctly raised was not dealt with with the expedition that it should have received. It can never be justifiable for a body to continue to levy monies that it has come to realise that it has no legal authority to raise. I take this to be a matter of cardinal importance and I will come back to it later, but at the very least the Board should have acted to stop extracting the full amount of the disciplinary levy set out in the Fees Notice much sooner that it did.

Mr Gordon has asked for an apology.

The Board acknowledged to me that it was unwise to have asserted to Mr Gordon that the disciplinary levy had "not been found to be illegal in a court or any other body with the jurisdiction to make such a finding." While literally correct, this was an inappropriate statement to make when the Board itself had come to realise that the Fees Notice was defective. I leave this matter there.

Mr Gordon's third claim - for a refund – is the matter that I principally want to deal with.

The amount in issue

The first issue to address is what is the amount of any levy raised improperly. The disciplinary levy fixed by the Fees Notice between 31 July 2010 and 11 January 2012 was $266. The Fees Notice also fixed charges for services under section 142. These latter are quite separate and are not in question in this complaint. This complaint is concerned with a clearly severable element of the Fees Notice – the disciplinary levy.

It is clear that a considerable element of the levy of $266 can be justified in terms of the objects of such a levy as set out in section 143. There is dispute about precisely what amount can be justified and what amount cannot (which I will return to) but there is no doubt that a

disciplinary levy at some level was warranted for that period. In these circumstances a question might arise as to whether the admitted illegality in calculating the levy affected the entire decision to impose a levy, rendering it wholly voidable, or whether it could stand in law in regard to part of the levy.

In exercising jurisdiction under the Ombudsmen Act I do not intend to speculate on the legal answer to this question. As Ombudsman I am concerned with the "propriety" of what the Board did. Insofar as it imposed a levy for matters contemplated by section 143 I do not consider that any administrative impropriety occurred. Only insofar as a levy was imposed for matters outside that section is any comment by the Ombudsman called for. Consequently, I intend to confine my consideration of Mr Gordon's claim for a refund to what may be termed the "excess" amount of the levy – that part of the $266 that could not be justified under section 143.

As already stated, there is a dispute between Mr Gordon and the Board about what precisely this figure is, and this dispute was examined by the Regulations Review Committee. I do not intend to take this argument any further than the Committee. Although I appreciate that this is a matter in contention, I intend as a working hypothesis to adopt the division between levy and fee that the Board has embodied in the amendment notice it issued with effect in January 2012. Under this notice the total amount previously included in a single disciplinary levy has been divided out into a levy of $175 and a fee of $90, a total of $265, almost the same as the previous disciplinary levy. On this basis I intend to treat $90 of the previous disciplinary levy operating from 31 July 2010 to 11 January 2012 as having been improperly exacted and thus being potentially refundable. The total amount in issue I understand to be about $600,000.

Considerations

Mr Gordon has consistently maintained that the levy was unlawful and he has been proved to be right. If his concerns had been heeded earlier the matter could have been attended to well before the levy had been collected for 18 months. The Board should have appreciated the problem and acted to correct it much earlier than it did. As it was the direct legal decision maker (with the power to issue fees and levy notices itself), it could be said that it allowed a refund liability to accrue by its own failure to take action.

The Board points out that it is solely funded through fees and disciplinary levies. It says it would have included the unlawful levy in a fee if it had appreciated the differences between the two forms at the time. In this sense, it does not consider that persons who paid the levy were disadvantaged. The effect of repaying some $600,000 could be devastating. In these circumstances it claims the effects of refunding would far exceed the mischief.

The Ministry put it to me that as the Board does not receive funding by way of parliamentary appropriation, Parliament must have contemplated that the Board's disciplinary and prosecutorial functions would be funded by fees paid by licensed plumbers, gasfitters and drainlayers.

Without minimising the seriousness of having imposed a levy improperly, the Ministry suggested that in these circumstances rather than acting entirely without parliamentary authority, the Board has used the wrong parliamentary authority in imposing the Fees Notice.

If the funding had not been imposed by means of the disciplinary levy it would have had to have been raised from the same group of persons by means of an increased fee. In these circumstances, while there may have been a procedural failure, there had, in its view, been no substantive unfairness.

My views

The Board and the Ministry both make the point to me that the funding model followed in implementing the legislation contemplates that plumbers, gasfitters and drainlayers pay fees and levies sufficient to cover all the costs the Board incurs in carrying out its functions. In particular, the Board receives no funding by way of central public grant or under general levies.

It may well be that the present arrangements between the Minister and the Board are that the Board covers all its costs out of fees and levies, and I can understand, at a time of financial stringency, why this is the preferred Government position. But such arrangements are not inviolable. For example, a question could arise as to the appropriate section of the public to bear the cost of the enforcement of legislation passed by Parliament - is prosecution of non-registered persons a social charge or an industry charge? Nothing in the 2006 Act precludes Parliament appropriating funds for the Board to carry out this function and I do not think that, for the purposes of this opinion, I should assume that it will not.

There is also the very real question of whether Parliament has conferred any fee-raising option on the Board at all in respect of this particular function (a matter still before the Regulations Review Committee).

While I am not unsympathetic to the position the Board finds itself in, it is fundamental that statutory bodies act within the law. Indeed such a proposition is an essential element of the rule of law itself. In my view matters cannot be permitted to remain in the unsatisfactory state of an unlawful levy to the extent of $600,000 having been extracted from a section of the population. The matters urged on me by the Board and the Ministry do not alter my view on this.

But these considerations do not lead me to the conclusion that the excess amount of the levy should simply be refunded (though that is a possible outcome). Rather they lead me to the conclusion that matters cannot be left as they are. I intend to discuss some options for solution before proceeding to a recommendation.

Validity of the illegality

Serious consideration should be given to whether the illegality should be validated. This could only be achieved by legislation passed by Parliament. It would thus depend upon the support of Ministers and other parliamentarians. Validation of unlawful or questionable subordinate legislation (which the Fees Notice is) is not uncommon, however regrettable or unfortunate it may be that it is necessary to effect it.

Validation could take the form of a simple validation, in which the unlawful disciplinary levy would be deemed always to have been lawful and there would be no refund or other financial consequence for the Board. This would cure the illegality but is a blunt means of proceeding.

Another option is to effect validation accompanied by a "financial arrangement" of some description. This could take the form of a one-off grant of funds to the Board to enable it to pay back the excess levy. However, it must be acknowledged that it would be difficult to persuade the Government at such a time to find the money to put the Board in funds.

More realistically, it seems to me, is that the Board, as a condition of validation, should engage with industry representatives, including but not limited to Mr Gordon, whereby the excess levies paid could in whole or in part be refunded over a period or some credit could be given in respect of future fee or levy payments in compensation. Any such arrangement would need to take account of the fact that all of today's licensed tradespeople may not be the persons who paid the unlawful levy between 2010 and 2012. The equities of different groups would need to be reflected in any such settlement. A validation accompanied by a financial arrangement of some kind, even if it did not result in a full return of the levies extracted at a time when they were unlawful would, it seems to me, represent a fair and more realistic outcome to this matter, though I appreciate that not every party might be fully satisfied with such a result.

Non-validation of the illegality

If the illegality is not validated then it seems to me that the Board has no alternative but to return the excess levies. Certainly, the Board could attempt to negotiate an arrangement with industry representatives along the lines sketched out above but it would do so starting from a position of obligation to right the legal wrong that has been perpetrated and which would still exist. There would be much less prospect of achieving a satisfactory outcome in these circumstances.

Conclusion

In my view the best outcome would be a validation of the levy accompanied by a financial arrangement as to how those who paid the levy were to be recompensed in some way.

2. Continuing professional development

Background

Mr Gordon's concerns in regard to this issue relate to requirements which the Board has imposed requiring continuing professional development (CPD) as a condition of registering persons to carry on the plumbing, gasfitting or drainlaying trades.

Under the legislation in force before the 2006 Act the then Board could be given power by regulation to impose such requirements. However, no regulations were ever made. Instead, from 1 April 2004 onwards, the then Board established a policy for the issue of competence-based licences relying on what it believed was a general authority to do this. When the 2006 Act came into force, the new Board carried this policy on, and it remained in operation until replaced by notices issued under the 2006 Act which came into force on 1 April 2010.

The Auditor-General in a 2010 report expressed considerable doubt about the legality of such requirements both pre- and ante- the 2006 Act. The Regulations Review Committee was of a similar view. I am not concerned with the legality or reasonableness of this policy. Mr Gordon's concern with its impact on him has been dealt with under a historical complaints policy established by the Board. Mr Gordon's complaint to me concerns the successor to that policy, the CPD requirements established in 2010 under the notices then issued by the Board.

Statutory provisions

The 2006 Act empowers the Board to define classes of registration and what these classes entail and then to prescribe standards for registering persons in those classes, including requirements for completing competence programmes of CPD (sections 28 and 30, especially section 30(1)(e)). The Board exercises these powers by issuing notices in the *Gazette*. Section 32 sets out the principles that are to guide the Board in prescribing these matters and section 33(1) explicitly obliges it to consult with the industry and persons or bodies substantially affected before it does so.

On 24 March 2010 (coming into effect on 1 April 2010) the Board issued three notices prescribing the requirements in terms of CPD for registration in various classes as a plumber, a gasfitter, and a drainlayer (the CPD Notices).[1]

Parliamentary complaints

In May and June 2010 Mr Gordon and another person laid complaints with the Regulations Review Committee about the CPD Notices.

There were a number of aspects to Mr Gordon's complaint to the committee. Some of these the committee upheld; some it did not.

[1] Plumbers, Gasfitters and Drainlayers Board (Plumbing Registration and Licensing) Notice 2010; Plumbers, Gasfitters and Drainlayers Board (Gasfitting Registration and Licensing) Notice 2010; Plumbers, Gasfitters and Drainlayers Board (Drainlaying Registration and Licensing) Notice 2010.

The committee clearly felt that the Board's role in promoting competency in the trades within its jurisdiction was not as narrow as Mr Gordon had contended. The Board's use of its registration powers to prescribe training requirements relating to CPD was specifically endorsed by the committee.

However, the committee did doubt whether the Board had observed all of the statutory requirements in issuing the CPD Notices. In particular, it did not consider that the Board had paid enough attention to the principles that section 32 prescribed. The principal reason for this seems to have been because of how the notices evolved from the previous policy-based method of imposing CPD. This suggested that the Board had paid inadequate attention to the requirements of the new statute. Allied to this was another distinct criticism made by Mr Gordon which the committee also upheld – that there was a failure to consult adequately before making the CPD Notices.

As with the disciplinary levy in the Fees Notice, the committee recommended that the CPD Notices be disallowed. Also as with the Fees Notice the motion to effect this was defeated. However, as I indicated above, the outcome of the parliamentary move to disallow the notices does not determine their validity. Nor do I consider it to be otherwise relevant to my consideration of Mr Gordon's complaint.

Board's position

The Board in its submission to me did not seek to defend the regime which operated up to the issue of the CPD Notices (only in issue in this complaint insofar as it affects those notices). It did point out that while the 2006 Act's provisions under which CPD could be prescribed came into force on 5 December 2006, most of the Act did not take effect until 1 April 2010. In the interim the Board was engaged on setting up key parts of the scheme established by the new Act. This cannot affect the validity of the CPD policy operated in that period but it may help to explain why the Board postponed making the CPD Notices until March 2010. In this regard it would have been better if the 2006 Act had dealt with the matter in a transitional provision.

But the Board did emphasise that a certain amount of consultative work did go on in that period which contributed to the Board's ultimate decision to issue the CPD Notices. It instanced consultation papers that were issued in June 2007 and May 2009 that raised questions about a CPD programme. In support of its view that the Board had turned its mind to the principles set out in section 32 it referred to a report that the Board prepared for the Minister in September 2009 that addressed the proposed CPD programme and referred to the statutory principles.

These factors, the Board said, show that it had focussed consideration on establishing a CPD scheme that effectively continued the one in place from 2004 and that it had taken the statutory principles into account. The Board also sent me a comprehensive document on CPD which it had published on its website in October 2011 initiating a round of consultation on a new CPD scheme. This latter development could not, of course, cure any defect in the consultation that led to the existing scheme, but it is, nevertheless, a relevant factor in considering what recommendation might result from the present investigation. I will return to these developments.

The Board further drew my attention to section 33(2) of the 2006 Act, a provision not referred to by the Regulations Review Committee in its report.

Section 33(2) provides that a failure to comply with the requirements to consult before prescribing registration or licensing requirements does not affect the validity of any notices prescribing those matters. The provision is clearly relevant when considering the legal validity of such notices or what legislative steps may or may not be necessary as a consequence. But I do not consider that it is relevant to the reasonableness of the actions or inactions of the Board in the first place. A failure by a public authority to consult on matters such as are in issue here is not excused from criticism just because there may be no legal consequence and, to be fair to the Board, it has not suggested that this is so. Consequently, I have ignored section 33(2) in considering the reasonableness of the Board's actions in making the CPD Notices. But it is relevant to the consequences of these actions.

Defects in the notices

Consultation is often seen as a necessary element in ensuring the fairness of administrative decision-making by enabling those affected by proposed decisions to express their views before such decisions are taken. No doubt this is an important, perhaps the principal, reason for requiring consultation prior to decision-making. But another important reason is to promote the effectiveness of any decision itself. By drawing on the knowledge and expertise of industry participants it can be expected that the decisions ultimately taken by the Board in regard to registration and licensing will be better, more grounded, decisions than those taken without the benefit of such input.

Even if the 2006 Act had not mandated consultation with the industry before adopting CPD requirements, it is likely that this would have been implicit as a legal requirement. But regardless of the legal position, good administrative practice required it.

The Regulations Review Committee considered that such consultation as was undertaken was not adequate. The Board pointed out to me that some consultation did occur in 2007 and 2009 before the CPD Notices were issued. Whether this was enough to satisfy the statutory requirement must remain moot. But it is noteworthy that the consultation on a new CPD scheme embarked upon in October 2011 is of a different order from the earlier consultation papers. In particular, the October 2011 consultation document includes draft notices on which comments are invited. While the earlier consultation documents raised questions about CPD requirements, they did not disclose in this level of detail how those requirements might look in practice. At the very least, the consultation on the CPD Notices could have been more informative and structured. In other words, it could have been much better than it was.

The Committee also concluded that the Board did not have adequate regard to the principles governing the exercise of its powers as set out in section 32 of the 2006 Act. As discussed above, the Board continues to dispute this, but it does concede that it failed at the time adequately to record its consideration of those principles thus not leaving an “audit trail” that would establish that it had addressed them.

Conclusion

To some extent, if there is an absence of evidence, the Board, in whose hands the keeping of that evidence lay, must accept the consequences of this. It is clear to me that the Board did have material on which it could rely. It was reasonable for it to have regard to the experience of the previous Board's policy-based scheme. It also had some feedback from the consultation documents that it did issue and it had the expertise of its own membership.

But given the limited nature of the consultation that did occur and the absence of evidence that the statutory principles were explicitly and carefully addressed before the CPD Notices were made, I am of the view that Mr Gordon's complaint on this score should be upheld. It seems to me that the degree of consultation that did occur was unreasonably truncated (section 22(1)(b) of the Ombudsmen Act) and that the apparent failure to address the statutory principles mean that the decision to make the notices appears to have been made contrary to law (section 22(1)(a)).

Redress

Mr Gordon asks for the scheme to be stopped immediately.

In this case, unlike the disciplinary levy, there still remains a real question about the legal effectiveness of the notices. The failure to consult about them cannot in itself invalidate them as section 33(2) of the 2006 Act makes clear. I do not intend to speculate on whether they are invalid for failure to address the principles set out in section 32. Presumptively, they are valid until set aside by a court of competent jurisdiction. I thus intend to treat them as legally effective. Furthermore, CPD requirements of some nature are clearly contemplated by the 2006 Act and the Board, as I have indicated above, had some material (not insubstantial) on which to base its decision. This is not a case of a cost being imposed on a particular sector without legislative authority. If the appropriate authorities consider that the doubts that have been urged as to the validity of the CPD Notices are serious enough to require legislative validation that is a matter for them.

In this case, the defects in the CPD Notices are being actively addressed by the Board in the consultation round on new notices that commenced in 2011. I am informed that that process is almost completed with draft notices having been submitted by the Board to the Minister in May 2012 and the Minister having approved them for promulgation in the *Gazette*. In my view these steps are sufficient to have addressed the deficiencies arising from the way in which the CPD Notices were made.

3. Refusal of licensing for non-payment of fee or levy

Background

Mr Gordon's third complaint concerns an electronic system operated by the Board in respect of applications for renewals of practising licences. He claims that this system, which links the payment of fees and levies to the application, forces applicants to pay fees before they can apply for renewal of their licences. In Mr Gordon's view if the Board wished to make such payments a condition of licensing it should have prescribed this in a notice after having consulted in accordance with the requirements of the 2006 Act (especially section 33). As it did not prescribe such a condition by notice it cannot rely on one now.

In elaborating on his complaint Mr Gordon states that the effect of the application system is that an applicant (who has not paid the fee) will not have his or her application referred to the Board for consideration as required by section 50(2) because the system will automatically reject it at the outset. Mr Gordon believes that the Board is thus arbitrarily refusing to renew practising licences until payment of the levy and fee has been made without regard to the review provisions of the Act.

Analysis

The Board considers that it has the authority to require the payment of levy and fees when renewing a person's practising licence without making this a term and condition of licensing in a notice prescribed under the Act. It relies principally on section 51(6) which provides:

> *"Despite subsection (1), if any fee or other money payable to the Board under this Act by the registered person has not been paid, the Board may refuse to renew that person's practising licence until that fee or other money is paid."*

Mr Gordon does not agree that section 51(6) gives such authority.

He argues that as the Board's licensing year runs from 1 April then in respect of any application made before that date, no money will be owing (at that time) and so the Board is not in a position to reject it under section 51(6). Despite this, he says, the Board's electronic system will not accept such an application. In his view there is no justification for this under the legislation.

I note that Mr Gordon's argument as to the effect of section 51(6) would only apply where an application is made to the Board before 1 April. In respect of applications made on that date or later, rejection would be permitted even on Mr Gordon's reading of section 51(6).

The Board's view is that the relevant fee and levy become "payable" once a person has made an application (up to three months before a licence expires). Thus section 51(6) is available to it to reject an application if the full fee and levy do not accompany the application.

I prefer the Board's interpretation of section 51(6) to Mr Gordon's. It would, even in Mr Gordon's view, be open to the Board to defer making a decision on an application received before 1 April until that date and to reject it at that point, so as to bring the application within section 51(6). I cannot think that this was what was intended. In my view "payable" in section

51(6) clearly includes amounts already accrued as owing. But it also means the fee and levy payable in respect of the licensing period that the applicant is making an application for, indeed I think that this was what was primarily intended by the provision. I do not see that the Board is acting unlawfully or unreasonably in the electronic system it is operating.

Conclusion

I do not agree with Mr Gordon's principal contention that the Board should have prescribed such a condition in a notice if it wished to reject an application for non-payment of a fee or levy.

It is possible that the Board could have taken this course (if such a term is within the scope of section 30), but it had no need to do so. Section 51(6) gives it a distinct statutory authority to reject applications for non-payment and is a complete answer to this aspect of Mr Gordon's complaint.

But there are other issues which I think need to be discussed.

Mandatory rejection

The first point to make is that rejection of an application for non-payment of levy or earlier fees is not made mandatory by the 2006 Act.

Parliament could have prescribed that any applicant in respect of whom a fee or levy remained unpaid could not be licensed to practice under the Act. But it did not do this. It conferred a discretion on the Board (subject to one exception I mention below) to reject an application if any fee or levy remained unpaid. Like any discretionary authority this power has to be exercised by the decision-maker (in this case the Board) reasonably and fairly in the particular circumstances of the case. Mr Gordon said to me:

> *"There may be circumstances that prevent the applicant from paying the levy and fee and the Board does have the power to exempt the payment of the levy and fee by the individual."*

I accept Mr Gordon's point that the Board must be prepared to consider individual submissions rather than always invoking its power under section 51(6) to reject an application. Indeed, it seems to me that it does so. The Board drew my attention to provisions in an amendment notice published on 7 July 2011 which acknowledge that the Board may waive a fee or levy in whole or in part and to information which it has published advising applicants how to apply for a waiver or refund of fees.

It is suggested in the material that the Board has provided to me that it should formalise, in a written policy its practice of refusing to renew a practising licence until the levy and fee are paid. It seems to me that an explicit policy on this matter is a good idea, though it cannot be one that in every circumstance would result in a refusal to relicense. Such a policy on the part of the Board would be to turn the discretion given to it by section 51(6) into a prohibition. That would be unlawful and unreasonable. I am satisfied that the Board recognises this.

Finally, on this point, it does seem to me that in one respect non-payment of a fee must lead to rejection of an application.

Section 50(1) sets out the requirements for a valid application. One of these is that the application must be accompanied by the prescribed fee (if any). For the registered person to be entitled to a renewal of his or her practising licence, the Board must be satisfied that (among other things) the application requirements of section 50 have been complied with (section 51(1)(a)). If the prescribed fee (which I take to be the current fee rather than any arrears) does not accompany the application, it seems to me that the Board is bound to reject the application, without regard to section 51(6).

Rights of review

Another reason that Mr Gordon objects to the electronic licensing system is that, he claims, it prevents review by the Board of a refusal to renew a licence. I am not sure that it does, but I agree with him that it is imperative that it should not. I have therefore set out my thoughts on this.

As Mr Gordon points out, the Registrar must refer any application to renew a licence to the Board under section 50(2). Section 51 then sets out comprehensively how the application is to be dealt with by the Board.

Section 51(1) lists in five paragraphs the matters in respect of which the Board must be satisfied if the licence is to be renewed. Section 51(4) relaxes one of these matters and section 51(5) extends four of them. Section 51(6) gives the Board an over-riding power to reject an application for non-payment of fees or levy.

Having considered these matters, if the Board is satisfied that the person is entitled to a renewal of licence, section 51(2) sets out what is to happen.

But if the Board is not satisfied that there is an entitlement to renewal, section 51(3) applies. Under this provision the person is to be informed of the Board's decision and of the right of appeal to the District Court. It seems to me that this provision applies whatever causes the Board not to be satisfied about renewal: it might result from a failure to comply with the application requirements or one of the other matters set out in section 51(1); it might be because the Board requires the person to undergo a competency programme under section 51(3); or it may be because the Board wishes to exercise its power to decline because of non-payment of fees or levy under section 51(6). In all cases the appropriate course is for the Registrar to advise the person of the Board's decision and the right to appeal to the District Court.

Any system operated by the Board for receiving and dealing with applications for renewal of licences must ensure compliance with these requirements, regardless of whether or not a complaint about such a matter falls within any internal complaints process operated by the Board.

4. Recommendations

Under section 22 of the Ombudsmen Act, where the Ombudsman considers that the section applies, he or she may make a formal recommendation to the appropriate department or organisation (but not to a Minister, reflecting the fact that Ministers are not subject to investigation under the Ombudsmen Act).

I have given my reasons above as to why I consider that section 22 does apply in respect of some of the Board's actions. It is therefore appropriate that I go on to consider what, if any, recommendation to make in this case.

Section 22(3) indicates a number of examples of reasons why a recommendation may be justified. In this case I consider that the residual reason in paragraph (g) is pertinent – that some (other) steps should be taken. As I have indicated above, I consider that a combination of legislative and administrative action is desirable.

Legislative action is wholly a matter for determination by Parliament and no one but parliamentarians can deliver it. My recommendation in this regard is therefore designed to ensure that such a proposal is put before the appropriate authorities (in the first instance the Minister). The Board is the subject of the complaint and it is essential that it raise with the Minister the question of remedial legislation. But I do not see the Ombudsman's power of recommendation in section 22(3) as being confined to the agency complained about. It can be directed to any appropriate department or agency.

In this case the Minister receives support from a department and the department has a monitoring role under the Accountability Agreement that the Minister has with the Board. I propose therefore to make a similar recommendation to the relevant department - formerly the Department of Business and Housing, now the Ministry of Business, Innovation and Employment – even though it was not apparently involved in these issues.

Therefore, pursuant to section 22(3) of the Ombudsmen Act 1975 I recommend as follows:

1. To the Ministry of Business, Innovation and Employment and the Plumbers, Gasfitters and Drainlayers Board, that they together or separately make proposals to the Minister of Building and Construction concerning the desirability or otherwise of:

    a. legislation to validate the Plumbers, Gasfitters and Drainlayers Board (Fees) Notice 2010 as it relates to the disciplinary levy; and

    b. funding to assist the Board to arrive at a satisfactory arrangement with registered persons who have paid excess amounts of levy under that Notice.

2. To the Plumbers, Gasfitters and Drainlayers Board (regardless of the outcome of 1 above), that it enter into discussions with representatives of persons registered under the Plumbers, Gasfitters and Drainlayers Act 2006 to achieve a satisfactory arrangement with persons who have paid excess amounts of levy under the Plumbers, Gasfitters and Drainlayers Board (Fees) Notice 2010 in respect of the disciplinary levy.

In accordance with section 22(3) I am sending a copy of this report and recommendations to the Board, the Minister of Building and Construction and the Ministry of Business, Innovation and Employment.