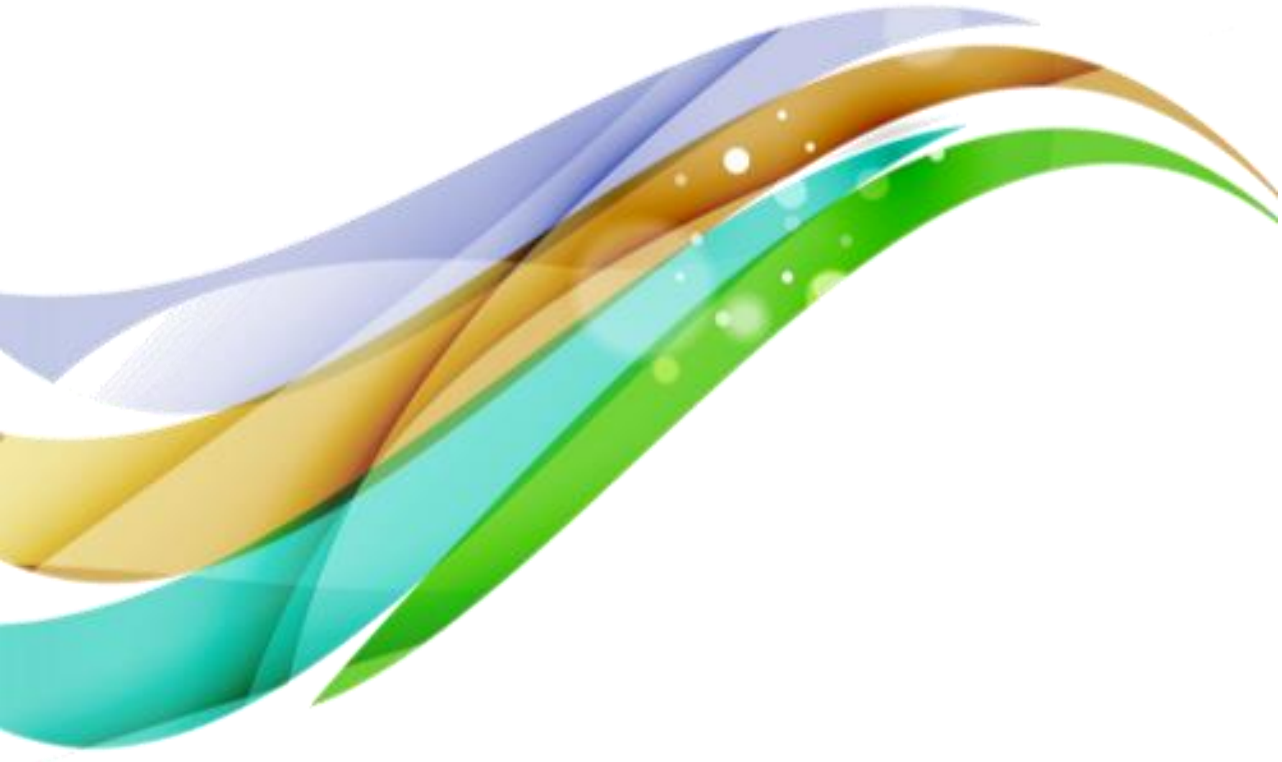
The Regulation of Lawyers and Legal Services in Aotearoa New Zealand

Te Pae Whiritahi i te Korowai Rato Ture o Aotearoa

Independent Review

Discussion document, June 2022



Contents

Executive summary

The New Zealand Law Society | Te Kāhui Ture o Aotearoa (the NZLS) has asked a three-person Independent Review Panel (the Panel) to review whether the current arrangements for the regulation and representation of lawyers and legal services are fit for purpose.

The Review has been prompted by concerns about the suitability of the complaints model, the culture and diversity of the legal profession, the powers available to the regulator to deal with unacceptable behaviour (including sexual harassment, bullying and discrimination) and whether a membership body such as the NZLS should be responsible for regulating the legal profession. The Panel is also considering the need for any changes to better protect consumers of legal services, ensure fair competition, enable innovation within the profession, and honour Te Tiriti o Waitangi and the bicultural foundations of Aotearoa New Zealand.

This Review is an opportunity to take a fresh look at the framework put in place by the Lawyers and Conveyancers Act 2006 (the Act) and whether the current arrangements are working for consumers and law practitioners.

Which legal services should be regulated?

The vast majority of legal services in Aotearoa New Zealand can be provided by both lawyers and non-lawyers, although only lawyers are issued with practising certificates and are then subject to minimum standards, regulatory oversight and a complaints service. This discussion document examines whether the current approach to regulating the conduct of lawyers is appropriate in a modern environment, where consumers increasingly seek legal services from a wider range of sources and where nearly 30 per cent of lawyers are in-house. We are interested in whether the current arrangements are adequate to protect consumers.

The discussion document also explores whether there is a need to revisit some core provisions of the Act, including the purpose statement, how Te Tiriti o Waitangi should be incorporated into the Act, and whether legislation should specify the objectives of the regulator.

Other issues under review include:

- whether law practices should be directly regulated, to improve protections for staff and clients
- whether current restrictions on corporate form should be removed, including allowing non-lawyers to have ownership interests in incorporated law firms and permitting lawyers and non-lawyers to enter into partnerships and operate as multidisciplinary practices
- whether a 'one size fits all' model is appropriate as lawyers increasingly practise in different ways
- whether the regulator needs a broader set of tools to address lower-level concerns before they give rise to concerns about fitness to practise.

How to promote a positive and diverse culture within the legal profession?

The Review examines how the regulation and representation of the legal profession can promote a healthy culture – one that reflects the diversity of Aotearoa New Zealand, supports the health and

wellbeing of lawyers, and encourages good conduct. We are also interested in how the regulation and representation of lawyers in Aotearoa New Zealand can further incorporate tikanga and te reo Māori.

There are still significant barriers to admission, progression and retention within the legal profession for women, Māori, Pacific peoples, Asian lawyers, people from ethnic minority backgrounds, and people with disabilities. The discussion document asks what steps are needed to improve diversity and promote a culture of wellbeing and inclusion.

The Review is also interested in feedback on the role of continuing professional development (CPD) and pro bono services, and how the regulatory framework can support meaningful CPD and promote pro bono legal work.

Is the model for regulating conduct and handling complaints fit for purpose?

We have heard some concerns about the effectiveness of the current model for examining complaints against lawyers. These include the time it takes to resolve complaints, a lack of consistent outcomes, a lack of transparency and a perception the process is not independent and does not encourage restorative approaches, which can appeal to many parties, including Māori and Pacific peoples.

The Review is exploring how the current complaints model could be improved. This could include options such as removing the statutory requirement for complaints to be considered by Standards Committees (which comprise a majority of lawyers, who devote considerable time as volunteers) through to establishing a new independent complaints body (with significant cost implications).

We are also seeking views on whether the current definitions of 'unsatisfactory conduct' and 'misconduct' remain appropriate. For example, it may be useful to clarify that the current definition of 'unsatisfactory conduct' covers breaches of the Act and Rules by a lawyer even where the personal conduct in question is unrelated to providing regulated services.

Should there be an independent regulator?

The NZLS is the regulator of the legal profession but is also a membership body with a duty to promote the interests of its members. While the NZLS has endeavoured to strictly separate its regulatory and representative functions, there remains an important question whether a membership body should be responsible for regulating lawyers. The current model is rare in other professions.

We outline several potential implications from the current arrangements and seek views on whether there is a need to establish a new regulator that is independent of the legal profession.

What are the optimal organisational institutional arrangements?

In addition to considering the level of independence needed for a legal complaints service and the regulator, the Panel is exploring what a fit-for-purpose governance structure might look like for the delivery of future regulatory and membership functions.

We seek views on the optimal institutional arrangements for a modern regulator / representative body, including whether there are opportunities to strengthen the profession's commitment to Te Tiriti o Waitangi.

1. Introduction | Whakataki

Lawyers occupy a privileged position in society. The legal profession enjoys the trust of clients and the Courts and plays a crucial role in influencing the development of the law and upholding the rule of law. With this privilege comes a responsibility to ensure the profession upholds the highest standards.

The Independent Panel has been asked by the NZLS to identify what changes are needed for modern and well-functioning regulation and representation of the legal profession in Aotearoa New Zealand, including whether the structure and functions of the NZLS are appropriate. This Review is a unique opportunity to examine the current state of the legal profession, analyse the issues confronting the profession, and identify the structures and rules necessary to better promote and protect consumer interests and encourage a confident, diverse legal profession.

The Terms of Reference for the Review can be found here.

Drivers for change

The disclosures in 2018 of sexual harassment and bullying put a spotlight on the legal profession. They raised broader concerns about the culture of the profession, the suitability of the complaints and disciplinary model, whether existing regulation was appropriate for tackling unacceptable conduct, and whether a membership body such as the NZLS should also be the regulator of the profession.

These questions arise within the context of a legal profession that has also been confronting issues of a lack of diversity and allegations of systemic barriers to participation. Young lawyers starting legal practice expect to be welcomed by a profession that reflects our diverse and multicultural society, with bicultural foundations.

Other drivers include an increase in legal services provided by non-lawyers, the use of technology to deliver legal services, and significant growth in the number of in-house lawyers employed in the private and public sectors.

Applying a Te Tiriti o Waitangi lens

Te Tiriti o Waitangi is not just a discrete component of this Review. We have endeavoured to apply a Te Tiriti and tikanga Māori 'lens' across all the issues in the Terms of Reference.

We are particularly interested in views as to how the statutory and regulatory frameworks might need to change to reflect our country's commitment to Te Tiriti. The Act makes no mention of Te Tiriti or Māori and there is no requirement for the NZLS to promote or have regard to the interests of Māori.

Next steps

The success of the Review depends on the Panel receiving substantive input and engagement from the legal profession and wider stakeholders. We intend to engage widely with the profession, consumer groups and other key stakeholders. The Panel has deliberately not outlined any preferred

options for change in this discussion document. We hope it will form the basis for conversations on what is needed to effectively regulate and represent the profession, and possible options for change.

It is important to note that while this document identifies a number of opportunities for reform, the Panel has not yet considered detailed options. Our final recommendations will take into account the potential cost and benefit implications.

We are scheduled to submit our report to the NZLS by the end of 2022. The NZLS will provide the Government with our report and its response in the first half of 2023.

Structure of this document

This document outlines issues in six areas:

- Section 2 outlines the current state of legal regulation and representation.
- Section 3 explores the focus and scope of regulation, including how the statutory framework might appropriately reflect the role of Te Tiriti o Waitangi.
- Section 4 focuses on the role of the regulatory framework in promoting a positive and diverse legal profession.
- Section 5 explores whether the current model for regulating conduct and handling complaints is fit for purpose.
- Section 6 seeks views on whether there is a need for a regulator of the legal profession that is independent of the professional membership organisation.
- Section 7 explores the suitability of the current NZLS governance structure and seeks feedback on the optimal institutional arrangements for a modern regulator and/or representative body.
- Section 8 outlines how to provide feedback on the discussion document.

A collection of Working Papers that have been produced to assist the Panel can be found here.

2. What is the current role of the New Zealand Law Society | Te Kāhui Ture o Aotearoa?

Under the Act, the NZLS is both a regulatory body, with a duty to the community, and a representative body, with a duty to its members.

The NZLS has 155 staff, including 75 regulatory staff, 48 representative staff, and 32 support staff. The NZLS is heavily reliant on the numerous volunteers who commit significant time to work in Standards Committees, Practice Committees, law reform committees, and in the Society's sections, branches and groups.

In 2022 there were over 16,000 lawyers with practising certificates issued by the NZLS, up from 11,223 practising lawyers in 2010.

Over the past three years the NZLS has received on average $22 million p.a. for its regulatory functions (from fees and levies on the profession) and $8 million p.a. for its membership services (from other income). The significant growth in the number of practising lawyers has resulted in a decrease in the regulatory costs for individual lawyers. Despite increases over the past two years, in real terms the practising fee ($1,290 in 2022) has declined by 12 per cent since 2010.

Regulatory functions

The NZLS' regulatory functions include issuing practising certificates and maintaining a register of the persons who hold practising certificates, setting practice rules and CPD requirements, managing the Lawyers Complaints Service, instituting disciplinary prosecutions, and advising on law reform. The NZLS maintains three staffed libraries (and 33 kiosks for online access) for practitioners and funds significant wellbeing initiatives under its Practising Well programme – all funded as part of regulatory services. There is also an NZLS inspectorate with responsibilities for monitoring compliance with lawyers' trust account responsibilities.

Lawyers fund the costs associated with regulating legal services through the annual practising fee. Lawyers also incur a levy set by the NZLS to fund the independent Legal Complaints Review Officer.

Representation of lawyers

As a membership organisation the NZLS seeks to advocate on behalf of the profession, promote collegiality, communicate with the profession on issues of importance, and promote CPD (with its subsidiary NZLS CLE Ltd specialising in legal education).

Membership of the NZLS is voluntary and lawyers with a practising certificate can become members at no charge. The NZLS membership services are funded via its sections (specialist groups that charge membership fees), conferences, training and investments.

A number of other legal membership bodies also play an important role in representing their members' (and others') interests, including Te Hunga Rōia Māori o Aotearoa (Te Hunga Rōia Māori), the Pacific Lawyers Association, NZ Asian Lawyers, the Auckland District Law Society, the Aotearoa Legal Workers' Union, various women lawyers' associations and many others.

3. What should be the focus and scope of regulation of the legal profession?

The current state: who can provide legal services?

The vast majority of legal services in Aotearoa New Zealand can be provided by lawyers and non-lawyers. Anyone who wants to act as a lawyer, including practising in the 'reserved areas', must fulfil the requirements to obtain a practising certificate from the NZLS and be subject to regulation.

In addition to reserving areas of work for lawyers, the Act establishes a number of protected terms. It is an offence for someone without a practising certificate to describe themselves as a 'lawyer', a 'solicitor' or a 'barrister', among other terms. Non-lawyers are free, for example, to describe themselves as an 'advocate' or 'legal expert', as long as they do not offer services in reserved areas.

The Act grants the NZLS power to admit, regulate and discipline lawyers. Receiving a practising certificate confers a number of responsibilities on lawyers (such as the need to adhere to the Conduct and Client Care Rules) but also confers benefits not available to non-lawyers (including the protection of legal professional privilege, the commercial advantages and status of being able to use 'exclusive' protected terms, and the ability to provide services within reserved areas).

The statutory framework for regulation of the profession

The purpose statement in the Act (s 3)

Section 3(1) states the purposes of the Lawyers and Conveyancers Act 2006:

> (a) to maintain public confidence in the provision of legal services and conveyancing services:
>
> (b) to protect the consumers of legal services and conveyancing services:
>
> (c) to recognise the status of the legal profession and to establish the new profession of conveyancing practitioner.

This purpose statement reflects a traditional consumer protection focus in regulation. However, we would welcome views on whether the purpose statement should also include a reference to upholding Te Tiriti o Waitangi.

This would signal the importance of Te Tiriti in the statutory framework for the regulation of lawyers and would bring it into line with other Acts establishing statutory bodies performing public functions. This change would have implications for other statutory bodies governed by the Act, including the Legal Complaints Review Officer, the Lawyers and Conveyancers Disciplinary Tribunal, the New Zealand Society of Conveyancers and the Council of Legal Education.

The fundamental obligations on individual lawyers (s 4)

Lawyers are subject to four fundamental obligations under section 4 of the Act, including a broad obligation to 'uphold the rule of law and facilitate the administration of justice in New Zealand'. We would like to test through this Review whether there is a case to create a new obligation for lawyers to uphold the constitutional principles of Aotearoa New Zealand, including Te Tiriti o Waitangi, or whether the current 'rule of law' obligation is broad enough to encompass these principles.

A specific requirement on lawyers to uphold the country's constitutional principles, including Te Tiriti, could be a positive and modernising step for a profession that is increasingly recognising its bicultural foundations and placing greater weight on cultural competencies and training. We welcome views on this concept.

We note that in 2021 the Federation of Law Societies of Canada published its guiding principles for fostering reconciliation. This statement indicated that lawyers have a responsibility to expand their knowledge and understanding of indigenous perspectives and knowledge, and to take steps to ensure they are not contributing to the harms their indigenous clients experience when engaging with the justice system.

The objectives of the regulator

The Act does not set out any objectives or any overarching principles to inform the NZLS in its decision-making. Given the wide discretion available to the NZLS when exercising its regulatory powers, there may be value in the statutory framework setting out the objectives of the regulator.

We welcome feedback on whether the legislation should establish regulatory objectives and what they might be. As an example, set out below are the regulatory objectives in the UK Legal Services Act 2007:

- protecting and promoting the public interest
- supporting the principle of the rule of law
- improving access to justice
- protecting and promoting the interests of consumers
- promoting competition in the provision of [legal] services
- encouraging an independent, strong, diverse and effective legal profession
- increasing public understanding of the citizen's legal rights and duties
- promoting and maintaining adherence to the professional principles.

Any regulatory objectives would need to be tailored for Aotearoa New Zealand and might include noting the increasing relevance of tikanga in the law and te reo.

1. Is there a need for a new purpose statement for the Act? What might the purpose statement include?
2. How should Te Tiriti o Waitangi be incorporated into the Act?
3. Should the statutory framework set out objectives for the regulator? If so, what should those objectives include?

Which providers of legal services should be regulated?

Why are lawyers regulated?

There is a significant *risk of harm* if people receive poor quality legal advice and representation. There is usually an information asymmetry between buyers and sellers of legal services, since the average client is not well equipped to judge the quality of the service being provided. Incompetent lawyers cause harm to clients.

A second, broader *public interest* factor also applies. Society as a whole has an interest in people getting good legal advice and representation. There is also a significant public interest in ensuring that lawyers facilitate the rule of law.

As noted above, only a very small portion of legal activity is currently reserved for lawyers, primarily pertaining to proceedings before Courts and Tribunals.[1] The rationale for reserving this activity for lawyers is that these services are critical to the rule of law and the administration of justice.

Anyone can provide legal services outside of these reserved areas of work, including lawyers and non-lawyers. However, if someone holds themselves out to be a lawyer (or uses another protected term) then they must have a practising certificate – which brings them within the NZLS' regulatory powers. Lawyers can also undertake conveyancing and provide immigration advice without having to comply with the sector-specific rules that govern other professionals in those areas.

Potential issues with the current model

The implications of the current model include:

- While lawyers and non-lawyers are both able to provide legal services, only lawyers are subject to regulatory oversight and regulatory costs, and have professional responsibilities. Do consumers of unregulated legal services require any protection beyond consumer protection laws?
- The current regulatory framework (with its origins in self-regulation) is not risk-based[2] or focused on consumer outcomes. The entire legal profession faces the same regulatory burden and costs, despite the fact that only some lawyers offer services in the important 'reserved areas'. Similarly, the regulatory framework ignores the fact that consumers of legal services receive very different regulatory protection depending on whether their provider holds themselves out as a 'lawyer'.
- In-house lawyers comprise nearly 30 per cent of the profession (in the public and private sectors) but only generate 4 per cent of complaints to the NZLS. They do not provide legal advice to consumers, yet still bear the regulatory burden of this regime.
- While the Act focuses on the regulation of the legal profession rather than legal services, it enables the NZLS to regulate the conduct of non-lawyers in certain instances. For example, the

[1] Section 6 of the Act, definition of 'reserved areas of work'.

[2] Modern regulation has moved away from a 'one size fits all' approach to a more tailored approach where the nature of regulatory obligations reflects the risks associated with the activity in question.

NZLS can regulate the activities of individuals who are employed by lawyers or incorporated firms, such as legal executives (s 121).[3]

The fact that both lawyers and unregulated non-lawyers can provide most legal services in Aotearoa New Zealand calls into question whether a framework that regulates only individuals who use 'protected terms' is fit for purpose. It is also likely that the use of technology (websites and AI) will enable the market for unregulated legal services to expand considerably in the future, so regulating only lawyers may become less relevant for consumers.

Unregulated providers of legal services are not required to meet any training or qualification standards, and are not subject to professional responsibilities that typically protect clients (eg, pertaining to conflicts of interest and legal professional privilege). There is no professional body for clients to complain to and seek redress for poor conduct, apart from proceedings before the Disputes Tribunal and Courts. Some possible areas of heightened risk to consumers include:

- Employment advocates: we are aware of claims from consumers and judges that the performance of some employment advocates is substandard and that some consumers suffer very negative outcomes.
- Paid McKenzie friends: it is foreseeable that self-represented litigants will increasingly rely on McKenzie friends (someone who attends Court to support a litigant), particularly given concerns about access to justice, the cost of going to Court and the high threshold for legal aid. While McKenzie friends play an important role, there is a growing trend in Aotearoa New Zealand and overseas for individuals/firms to specialise in this area and seek payment for their services.
- The current model may create an incentive for legally trained individuals (including enrolled barristers and solicitors and previously disbarred lawyers) to deliberately avoid regulatory scrutiny by choosing not to seek a practising certificate.

Any move to extend regulation to better protect consumers of legal services would need to consider potential adverse effects of reducing competition.

Approaches overseas to the regulation of legal services

Aotearoa New Zealand is within the mainstream internationally in regulating lawyers rather than all providers of legal services.

Our model is similar to that in England & Wales, where both the Competition Markets Authority (CMA) and a recent independent review have outlined concerns with the way that legal services regulation focuses on professional titles and reserved activities, rather than the risk profile of the activities being undertaken. The CMA notes that this approach has the potential to restrict competition and may lead to unnecessary costs for some legal services – and that it creates a 'regulatory gap' where users of unregulated legal providers are unaware of the risks and lack of protection they face.

[3] 3% of the complaints the NZLS is asked to resolve are about non-lawyers.

A table summarising the approaches adopted internationally to regulating lawyers can be found here.

Potential models for the scope of regulation

High-level options to address the current differing protections for consumers of legal services include:

1. **No change**: accept that lawyers will be subject to additional regulatory costs (which offers professional and competitive advantages) and that consumers may occasionally suffer negative outcomes from accessing unregulated legal services, for which they will have to seek redress through consumer protection laws.
2. **Tailor the scope of the current regulatory framework** (while maintaining the current structure of 'reserved areas' and 'regulated services') by either:
    a. extending the scope of reserved areas of work – noting that extending the list of services that can only be undertaken by lawyers may have adverse consequences on the competitive market and the prices charged to consumers, or
    b. limiting the regulation of lawyers to reserved areas of work – noting that such a significant deregulatory move may dilute the professional responsibilities of lawyers, lead to negative outcomes for consumers and create significant confusion.
3. **Create a parallel 'light-touch' regime for specific categories of legal services provided by non-lawyers:** create a statutory power that could be used to require the providers of specific high-risk legal services to comply with aspects of the regulatory framework. The obligations would not be as comprehensive as those applying to lawyers but could, for example, include a mandatory public register and require participation in a complaints scheme.
4. **Regulate all providers of legal services**: require the registration and regulation of all 'providers of legal services', whether legally qualified or not. The nature of regulatory obligations would vary depending on the degree of risk to the public interest or to consumers (particularly those who are vulnerable). Higher-risk legal services would attract additional regulatory requirements, while lower-risk areas could be subject to less prescriptive regulatory requirements (such as only being subject to a complaints regime). Professional titles would remain protected and could be a prerequisite for certain higher-risk areas of work.

4.	Are the reserved areas for lawyers appropriately defined?
5.	Are there instances where consumers are likely to suffer adverse outcomes from using unregulated providers of legal services?
6.	Should the focus of the Act on regulating the activities of lawyers be broadened to include providers of legal services more generally?
7.	Should regulatory obligations vary depending on the degree of risk from the type of legal service?

Regulating business structures

The Act is very restrictive about the business structures that lawyers are permitted to use. These restrictions reflect a belief that the profit-oriented motives of non-lawyer owners might undermine the

professional responsibilities of lawyers within a practice – including their independence, their duty to the client, confidentiality obligations, and conflict of interest protections.

These restrictions mean that Aotearoa New Zealand is increasingly out-of-step with how lawyers overseas are regulated. This may be reducing the opportunity for investment and inhibiting the development of innovative practices and potentially better outcomes for consumers.

The use of alternative business structures

Most law firms in Aotearoa New Zealand operate with a partnership structure. The Act permits incorporated law firms, but only in narrow circumstances. The Act essentially prevents anyone other than actively involved lawyers from holding shares or being a director in the firm.

Alternative business structures (ABSs) permit investment and shareholding in incorporated law firms by persons other than lawyers. They have the potential to provide firms with flexibility in structuring their business arrangements, facilitate external investment and encourage entry by new providers. ABSs can provide greater choice, higher quality and lower costs for consumers.

Many jurisdictions allow various forms of incorporation, including England & Wales, Scotland, Ireland, New South Wales and Victoria. The use of ABSs is also typically accompanied by direct regulation of the entities themselves as well as the lawyers within them, to ensure the duties of legal service providers are being met.

8.	Should the Act allow law firms to use alternative business structures that permit ownership, management and investment by persons other than lawyers?

The role for multidisciplinary practices

Barristers and solicitors in Aotearoa New Zealand are prohibited from entering into a partnership with a member of another profession, such as an accountant, while holding themselves out as a lawyer.

A multidisciplinary structure is increasingly common overseas. It allows lawyers to come together with non-lawyers and offer clients a 'one stop shop' for a range of professional services. The most common combinations are law firms offering tax, consulting and forensic services, or accounting firms offering legal services. The multidisciplinary structure enables the sharing of profits, risk and information with non-solicitors.

9.	Should the Act permit multidisciplinary practices, where lawyers can enter into a partnership with non-lawyers?

Regulating entities as well as individuals

Regulation of legal services has traditionally been aimed at individual practitioners. The move by the NZLS in 2021 to require law practices (including barristers' chambers) to nominate a designated lawyer to report on conduct issues within the practice was a step towards a form of entity regulation, but the obligations and potential sanctions still attach to the individual lawyer.

Entity regulation broadens the focus of professional regulation to include obligations on both the individual and the legal practice they are employed by or own.

Direct regulation of legal practices occurs in Australia (NSW, Victoria) and England & Wales and typically involves setting outcomes for practices to achieve, rather than prescriptive rules. The objective is often to entrench an ethical infrastructure within the firm and incentivise firms to offer services of high quality and protect consumer interests, and – just as importantly – enable law firms to be held accountable by the regulator if they fail to protect their staff.

10.	Should entities providing legal services be directly regulated, in addition to individual lawyers?

The appropriateness of regulatory tools

The Act confers a number of regulatory powers on the NZLS, but it does not have powers to respond quickly when concerns arise with a practising lawyer.

The power to compel a lawyer to do something (eg, to undertake further training) sits with the 22 autonomous Standards Committees rather than the NZLS Executive. This decentralised authority can only be used if a Standards Committee determines there has been unsatisfactory conduct or if the threshold has been met for the Standards Committee to intervene in a legal practice, which is primarily used to protect clients' funds (s 163).

We would welcome feedback on whether the NZLS Executive (or future regulator) should have a broader set of regulatory tools, including powers to direct lawyers to take specific actions. We are particularly interested in whether there should be the ability to address lower-level concerns before they give rise to concerns about fitness to practise (eg, mental health concerns, concerns about competence, inadequate supervision arrangements). Other New Zealand regulators, such as the Medical Council, have statutory powers to undertake a competence review or place a practitioner under conditions intended to support a safe return to practice after a required health examination. Such powers do not have disciplinary focus and are both protective of consumers and supportive of practitioners.

11.	What additional regulatory tools should be available to the regulator?

4. How best to promote a positive and diverse culture within the legal profession?

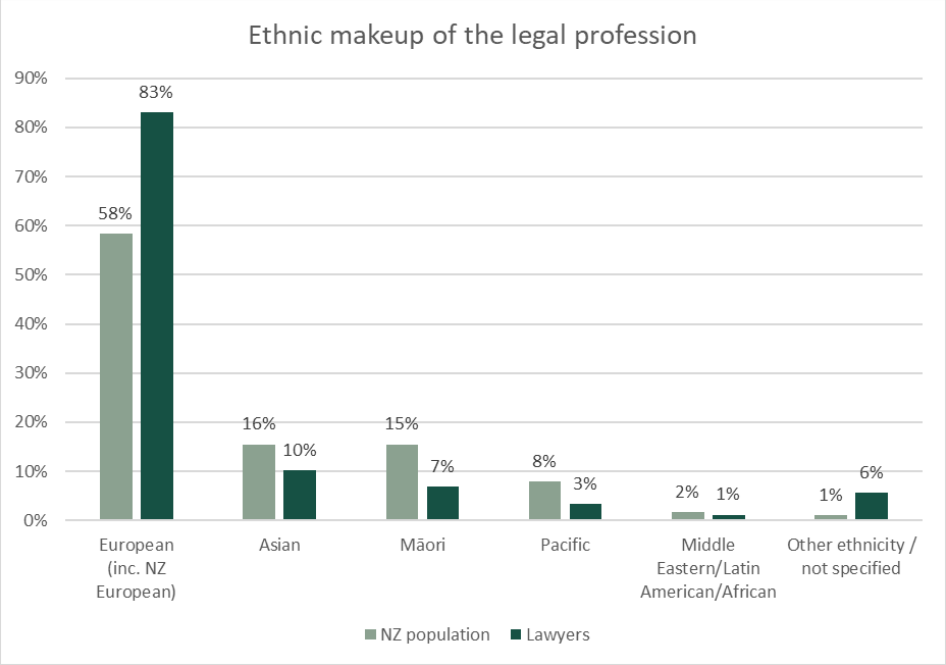
A key focus for the Review is how the regulator can promote a healthy culture within the legal profession. This requires considering the role of the regulator in promoting a welcoming and inclusive legal profession that reflects the diversity of the community it serves, encourages good conduct and supports the mental health and wellbeing of lawyers.

Promoting inclusion and diversity within the profession

The make-up of the legal profession in Aotearoa New Zealand has changed greatly in recent years, with growing numbers of women, Māori, Pacific peoples, Asian lawyers and people from ethnic minorities entering the profession. There is growing recognition of the importance of welcoming Rainbow and gender diverse people in workplaces. A diverse and inclusive profession with a healthy work culture is essential for ensuring the legal profession is able to attract and retain lawyers and effectively serve a broad range of communities.

However, there are still significant barriers to admission, progression and retention within the legal profession for certain groups of lawyers. These barriers are particularly marked for women, Māori, Pacific peoples, Asian lawyers and disabled lawyers. It is difficult to avoid the conclusion that parts of the profession have not moved with the times, and that significant changes are needed if the profession is to better reflect and serve the diverse population of Aotearoa New Zealand.

Table 1: Ethnic make-up of the legal profession (2021)[4]



[4] Some lawyers may identify with more than one ethnicity.

A significant contributor to the lack of diversity within the legal profession is the pipeline into the profession. Law students from low-decile schools are under-represented at law schools and the challenges of social mobility mean that a career in the law is not an option or even a consideration for many.

Examining the data in detail makes it clear that more needs to be done to promote inclusion and diversity within the profession. For example:

- Women are significantly under-represented in senior roles. Although women make up 61 per cent of lawyers in multi-lawyer firms, they comprise only 39 per cent of partner and director roles.
- There have been very few Māori Queen's Counsel (QC) and only 25 per cent of current QCs are women.
- No Pacific lawyer has been appointed to any senior Court (High Court, Court of Appeal and Supreme Court) and there has only been one appointee of Asian descent.
- As of October 2021, Crown Solicitor firms in urban centres such as Christchurch, Gisborne and Whanganui had no Māori Crown prosecutors.
- There is a lack of reliable data on disabled lawyers. In a longitudinal study, only 7 per cent of law students reported having a disability, yet 1 in 4 New Zealanders have a disability.

A diverse legal profession is likely to have positive impacts on firm performance, to be less tolerant of unacceptable behaviour and better placed to meet community expectations. One example of the impact that a lack of diversity can have is highlighted by a report from the Superdiversity Institute, which notes that many Asian communities are currently facing access-to-justice issues, in part because of the lack of cultural understanding and language barriers between individuals and their lawyers and the Courts.

A focus on diversity overseas

The NZLS has taken steps to improve gender equality, including inviting organisations to sign up to a Gender Equality Charter and a Gender Equitable Engagement and Instruction Policy. Examples from regulatory/representative bodies overseas suggest that more can be done to promote diversity within the legal profession:

- Legal regulators in England & Wales have a statutory regulatory objective to 'encourage an independent, strong, diverse and effective legal profession'.
- The Solicitors Regulation Authority in England & Wales is using transparency as one means to create change, including by publishing data on ethnicity pay gaps and levels of diversity within the profession (including data on characteristics that can be broken down by position within law firms, age, sex, ethnicity, parental qualification/occupation).
- The American Bar Association has established a Diversity and Inclusion Center that provides resources and develops initiatives to eliminate racial bias and enhance diversity and inclusion within the legal system.
- Other legal representative bodies have established formal mechanisms to promote diversity, including the Law Society of England & Wales (which funds networks for women lawyers, LGBT+ lawyers, ethnic minority lawyers and lawyers with disabilities) and the Law Institute of

Victoria, which has a permanent diversity committee tasked with increasing and promoting diversity in the profession.

12.	What steps are needed to improve diversity and promote a culture of inclusion within the legal profession?
13.	Does the regulator need additional tools to help improve diversity (eg, the ability to require firms over a certain size to publicly report on the gender and ethnicity of partners)?

Promoting good conduct and a positive culture

A renewed emphasis on promoting good conduct

The report of the NZLS Working Group chaired by Dame Silvia Cartwright examined in detail the impact of inappropriate workplace behaviour within the legal profession and options for preventing such conduct, improving reporting requirements, and ensuring that complaints and disciplinary procedures are fit for purpose.

As a result of the review the NZLS made extensive changes to its rules in 2021 to help promote wellbeing and a positive culture, and to improve conduct within the profession, including:

- clearer conduct standards and rules to prohibit victimisation
- requiring law practices to have effective policies and systems in place to prevent and protect all persons engaged or employed by the practice from unacceptable conduct
- new reporting requirements on law practices where the NZLS must be notified by a designated lawyer about inappropriate conduct, with annual filing obligations
- lawyers having a duty to report to the NZLS if they have reasonable grounds to suspect that another lawyer may have engaged in misconduct.

A focus on health and wellbeing

Recent surveys in Aotearoa New Zealand and worldwide have found that lawyers often experience negative wellbeing effects at work, for example, through stress, time pressures and bullying and harassment. The 2018 Legal Workplace Environment Survey also found strong associations in the legal profession between the frequency of bullying behaviours and poor work culture. Of concern is that the majority of those who experience inappropriate conduct or have mental health concerns do not report the behaviour or seek help, often due to fear of negatively impacting their career.

The NZLS has a number of initiatives in place to support lawyers through the Practising Well programme. This includes a recently established support service, Law Care 0800 line, for lawyers seeking personal support as a result of bullying, harassment or other unacceptable behaviour. It also offers free counselling services to lawyers, and a National Friends Panel provides an avenue for lawyers to discuss practice issues on a confidential basis with other lawyers.

Currently, the NZLS has limited regulatory powers to address broader mental health concerns within the profession and at specific firms. Broader regulatory powers and a shift to entity-based regulation would enable the regulator to respond more effectively to such concerns.

The role of representative bodies

> "If you want a good profession you need a connected profession. Problems arise when a profession becomes disconnected from its members."[5]

This quote neatly encapsulates the role that a membership body can play within the profession to bring individuals together, create a common sense of purpose, and help shape a culture of mutual support. To a large extent, creating a healthy culture within the legal profession needs to be driven by membership bodies that advocate for their members.

A good example is Te Hunga Rōia Māori, the Māori Law Society. Te Hunga Rōia Māori has played a significant role over the past 30 years in encouraging mutual support and collegiality among Māori lawyers and law students, representing the interests of te iwi Māori in the legal profession, identifying and responding to the legal needs of Te Ao Māori, and promoting the education of its members in tikanga Māori and Te Ture Pākehā.

14. What steps are needed to promote positive culture change, health and wellbeing, and help ensure lawyers are safe within their workplaces?

The role of continuing professional development

Consumer protection is a stated purpose in the Act, and Rule 3.9 provides that lawyers must undertake continuing education and professional development necessary to ensure an adequate level of knowledge and competence in their fields of practice. Regular education and training can help individuals maintain their competence and develop new skills. CPD is increasingly used to help lawyers develop skills in negotiation, communication, conciliation, cultural competence, tikanga and the law, te reo Māori and other contemporary skills that can enhance legal practice and contribute to a positive culture within the profession. Many larger law firms and employers of in-house lawyers, as well as representative bodies such as the Auckland District Law Society, already offer a wide range of CPD courses.

The CPD rules require practising lawyers to develop a written CPD plan and complete a minimum of 10 hours of CPD activities each year. The emphasis is on reflective practice. Lawyers are free to choose the activities they undertake, although the activities must be verifiable. The NZLS examines a sample of lawyers' CPD plans and documentation to verify they have met the requirements.

The suitability of the CPD requirements

The obligations for CPD in Aotearoa New Zealand are typically less onerous than most comparable jurisdictions, both in terms of the expected commitment of 10 hours and leaving the content of CPD entirely up to the discretion of the individual lawyer. However, England & Wales recently moved away from highly prescriptive CPD requirements and now simply require that lawyers maintain the

[5] Justice Christine Grice, 2022.

competence needed to carry out their roles, with no target for the number of hours of education required. Further information on international approaches can be found here.

CPD should be meaningful and relevant to the individual lawyer. It is unlikely to be practical to be overly prescriptive as to the content of CPD that lawyers must undertake, particularly in such a broad profession. However, recent changes have provided the NZLS with the power to introduce mandatory CPD components. As we explore below, there are two areas relevant to promoting a positive and diverse culture where the NZLS could mandate certain CPD components.

Anti-bullying and discrimination training

Providing lawyers with the knowledge and tools to deal with matters such as bullying/harassment and unconscious bias may be one means to help contribute to an improved workplace culture. However, there may be scepticism about whether those who bully and exhibit discriminatory behaviours will be susceptible to change via compulsory training courses.

The 2018 Working Group recommended that the NZLS make it compulsory for lawyers to undergo training in anti-bullying, discrimination and harassment as part of CPD requirements. The Independent Review of Russell McVeagh by Dame Margaret Bazley recommended a mandatory training programme for those in management positions within the firm.

Cultural competency training

In 2015 the Canadian Truth and Reconciliation Commission (TRC) issued a report that called upon Law Societies to ensure that lawyers receive cultural competency training. Their report recommended that CPD should include a requirement in skills-based training in intercultural competency, conflict resolution, human rights, and anti-racism. As a result of this recommendation, British Columbia and Alberta have instituted mandatory cultural competency training for lawyers. Health professional regulators in Aotearoa New Zealand are already subject to statutory requirements to set standards of cultural competence.[6]

15. Are the current CPD requirements fit for purpose?
16. Should it be mandatory for lawyers to undergo training in anti-bullying and discrimination as part of their CPD requirements?
17. Should it be mandatory for lawyers to undergo cultural competency training as part of their CPD requirements?

The role of pro bono services

The provision of pro bono legal services has often been seen as part of lawyers' professional responsibility to help ensure equal access to justice. Pro bono work not only benefits consumers; it

[6] Health Practitioners Competence Assurance Act 2003, s 118(1)(i).

contributes to a fair and efficient justice system and is often a rewarding experience for the lawyers involved.

The Act restricts how pro bono services can be provided

Self-employed lawyers can take any pro bono case they wish. However, section 9 of the Act makes it an offence for employed and in-house lawyers (who comprise approximately 60 per cent of the profession) to provide legal services to the public outside of the course of their employment, unless they do so through a Community Law Centre or the Citizens Advice Bureau.

Parliament recently voted down a proposal to allow employed lawyers to provide free services to the public if they do so with the agreement of their employer and in accordance with Conduct and Client Care Rules. Although there was consensus that the current pro bono restrictions are problematic, concerns were raised about the lack of supervision of lawyers who independently provide free services (and potentially a corresponding lack of indemnity protections) and about the definition of 'pro bono' not ensuring services were focused on those consumers with unmet legal needs.

Encouraging lawyers to consider doing more pro bono services

Steps have been taken to facilitate the use of pro bono services and encourage lawyers to undertake them where possible. In 2021, a pro bono 'clearing house' tool, Te Ara Ture, was launched to better match lawyers wanting to do pro bono work with people who need legal services.

However, other jurisdictions are more active in encouraging lawyers to provide pro bono services. The voluntary National Pro Bono Target in Australia sets an aspirational target of lawyers doing 35 hours of pro bono services per year, with signatories covering 12,000 lawyers. In the United States the American Bar Association has set a goal of 50 hours of annual pro bono activity.

Very few countries require lawyers to undertake pro bono activity (Indonesia, the Philippines, South Africa, South Korea and Vietnam). There are a number of reasons why mandating pro bono work may not be effective, including that not all lawyers can afford to provide free services, not all lawyers would be equipped to provide consumer-facing legal services, and the burden may fall disproportionately on lawyers who are already underpaid (such as criminal lawyers operating on legal aid). Many lawyer groups (such as Māori, Asian and Pacific peoples) already provide free services to support whānau and volunteer within their community.

There is a lack of good quality information on the pro bono activities of lawyers in this country. By contrast, nine states in the United States require lawyers to report on their pro bono hours, with 13 states having voluntary pro bono reporting systems. Such reporting requirements can help improve the information base, and may change behaviour simply by measuring what is currently being done.

18.	How might the statutory framework and the regulator facilitate and encourage pro bono services?

5. Is the current model for regulating conduct and handling complaints fit for purpose?

The current state: how are consumer complaints and unacceptable conduct addressed?

Law firms must have 'appropriate' procedures for ensuring each complaint is dealt with 'promptly and fairly' (Rule 11.5). Consumers must be advised of this process at the point of engagement.

The Act requires the NZLS to deal with complaints 'in a fair, efficient, and effective manner'. All complaints must be in writing (s 134) and must be referred to a Standards Committee (s 135).

The NZLS has 22 Standards Committees, made up of volunteer lawyers[7] and lay members who devote significant time to complaints. All complaints must be submitted to a Standards Committee, which makes decisions independently from the NZLS. The Standards Committee may investigate and determine that no further action is required or that there has been 'unsatisfactory conduct' (and issue associated orders), or prosecute the matter before the Lawyers & Conveyancers Disciplinary Tribunal (the LCDT).

The Legal Complaints Review Officer (LCRO) is an independent office under the Ministry of Justice. The LCRO can review decisions made by a Standards Committee following an application (usually from a party to the complaint). The LCRO has the power to lay charges against a practitioner before the LCDT or direct a Standards Committee to do so.

The LCDT is a quasi-judicial body tasked with hearing serious matters regarding a practitioner's fitness to practise. This includes, for example, serious disciplinary charges ('misconduct'), applications to be restored to the roll of practitioners, and appeals against refusals to issue a practising certificate.

Why is there a need for an external complaints service?

Complaints can be damaging, time-consuming and expensive. An effective regulatory system typically provides an expedient, low-cost means of resolving matters without having to go through the Courts. In the case of the legal profession, an effective complaints process can serve several important functions, including:

- providing an important means of upholding consumer confidence in the profession
- giving consumers a voice and an outlet when things go wrong
- assisting the regulator to gather information to determine whether standards are being met and to take action where necessary
- identifying unsatisfactory professional conduct and establishing whether disciplinary action is warranted.

[7] Conveners of the Standards Committee currently receive a nominal payment.

Regulating unsatisfactory behaviour and misconduct

The Act and the associated Rules set out the meaning of 'unsatisfactory conduct' and 'misconduct', which can be summarised as:

- A finding of **unsatisfactory conduct** (s 12) can be made if the conduct in question would be regarded by lawyers of good standing as falling short of the competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer and can also be made if the lawyer has breached the Conduct and Client Care Rules.
- A finding of **misconduct** (s 7) can only be made by the LCDT and includes conduct that would reasonably be regarded by lawyers of good standing as 'disgraceful or dishonourable', wilful or reckless contravention of the Conduct and Client Care Rules, and conduct unconnected with the provision of legal services that justifies a finding they are not a 'fit and proper person' to practise as a lawyer.

The current definitions of 'unsatisfactory conduct' in s 12(a) and (b) of the Act relate to conduct occurring 'at a time when [the lawyer] is providing regulated services'. It may be useful to clarify the extent to which the definition in s 12(c), concerning breaches of the Act or the Rules, can relate to lawyers' personal conduct – in particular, to make it clear that the provision catches clearly offensive conduct unrelated to the provision of regulated services but where there is either a link to the workplace, colleagues, or clients, or where the conduct may bring the profession into disrepute.

The NZLS has signalled that it wants to explore options to change the Act to strengthen obligations on lawyers and its powers.

19.	Is there a need to update the definition of 'unsatisfactory conduct' and 'misconduct'?

The current complaints model has flaws

Over the past five years the NZLS Lawyers Complaints Service has received, on average, 1,467 complaints each year. Of the complaints where a Standards Committee made a determination, 87 per cent of complaints were dismissed with no further action required.

We have identified a range of concerns about whether the current complaints model is fit for purpose:

- **The current model is not resolving complaints efficiently**: for complaints resolved in the nine months to March 2022 it took an average of 259 days to resolve each complaint, and it took an average of 463 days to resolve those complaints where a Standards Committee issued an order (typically following a finding of 'unsatisfactory conduct' against a lawyer). The delays reflect the complexity of claims and the significant burden of case management, in which the complaints regime at the level of Standards Committees has come to resemble the civil jurisdiction of a Court. The lack of timely resolution is compounded for the 16 per cent of cases that then proceed to the LCRO, which takes on average over a year to review a complaint.
- **A lack of consistent outcomes**: the current Standards Committee model is highly decentralised, which can lead to material differences in outcomes, despite efforts by the NZLS to ensure uniformity of process and approach throughout the country. For example, since

1 July 2017, the rate at which complaints were dismissed with 'no further action' varied between 73 per cent (Hawke's Bay) and 90 per cent (North Otago).

- **A lack of transparency is likely to undermine public confidence**: both the Standards Committees and the LCRO are authorised to publish decisions as is 'necessary or desirable in the public interest'. The LCRO publishes full decisions in approximately 33 per cent of its cases, while the Standards Committees publish a short summary of facts in 3 per cent of concluded complaints (22 per cent of upheld cases). Over the past 10 years a Standards Committee has concluded that a lawyer's conduct met the threshold of 'unsatisfactory conduct' in 1,751 occasions, but only disclosed the lawyer's name in 62 of those cases. The legislation surrounding name publication is unnecessarily complicated and obscure. Decisions about name publication ultimately lie with the NZLS Board under regulation 30 of the Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008.
- **A perception the complaints process is not independent:** the current system is open to the criticism that it is run 'by lawyers for lawyers'. This perception is not helped by the fact that Standards Committees may comprise local lawyers adjudicating on the conduct of their colleagues. The Act requires a Standards Committee to have at least two lawyers and one lay person, and the NZLS policy is they may have up to seven lawyers and two lay people.
- **The complaints model is not consumer-centred or restorative:** the most frequent outcome when a Standards Committee issues an order is for lawyers to pay a fine or costs to the NZLS (88 per cent of orders). Given that most of these cases involved a finding of 'unsatisfactory conduct' against a lawyer, it is notable that in only 7 per cent of such cases was a lawyer required to issue an apology and in only 9 per cent of cases was the lawyer ordered to undertake further education or training.
- **The complaints model may not be working for Māori and Pacific peoples:** we have heard from stakeholders that the current complaints model, which is highly adversarial and largely undertaken by exchanging written submissions, may be seen as inaccessible by Māori and Pacific peoples (both as clients and lawyers).
- **The complaints model fails to meet the needs of consumers and lawyers:** consumers and lawyers report being harmed by a slow, adversarial complaints model. As discussed below, there are opportunities for incorporating greater use of tikanga-based dispute resolution principles, with an emphasis on kanohi ki te kanohi (face-to-face) communication, conciliation and mediation.
- **The current model is ill suited to resolving disputes about costs:** Standards Committees are currently involved in assessing whether a lawyer's fees are reasonable. Although some complaints are resolved informally (including by mediation), a fee can only be adjusted if it is determined by a Standards Committee not to be fair and reasonable, which requires an unsatisfactory conduct finding and an order for fees to be reduced, cancelled or refunded. Where grossly excessive fees have been charged, that is a misconduct issue and is referred to the Disciplinary Tribunal.

Our work to date has identified several factors contributing to the current state:

1. **A very prescriptive legislative framework:** a key factor contributing to lengthy delays is that the Act requires every complaint to be referred to a Standards Committee for consideration. The impact of the Standards Committee model includes:

a. The NZLS is limited in its ability to triage the complaints and cannot dismiss cases that are obviously frivolous. The NZLS has recently requested a legislative amendment that would enable it to refer complaints to a 'triage committee' that could dismiss inconsequential complaints or refer them to other agencies.

b. Most of the 22 Standards Committees only meet once a month to discuss complaints, which means there is an inherent limitation on the system being able to resolve complaints promptly.

c. Referring all complaints to Standards Committees (which can entail parties exchanging submissions and cross-submissions) makes the complaints process more formal, adversarial and less amenable to negotiated outcomes. Despite the Act empowering Standards Committees to explore conciliation, over the past five years only 8 per cent of complaints have resulted in negotiated or mediated outcomes (including via the NZLS Early Resolution Service).

2. **A lack of resources**: both the LCRO and the NZLS Standards Committees have a high caseload and there is a clear need for more resources. The current NZLS model of relying on unpaid volunteers to resolve complaints is not sustainable.

3. **A focus on adjudication and discipline**: unlike an ombudsman model that would focus on determining what is a fair outcome in the circumstances, the current model focuses on adjudicating whether or not a lawyer has fallen short of expected professional standards. The potential for disciplinary sanctions to attach to a complaint means that the entire complaints process has become quasi-judicial and adversarial, regardless of how minor the complaint may be. It is a disciplinary system rather than a complaint resolution system.

4. **Minor complaints may not be being effectively addressed by law practices:** the lengthy delays experienced within the Lawyers Complaints Service may be exacerbated by the invisibility and nature of law firms' internal complaints procedures. There are no requirements for law firms to make their complaints process accessible, deal with complaints at an arm's-length basis from the subject of the complaint, or endeavour to resolve the complaint within a certain timeframe. There is also no requirement that complainants must first complain to the responsible lawyer to enable them to remedy the situation, before making a formal complaint to the NZLS.

Alternative legal complaints models

In comparable jurisdictions the most serious cases of professional misconduct by lawyers are all prosecuted before an independent tribunal. That disciplinary tribunal is the only entity in each jurisdiction with the power to strike off or suspend a lawyer.

There is a degree of commonality about the complaints bodies, as set out below. Further information is available here.

Table 2: Models for examining complaints about legal professionals

Type of model	Description	Jurisdictions
A profession-led complaints model	• complaints are investigated and resolved by the self-regulatory body • some involvement of lay participants (who are in the minority) • opportunity to seek an independent review of a decision	New Zealand Northern Ireland Ontario British Columbia
A single independent complaints body	• a single independent entity is tasked with receiving and investigating all complaints, including poor service and misconduct • majority of decision-makers are lay participants	Ireland Victoria Western Australia
Two complaints bodies, with jurisdiction depending on the nature of the complaint	• an independent consumer-facing entity deals with complaints about poor service, with a majority of lay decision-makers (akin to an ombudsman) • the regulator deals with complaints about dishonesty and behaviour that require a regulatory response • the regulator may or may not be independent from the profession under this model	England & Wales Scotland New South Wales (the Office of the Legal Services Commissioner can resolve or refer conduct complaints)

The Law Society of Ontario shows how a regulatory complaints process can be made more accessible by reflecting indigenous practices. When a complaint is made by First Nations, Inuit and Métis peoples, the Law Society asks the complainant for their views on how the Society can respond in a way that best reflects the complainant's indigenous values. If a hearing is required, the Law Society has modified procedures that are available on an opt-in basis, including conducting hearings close to communities, having local Elders present, having staff in informal clothing, using traditional ceremonies, and having modified seating arrangements (eg, in a circle).

Potential structural options for change

Most of the issues with the current complaints model are the result of a prescriptive legislative framework that has not kept pace with modern regulatory practice.

Three potential options for reform are set out below. All three options could incorporate tikanga principles of dispute resolution, including options to improve the informal resolution of disputes, the use of conciliation and mediation, and processes that enable all parties to preserve their mana. There may also be a role for a parallel complaints process better tailored for Māori complainants and lawyers, if both parties are willing.

1. **Substantially reform how the NZLS handles complaints**

   This option would include removing the provisions in the Act that prescribe how the NZLS must handle a complaint and instead require the NZLS to offer a complaints service that meets best-practice complaints principles. The NZLS would have flexibility to develop appropriate procedures, tailoring them to better reflect the nature of different categories of complaint. This

option could also involve the NZLS moving away from the current volunteer model to contract the services of appropriately qualified decision-makers, with greater use of lay decision-makers.

2. **Establish a new independent complaints body for all complaints**

   This option would establish a new entity to receive, investigate and determine all complaints about lawyers. The body would be independent of the legal profession (it may or may not be independent of the regulator) and would be tasked with handling complaints against lawyers. If an investigation uncovered serious wrongdoing, the matter would be referred to the Tribunal for disciplinary action, as currently occurs. Under this model there is unlikely to be a continuing need for the LCRO.

3. **Have two separate bodies deal with complaints of poor service or conduct**

   This option would require a delineation based on the nature of complaints: low-level complaints alleging poor service from a lawyer (eg, communication, billing) would be directed to a new consumer-facing complaints body that could order remedies, while complaints about conduct that might require a disciplinary response (eg, that call into question fitness to practise) would continue to be directed to the regulator.

20.	Is the current complaints model fit for purpose? What are the key issues?
21.	Is there a need for structural changes to the complaints model?
22.	Is there a need to establish an independent entity to investigate and resolve complaints?
23.	What might a tikanga-based complaints or disciplinary process look like?

6. Should there be an independent regulator?

The current state: the fusing of regulatory and representative functions

The Act marked a departure from the legal profession self-regulating to a co-regulatory regime, with the Minister of Justice having some supervisory responsibilities (eg, approval of proposed practice rules and annual practising fees). However, in reality the NZLS continues to enjoy a lot of autonomy as a regulator and representative body.

As a regulatory body the NZLS has a duty to the community, and as a representative body it also has a duty to promote the interests of its members. Since the Act was passed in 2006 the NZLS has endeavoured to strictly separate these functions to avoid perceptions that it may be conflicted.

The question whether the regulatory functions should be separated from membership services is broader than whether there should be an independent complaints body. Additional regulatory functions (beyond complaints handling) include issuing practising certificates and maintaining a register of those who hold practising certificates, setting practice rules and CPD requirements, inspecting trust accounts, instituting disciplinary prosecutions, and advising on law reform.

Occupational regulation in Aotearoa New Zealand typically involves the establishment of a statutory body accountable to a Minister and independent from organisations representing the industry or profession. The possibility of direct regulation of the legal profession by the Government is not being considered given the potential consequences for the independence of the profession and the rule of law.

Potential issues over the NZLS dual functions

Some possible issues from the NZLS having both regulatory and membership functions include:

- The NZLS may be less willing to disrupt the status quo since it is governed by elected members, for example in taking stronger measures to improve diversity and inclusion within the profession and tackle inappropriate conduct.
- The elected Council may be reluctant to set practising fees at a level needed for the NZLS to effectively fulfil its regulatory functions. For example, given the delays resolving complaints at both Standards Committees and the LCRO, one might expect the Council to have significantly scaled up the resourcing required to ensure the timely resolution of complaints (including paying Standards Committee members or outsourcing functions).
- We have heard from several stakeholders that the current model means the law profession does not have a strong advocacy body. There is clearly a tension in how a membership body intended to advocate on behalf of lawyers can effectively represent their interests on matters of importance from a regulatory perspective.
- There is also a perception among elements of the public that the NZLS is an entity run 'by lawyers for lawyers' and that it faces an unmanageable conflict of interest.

Regulatory / representative models adopted overseas

There has been an international trend towards establishing independent regulators of legal services, with some variation in the role played by professional bodies across jurisdictions. The table below summarises various approaches and more information can be found here.

Table 3: Models for regulation and representation

Type of model	The legal profession	Other New Zealand professions
A membership body has both representative and regulatory functions This includes where only complaints are dealt with independently (as indicated)	New Zealand Scotland* Northern Ireland** Canada*** Australian Capital Territory and Northern Territory Queensland, New South Wales, South Australia and Tasmania (all of which have an independent complaints body)	Teachers
Separate entities provide regulatory and representative functions	England & Wales Ireland Victoria and Western Australia	Engineers and engineering associates Architects Health practitioners Financial advisors Builders Electrical workers Plumbers, gasfitters and drainlayers Real estate agents Residential property managers (proposed)

* The Roberton report suggested establishing an independent legal regulator in Scotland. ** There is also oversight by the Lord Chief Justice of Northern Ireland and a Lay Observer. *** The Attorney General of British Columbia recently announced that a new independent regulator is to be established for all legal professionals in the province.

Alternative models to consider

Whether the Panel recommends an independent regulator will be influenced by decisions on other aspects of the Review. For example, if we recommend extending the scope of regulation to all legal services or permit alternative business structures and multidisciplinary firms, it is likely to become even less appropriate for the membership body for lawyers to be responsible for regulating all law services. Similarly, a recommendation to set up an independent complaints body will influence whether there should be an independent regulator and vice versa.

High-level options regarding the potential separation of regulatory and membership services include:

1. **No change**

2. **Operational separation: improve separation of functions within the NZLS**

   One option is to reflect the approach in England & Wales, where the largest regulator, the Solicitors Regulation Authority, is formally part of the Law Society but is functionally independent.

   A similar approach in Aotearoa New Zealand might entail establishing separate brands, separate governance structure, separate IT systems/access, and more tightly defining how information is dealt with, particularly at the branch level. This option would likely entail the regulator having an independent Board that is competency-based, comprises a majority of lay members, and has strengthened powers (including responsibility for rule and fee setting).

3. **Establish a new independent regulator**

   Under this option a new independent regulator would be established to regulate lawyers / legal services, with the NZLS to operate solely as a membership organisation. In this example the new regulator may also be responsible for handling complaints about lawyers.

Options 2 and 3 would have significant cost implications. Research indicates that the cost of the core regulatory functions of the NZLS is currently towards the upper end of the costs incurred by overseas legal regulators (on a per-lawyer basis) – with the per-lawyer costs being higher than in England & Wales, Ireland and Victoria, but lower than the costs in Scotland and British Columbia.

24.	Is there a case to change the current arrangement where the NZLS exercises both regulatory and membership functions? Why?
25.	If an independent regulator is established, what functions should lie with the regulator and what functions should lie with the professional membership body?
26.	If an independent regulator is established, what would be the implications for the continued ability of the NZLS to provide representative services?

7. What are the optimal institutional arrangements for modern regulatory and representative bodies?

The current state: the NZLS' governance arrangements

The NZLS is governed by both a council and a board. The NZLS President chairs the Council and the Board, while the Chief Executive is responsible for day-to-day operations of the organisation.

The Council has delegated most of its powers to the Board. Its retained powers include electing the President and Vice-Presidents of the NZLS, amending the constitution, making practice rules, and those powers that the Act does not permit it to delegate (including fixing fees and levies).

The Council has 25 members, all of whom are members of the legal profession. It consists of the President and four Vice-Presidents, one member from each of the 13 regional branches (who are each elected by branches), a representative from each of the three sections (also elected), the Chair/President of the New Zealand Bar Association, a representative from the Large Law Firms Group, and an observer from the New Zealand Institute of Legal Executives. Te Hunga Rōia Māori and the Pacific Lawyers Association joined the Council as members in 2020.

The NZLS Board consists of the President and four Vice-Presidents. The Board acts as an executive body and has governance and oversight responsibilities.

The Review is considering the level of independence needed for both a legal complaints service and a regulator. However, we also need to consider what a fit-for-purpose governance structure might look like for the delivery of regulatory and representative functions. This section explores the suitability of the current NZLS model and seeks feedback on what future organisational and governance arrangements might look like.

How effective are the current institutional arrangements of the NZLS?

Some potential concerns with the current governance structure include:

- The Council consists primarily of elected members, with no requirements for governance experience. The use of popular elections may not be suitable for a modern regulatory body tasked with ensuring the interests of the public and clients are protected.
- It is also not clear whether a modern regulator requires both a part-time President (broadly representing the membership) and a Chief Executive (responsible for efficient operations of a regulator).
- Regular elections result in significant turnover of Council and Board members. This risks the loss of institutional memory and the ability to pursue longer-term strategies.
- There is no requirement for the Council or Board to have lay members.

- The Council consists of up to 25 members. While it may be appropriate for a membership body to have strong geographic representation, it results in an unwieldy structure and may hinder efforts to provide strategic direction to the national regulator.
- Having a regulatory budget set by elected members does not reflect best-practice standards.
- The Lawyers Complaints Service depends on the availability of appropriately skilled people who can provide timely advice, but currently the model relies on the goodwill of volunteers.

The lack of diversity within the NZLS Council and Board is also striking. We have been unable to confirm whether the NZLS Council has ever elected a Māori representative to the Board. While allocating a seat at the Council to both Te Hunga Rōia Māori and the Pacific Lawyers Association is a welcome development, reserving 2/25 seats to these entities does not ensure a commitment to honouring Te Tiriti, diversity in governance structure or sensitivity to the challenges facing minority groups within the profession and the populations those groups serve.

What might a fit-for-purpose governance structure look like?

Considering an appropriate governance and institutional structure for the regulator will require giving due weight to the adage 'form follows function'. The Panel's recommendations elsewhere – including the scope of legal regulation, the case for an independent complaints body, and whether the NZLS can continue to effectively exercise both regulatory and representative functions – will inform the structure of the regulator.

We seek views on what a fit-for-purpose governance structure would look like for regulatory and for representative functions. Relevant considerations include:

- the need for a broad representative body like the NZLS Council
- how governance members (on the Council, Board or other) should be chosen, retained and remunerated, including the role of elections and the possibility of independent appointments
- the make-up of governance members, including:
  - the role and proportion of seats reserved for lay members
  - whether there should be competency requirements for governance positions
  - whether there remains a need for governance roles that reflect geography and legal subject-matter expertise
  - whether there is a need for governance roles that ensure there is a suitably diverse governance membership.

What should be the relationship between any future regulator / representative body and Māori?

As noted earlier, there are opportunities to strengthen the profession's commitment to Te Tiriti o Waitangi through changes to the purpose statement of the Act, obligations on lawyers, and the regulator's objectives. It is also important to consider the relationship between any future regulator / representative body and Māori, having regard to Te Tiriti.

How other professions have reflected Te Tiriti

We have reviewed 22 professional organisations (nine regulators and 13 membership bodies) in Aotearoa New Zealand to assess the approaches taken by those organisations to articulate and give effect to Te Tiriti o Waitangi obligations.

We have identified below a broad range of features that were used by professional organisations to show commitment to Te Tiriti o Waitangi at a governance, policy or operational level:

1. Governance requirements
   a) minimum Māori membership requirements for Boards
   b) a requirement that assessment of the skills of potential governance appointees includes consideration of their Māori or Te Tiriti o Waitangi competency requirements
   c) 50/50 Māori/non-Māori Board membership. Often this is in the form of having two separate caucuses (a Māori caucus and a non-Māori caucus) that come together to form an organisation's governing board.
   d) having two co-chairs (one Māori, one non-Māori)
   e) having Māori committees or sub-committees of the Board, either to carry out specific functions for the Board or to advise the Board directly.
2. Formal partnership agreements with Māori, which could be with an external party or a collective within the profession. The NZLS MoU with Te Hunga Rōia Māori o Aotearoa is an example of such an agreement.
3. Explicit Te Tiriti o Waitangi commitments or statements, usually found in constitutional documents, strategic plans or organisational policies.
4. Demonstrated Māori participation in operations, including specific Māori roles (either on the executive leadership team or in staff/advisor roles) and dedicated tikanga advisors.
5. Specific flagship projects focused on Māori or Te Tiriti o Waitangi outcomes.

The scenario of an independent regulator

The regulatory bodies we examined typically did not go as far as the membership bodies in initiatives designed to show a commitment to Te Tiriti o Waitangi. However, most regulators had explicit Te Tiriti commitments in their key documents and many had minimum Māori membership requirements for their Boards.

We welcome the views of stakeholders as to whether, and if so how, the governance structure of any future independent regulatory body could better reflect Te Tiriti.

The scenario of a dual regulatory / representative body

If the outcome of this review is that the current NZLS model of dual regulatory and representative functions continues, there may still be room for improvements to better reflect Te Tiriti.

We would like to hear from stakeholders whether the relationship between the NZLS, Māori and Te Hunga Rōia should change, and if so how. Te Hunga Rōia Māori is a volunteer organisation and has

no full-time staff. While it has recently received some support from the NZLS to produce submissions on law reform, it has minimal financial security and has been entirely reliant on the goodwill of its members.

For example, there may be a case for Māori, including Te Hunga Rōia Māori, to have a greater role in the governance of the NZLS, to have statutory recognition, or to undertake certain functions on behalf of the NZLS.

Our Terms of Reference require us to consider what fit-for-purpose governance would look like for the delivery of regulatory and representative functions, including having regard to diversity, required competencies, a commitment to honour Te Tiriti o Waitangi, and the extent to which regulatory functions should be governed by elected members.

27. If the regulatory and representative functions of the NZLS are to be split into two separate entities, what would an appropriate modern governance structure look like and how might governance members be selected?

28. If the regulatory and representative functions are to remain within the NZLS, what would an appropriate and modern governance structure look like and how might governance members be selected?

29. Under either scenario (split or dual functions), how can a future governance structure better reflect Te Tiriti?

8. Have your say

The Panel invites comments on the issues raised in this discussion document by 5pm on 12 August.

All submissions will be treated in confidence by the Panel and the Secretariat. Submissions and personal information will not be disclosed to any party without your express prior agreement.

How you can contribute

There are two main ways you can respond:

Providing a written submission

Please email your response to the discussion paper to secretariat@legalframeworkreview.org.nz

Alternatively, you are welcome to post your response to the following address:

Legal Review Secretariat
c/o Sapere Research Group
PO Box 587
Wellington 6140

Completing an online survey

In addition to providing a written submission, stakeholders are invited to complete an online survey. The survey can be completed at www.surveymonkey.com/r/nzlawreview.

Facilitated events

The Independent Panel will also be holding a number of in-person and virtual events to explore the issues and options raised in this discussion document. Please check our website for updates on these events: https://legalframeworkreview.org.nz/

NZLS consultation activity

The NZLS will separately be coordinating and providing opportunities for comment during the consultation period: www.lawsociety.org.nz/about-us/consultations/independent-review-consultation