INDEPENDENT
REVIEW

FINAL REPORT
MARCH 2023

Regulating Lawyers in Aotearoa New Zealand

Te Pae Whiritahi i te Korowai Rato Ture o Aotearoa

Contents

Foreword 5

Executive summary 6

Recommendations 15

Whakarāpopototanga tāpae 17

Ngā Tūtohu 27

1. Introduction 29

Context for the review 29

Terms of Reference 30

How we went about our work 31

Acknowledgements 31

Next steps 32

Structure of this report 32

A. Where we are now | Kei hea tātou ināianei

2. Regulating lawyers: the current state 36

Why do lawyers need to be regulated? 36

A brief history of regulation of the legal profession 37

The structure of the Law Society 39

3. What we heard from consultation 41

Main consultation themes 42

A solid foundation to build on 46

B. A new independent regulator | He kaiwhakahaere ture motuhake hou

4.	**The case for changing the regulatory model**	**48**
	Our framework for analysing the regulatory model	48
	Trust in the Law Society as regulator is eroded by its dual functions	49
	The Law Society's dual functions undermine its regulatory efficiency and effectiveness	55
	The Law Society is constrained in its ability to represent the interests of lawyers effectively	61
	Conclusion: the Law Society should no longer both regulate lawyers and promote their interests	63
5.	**Options analysis: the case for a new independent regulator**	**64**
	Recommendation: establish a new independent regulator	64
	Our response to submissions against independent regulation	68
	A cost-benefit analysis highlights the case for independent regulation	70
	Other options considered	72
6.	**Institutional arrangements for the regulator and representative body**	**79**
	Allocation of regulatory and representative functions	79
	Flaws with current governance arrangements	80
	The Board of the new regulator	81
	Recommended appointment process for the new Board	85
	The governance of the Law Society as a representative body	87

C. What needs to happen | Ngā mahi e tika ana kia mahia

7. New statutory objectives and obligations **92**

A new purpose statement 92

Te Tiriti o Waitangi and the statutory framework 93

Setting out regulatory objectives in the Act 94

The fundamental obligations of lawyers 99

Minority view 104

Access to justice and pro bono services 107

8. The scope of regulation: who should provide legal services and be regulated? **110**

Which providers of legal services should be regulated? 110

A more flexible, 'freelance lawyer' model 116

Allowing employed lawyers to provide pro bono services 121

Permitting new business structures 122

Regulating law firms as well as lawyers 127

9. Quality care, information and competence assurance in a new regulatory model **130**

Prioritising the interest of consumers 130

Competence assurance 132

The regulator's powers 133

The role of Continuing Professional Development 137

Admission to the legal profession 141

10. A reformed complaints system **143**

Complaints system: the current state 143

The complaints system requires wholesale reform 144

Putting in place a more effective complaints system 159

11. Cultural challenges: improving diversity, inclusion, conduct and mental health **169**

Progress on diversity but challenges remain 170

The role of the regulator in supporting diversity and inclusion 173

Addressing conduct and cultural problems in the legal profession 179

Appendix
List of those who made written submissions 187

Foreword

We are pleased to deliver our report, *Regulating Lawyers in Aotearoa New Zealand | Te Pae Whiritahi i te Korowai Rato Ture o Aotearoa* – the report of the independent review of the statutory framework for legal services in Aotearoa New Zealand.

Undertaking this review has been a privilege and a significant responsibility. We commend the Law Society for having the foresight and courage to commission such a wide-ranging review. We are conscious of the trust and hopes that the Society, lawyers and members of the public have invested in this inquiry.

We are grateful to all the people who shared their experiences and wisdom with us, in meetings, survey responses and submissions. We thank everyone who contributed to the review, particularly the Secretariat who ably supported our work over the past year and the international experts who shared lessons from other jurisdictions.

We believe that implementation of our recommendations will build on previous reforms to create new, fit-for-purpose legislation to regulate lawyers in Aotearoa New Zealand – recognising our bicultural foundations and the constitutional significance of Te Tiriti o Waitangi, and equipping a new independent regulator to meet the expectations of the community and the legal profession, as the market for legal services continues to evolve.

We hand over this report, trusting that the 'once in a generation' opportunity of this review will be seized.

He mihi mahana ki a koutou

Professor Ron Paterson (Chair)

Jane Meares

Professor Jacinta Ruru

Executive summary

This independent review was commissioned by the New Zealand Law Society | Te Kāhui Ture o Aotearoa (the Law Society or the NZLS).

The Independent Review Panel, consisting of Professor Ron Paterson (Chair), Jane Meares and Professor Jacinta Ruru, commenced work in March 2022. Our task was wide-ranging and ambitious – to review the framework for the regulation and representation of legal services in Aotearoa New Zealand.

Context for Independent Review

The genesis for this review can be found in the 2018 disclosures of reports of sexual harassment of young lawyers and summer clerks. This prompted the Law Society to commission a comprehensive Legal Workplace Environment Survey, which highlighted that these were not one-off incidents. Many lawyers had experienced harassment, bullying, discrimination and racism during their careers. The subsequent report of the Law Society's independent Working Group (the Cartwright Report) recommended a raft of changes to enable better reporting, prevention, detection and support in respect of unacceptable workplace behaviour in the legal profession.

In addition to concerns about the powers available to the regulator to deal with unacceptable behaviour, other important context for the Law Society's decision to commission this independent review included: widespread dissatisfaction with the statutory system for handling complaints about lawyers; a desire to confront cultural challenges and improve diversity, inclusion and mental health in the legal profession; and ongoing unease about whether a membership body should be responsible for regulating the legal profession and can adequately represent the interests of lawyers if constrained by its regulatory role.

The Lawyers and Conveyancers Act 2006 (the Act) has been in force for 14 years. In the intervening years there have been significant changes in the delivery of legal services, the role of non-lawyers and the use of technology.

Our country has also changed significantly. Aotearoa New Zealand is a more multicultural society, striking in its ethnic and linguistic diversity. There is much greater recognition of our bicultural foundations and of Māori as tangata whenua, while the use of te reo Māori in daily life is becoming more commonplace. The unique, constitutional significance of Te Tiriti o Waitangi is now reflected in legislation and policy. Tikanga Māori is more firmly recognised as part of Aotearoa's law and is being incorporated more substantially into the core syllabus of the law degree.

Terms of Reference

The Terms of Reference[1] for this review, developed by an independent steering group appointed by the Law Society, called for an examination of the entire statutory framework for regulating lawyers. The Panel was required to examine the following key aspects of the regulatory framework for lawyers in Aotearoa New Zealand: conduct, complaints and discipline, regulated services and appropriate separation of interests and roles. The scope of the review included:

1 See The New Zealand Law Society *Independent review of the statutory framework for legal services in Aotearoa New Zealand: Terms of Reference* (September 2021) <https://legalframeworkreview.org.nz/terms-of-reference/>.

- whether the Law Society's representative functions should be separated from all or some regulatory functions
- how unacceptable conduct is prevented and addressed
- how complaints are made and responded to, including issues relating to transparency
- which legal services are regulated and by whom
- optimal organisational and governance arrangements for the Law Society
- the role of Te Tiriti o Waitangi and biculturalism in the statutory framework, and in organisational and governance arrangements
- how inclusion and diversity should be expressed in the regulatory framework, and in organisational and governance arrangements.

The Panel was asked to reflect on the changing environment and to examine the need for 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.

The review process

The Law Society described this review as a 'once in a generation' opportunity to shape how the profession is regulated and represented. The Panel was committed to ensuring stakeholders had multiple opportunities to have their say during consultation on the review.

The Panel's discussion document was published on 14 June 2022 and widely circulated, inviting responses by completing an online survey and/or by making a submission. It prompted 1,308 survey responses (mainly from lawyers) and 183 submissions, including from over 30 law representative and consumer groups. Several working papers were prepared, researching specific topics raised in the discussion document and published at www.legalframeworkreview.org.nz.

From June to September 2022, the Panel participated in three webinars and five branch events, and held 55 meetings with over 250 stakeholders and four focus groups with sole practitioners, lawyers from small firms, and lay and lawyer members of Standards Committees. The Panel also travelled overseas to meet with regulators and representative bodies in England and Wales, Ireland, Scotland, Canada and Australia (New South Wales and Victoria).

Overall, the Panel was pleased with the levels of engagement within the legal profession and from key representative groups, including Te Hunga Rōia Māori o Aotearoa, the Pacific Lawyers Association, NZ Asian Lawyers, the New Zealand Bar Association, Aotearoa Legal Workers' Union, the ADLS, the Government Legal Network, the Large Law Firms Group, the New Zealand Law Students' Association, the In-house Lawyers Association of New Zealand and a range of women lawyers' associations. Consumer views came through strongly in submissions from Community Law Centres o Aotearoa, Consumer NZ and Citizens Advice Bureau, and via a Kantar representative survey of New Zealanders.

This final report represents the culmination of 12 months of extensive engagement, research and analysis. It is evidence-based and reflects best practice and lessons from the regulation of other professions in New Zealand and of lawyers overseas. It provides a blueprint for future reform of how the legal profession is regulated and represented.

Overall conclusion: the current regulatory model is not working

While the current model for regulating and representing lawyers works well in some areas, it falls short in many others.

The rationale for occupational regulation is to protect consumers and the public. However, the

current regulatory model, with the Law Society exercising dual functions, does not adequately protect and promote the interests of consumers. The Law Society's responsibility to promote the interests of the profession conflicts squarely with its duty to regulate in the interests of the public.

Trust in the Law Society as regulator is being eroded by its dual functions. Consumer groups express a lack of trust in the Law Society given its conflicting roles and a perception of 'lawyers looking after other lawyers'. Many lawyers lack confidence the Law Society can effectively address the challenges confronting the profession.

An inefficient and expensive regulatory model is not meeting the needs of consumers or the profession. Competing objectives and conflicting duties undermine the efficiency and effectiveness of the Law Society as a regulator. The legislative framework is unnecessarily prescriptive and ties the hands of the Law Society.

The Law Society's regulatory work tends to be reactive and is not transparent. It has a bias towards preserving the status quo, which is partly a feature of the Law Society being accountable to the profession. Unlike many modern regulators, there is comparatively less focus on initiatives to address consumer concerns, policy leadership on wider market issues, and prioritising resources to identify and manage risks. In some instances the Law Society has deferred to the interests of lawyers over those of consumers.

Our consultation process also highlighted that the Law Society's dual functions constrain its ability to represent the interests of lawyers effectively. Many lawyers believe the profession lacks a strong membership body that can advocate for reform of regulatory processes and provide support to lawyers subject to complaints. The Law Society's dual functions deter lawyers from seeking assistance from their representative body on matters such as mental health issues, lest a regulatory intervention be triggered.

The current complaints system is not working. It is slow, adversarial, produces inconsistent outcomes, is perceived as biased towards lawyers, and is not consumer-centred or restorative. It is not meeting the needs of consumers or lawyers. This is not the fault of the Law Society, but is a direct result of legislative requirements that have put in place a rigid and inflexible complaints system.

The regulator also lacks the necessary regulatory tools to adequately protect the public, respond promptly to evidence of consumer harm, and take action when competence or health concerns emerge about a lawyer's fitness to practise. We identified legislative and regulatory restrictions that do not serve consumers well, including unjustified restrictions on the business models available to lawyers, unnecessary restrictions on when lawyers can practise on their own account, and a lack of regulatory focus on law firms.

There is a strong case for a new independent regulator

The public and the legal profession in Aotearoa New Zealand would benefit from a new independent regulator. This conclusion is supported by best-practice regulatory principles, backed by consumer groups and a significant part of the profession, and informed by a clear international trend away from lawyers regulating their own profession.

Major reviews of legal regulation overseas have also concluded that the legal profession should be independently regulated and that it can be done in a manner that does not compromise the important role of the legal profession to uphold the rule of law and speak up against the government of the day. Separate entities successfully provide regulatory and representative functions for lawyers in Victoria (Australia), Canada, England and Wales, and Ireland. The self-regulatory model for lawyers is an outlier in professional regulation in New Zealand.

Many lawyers argue that the current system 'ain't broke' and express concern that reform would be expensive. However, our analysis has not borne this out. While it is always hazardous to estimate the cost of reform, a cost-benefit analysis highlights the case for independent regulation.

We are not proposing direct government regulation of the legal profession. The new regulator would be established as an independent statutory body. It would not be a Crown entity, nor subject to directive powers or statements of policy from government. A statutory objective of the new independent regulator would be to "uphold the rule of law and facilitate the administration of justice" and its functions would continue to include responsibility for advising on law reform.

The current governance structure of the Law Society, with a large, elected council and an elected board, is unwieldy and outdated. Modern governance will be needed for the new regulator, preferably a small, competence-based board with a diverse membership. We recommend a board of eight members selected for their governance skills, with an equal split between lawyer and public members. The board should be chaired by a public member to signal clearly that the regulator is independent from the profession. At least two board members should bring strong te ao Māori insights. Appointments would be for up to four years, with a maximum tenure of 10 years. There would be no elections for lawyer seats on the board.

To safeguard the independence of the appointments process, the Minister of Justice would make governance appointments following advice from a nominations panel, comprising a mix of people nominated by consumer groups and legal representative bodies (eg, the Law Society and Te Hunga Rōia Māori). Ministers should not depart from appointment recommendations made by the nominations panel without good reason, to be provided in writing and publicly disclosed at the time of new appointments.

The Law Society as a new membership body

Establishing an independent regulator means the Law Society would no longer have statutory powers and would become solely a membership body. But the Law Society will continue to play an important and valuable role for the profession and for Aotearoa New Zealand, as a strong and independent voice speaking up for the rule of law. The Law Society, as a pure membership body, should remain the peak national body to represent the interests of New Zealand's lawyers.

The structure and governance of the Law Society will need to reflect what its members want and how it can best meet their needs. In our view there is no need for both a governing council and a board. We suggest a single governance layer, with a board of 8-10 members including public members to complement the skillsets of elected members.

New statutory objectives and obligations

A new statute for the regulation of lawyers should include a stand-alone, overarching Te Tiriti clause: "All persons exercising powers and performing functions and duties under this Act must give effect to the principles of Te Tiriti o Waitangi." This will signal the importance of Te Tiriti to New Zealand's constitution and legal system, and guide how the regulator engages with the profession and the public and fulfils its functions.

The new regulatory regime should spell out the objectives of the new regulator. The primary objective should be to protect and promote the public interest, with subsidiary objectives of:

1. upholding the rule of law and facilitating the administration of justice
2. improving access to justice and legal services
3. promoting and protecting the interests of consumers

4. promoting ethical conduct and the maintenance of professional competence, including cultural competence, in the practice of law
5. encouraging an independent, strong, diverse and effective legal profession.

The first three objectives are shared by many legal professional regulators. The latter two objectives reflect areas in need of regulatory focus in Aotearoa New Zealand: prevention of sexual harassment, bullying and discrimination in the workplace; maintenance of competence, including cultural competence – being sensitive to the needs, values and beliefs of Māori, and of clients from other cultures, including Pacific peoples and Asian consumers; and responding to concerns that the legal profession has for too long not been inclusive or diverse.[2]

In a new regulatory framework, we are also proposing changes to lawyers' fundamental obligations. There should be a revised obligation "to *promote* and protect" the interests of their clients – subject to overriding duties as an officer of the High Court and under statute. We also suggest a new, fundamental obligation on all lawyers "to maintain their competence and fitness to practise in their areas of practice".[3]

The scope of regulation: who should provide legal services and be regulated?

At present there is no basis for changing the scope of regulation as it applies to lawyers or extending it to cover currently unregulated legal services.

Many submitters raised examples – such as employment advocates – where consumers have poor outcomes from using unregulated legal providers. Should any government consider options for regulating these providers, there are more suitable, lighter-touch methods than extending the scope of regulation applicable to lawyers. We consider the current areas of practice reserved for lawyers (primarily related to litigation) to be appropriate.

A new 'freelance lawyer' model

The requirement for lawyers to seek prior approval from the regulator before being allowed to practise on their own is an outdated requirement that is failing both consumers and lawyers. It creates a barrier for some lawyers who wish to return to the workforce and limits flexible working arrangements. This impacts on the diversity of the profession, limits competition and innovation by prohibiting contracting, and is excessively protective in situations where there is minimal risk of consumer harm.

We recommend adopting the 'freelance lawyer' model operating in England and Wales. Lawyers should be able to provide legal services to the public without needing prior approval as a sole practitioner if their practice is confined to areas that are not reserved areas of work, they practise on their own and do not employ anyone, they practise in their own name, are engaged directly by clients and do not handle client funds.

Permitting employed lawyers to provide pro bono services

Pro bono services are not the answer to the major access to justice problems facing New Zealand society. However, some barriers to the provision of free legal services could safely be removed.

The statutory blanket ban on employed lawyers providing legal services outside the course of their employment is overly broad and not justifiable. Our consultation highlighted the enthusiasm of highly capable lawyers who want to help people in their community in need of legal services, but who are currently prevented by the Act from doing so. We recommend that employed lawyers be

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2 A minority view proposes three additional objectives, relating to support for the use of te reo Māori and other first languages, preservation of tikanga, and promotion of climate change consciousness in the practice of law.

3 A minority view proposes reference to Te Tiriti as part of a lawyer's fundamental obligation to uphold the rule of law, and a new fundamental obligation relating to tikanga.

able to provide pro bono services to consumers so long as the activities are in non-reserved areas, are provided at no cost, and the lawyer does not handle client funds. Over time the new regulator could examine whether this could be extended to reserved areas with additional protections.

Permitting new business structures and encouraging innovation

The Act imposes two main restrictions on the business arrangements that can be used by lawyers: anyone other than an actively involved lawyer is prohibited from holding shares or being a director in an incorporated law firm, and lawyers are prohibited from entering into partnerships with non-lawyers. Both these restrictions should be removed.

Consumers of legal services will be better off if lawyers have the flexibility to choose the corporate form through which they provide services. The current business restrictions negatively impact the ability of law firms that wish to innovate, seek external investors, or partner with other professionals (eg, accountants) to deliver broader services to consumers. An analysis of comparable jurisdictions where lawyers are now permitted to operate under alternative corporate structures does not indicate any consumer harm from the new forms of business.

Consumers are also likely to benefit from the use of new technologies to improve access to legal services, for example by unbundling services, so consumers themselves can undertake some of the work required for a transaction. Far from 'dumbing down' the profession, overseas commentators believe technology may well assist in meeting unmet legal needs and growing the legal market for the benefit of the public and the profession. However, we did not identify any issues resulting from changes in technology that require a wholesale reconsideration of how legal services are regulated.

Regulating law firms as well as lawyers

The Act currently focuses regulation on individual lawyers, meaning that law firms have become, for all intents and purposes, functionally invisible to the regulator. A lack of 'entity regulation' in New Zealand means that in disciplining individual lawyers the Law Society may be addressing a symptom rather than the root cause of consumer harm. A law firm, through its hierarchical employment relationships, can exert a significant degree of control on the extent to which individual lawyers can fulfil their professional obligations.

We recommend that entity regulation be introduced in New Zealand. Direct regulation of law firms will help entrench an ethical infrastructure within firms, with benefits for clients, the public and the legal profession.

Quality care, information and competence assurance

More needs to be done to place consumers at the heart of the regulatory framework for legal services.

Changes are needed to promote consumers' interests and shift the current balance in the client-lawyer relationship, with an emphasis on consumers' rights to good-quality care and information, including about fees. The regulator should track client experience and consumer expectations, and prioritise consumers' interests in its regulatory strategy, informed by advice from a consumer panel.

New regulatory tools

The current model reactively addresses individual breaches of professional standards. The regulatory framework should enable the regulator to shift from reactively addressing competence issues through a disciplinary lens, to proactively identifying 'at risk' lawyers and targeting support and resources to intervene before consumers are harmed.

We recommend a number of new regulatory tools with an emphasis on consumer protection and maintenance of competence. They include:

- the power to suspend a practising certificate pending the outcome of a disciplinary process where the regulator is satisfied the lawyer poses a risk of serious harm to the public or to public confidence in the profession
- the power to intervene without the need for a disciplinary or fault-based finding when concerns about a lawyer's fitness to practise arise. This would include the power to direct a lawyer to undergo a health or competence review and associated remedial measures, and the power to require a lawyer to undertake further training (even if a complaint is not upheld)
- the ability to undertake practice reviews to monitor lawyer and firm compliance with professional and ethical standards
- the ability to impose bespoke conditions on a lawyer's practising certificate (eg, to limit scopes of practice or to require supervision).

Continuing professional development

Lawyers appreciate the need to maintain and develop their skills, in order to meet their clients' needs and fulfil their professional obligations. Most lawyers are conscientious in keeping up to date with developments in the law.

Regulations require lawyers to have a written plan for their continuing professional development (CPD) and complete at least 10 hours of interactive and verifiable CPD activities each year. This is a blunt instrument for maintaining competence. There is a fair level of consensus that CPD has become a 'tick-box' exercise.

We do not recommend fundamental reform of CPD at this time. However, once a new regulator is in place, it should review the CPD framework. The regulator might consider following the model adopted in England and Wales, which has moved away from prescribing that lawyers do minimum hours of learning each year, to a new competence-based framework that defines the continuing competencies required of all lawyers.

We recommend some more immediate changes, such as trusting lawyers to do part of their 10 hours through self-paced (and therefore non-verifiable) learning. We also recommend following the Victorian approach where the regulator requires a portion of CPD to include core mandatory CPD categories, which could change on a rolling basis and include topics such as ethics or tikanga.

A reformed complaints system

The complaints system is not working

Consumers and lawyers report that the current complaints system is not working. This is not a problem that can be addressed through minor reform. Only legislative change can address the issues that have arisen from the unnecessarily prescriptive Act.

The current model requires every complaint to be considered by one of 22 Standards Committees, which comprise a majority of volunteer lawyers and operate independently from the Law Society. The process is slow, highly adversarial, is not restorative in nature, does not produce consistent decisions, and examines more complaints (on a per-lawyer basis) than comparable legal regulators overseas. The most minor of complaints can take nearly a year to be addressed, with adverse effects on the mental health of the parties involved. Consumers and complaint resolution have become almost incidental to regulatory processes. Of particular concern is that, with lawyers judging other lawyers, the Standards Committee process is seen by consumers as lacking independence, although there is no evidence lawyers are 'soft' on their peers.

Our consultation found consensus that formal disciplinary proceedings should be reserved for only the most serious of complaints. Many noted the opportunities to de-escalate and resolve most complaints through more informal procedures involving negotiation, mediation and tikanga-based approaches.

Putting in place a more effective complaints system

We propose a new complaints model that abolishes the role of Standards Committees and gives the new regulator the power to investigate and resolve complaints using in-house staff. A new pathway will be created for complaints about 'consumer matters' (such as fees, delay and poor communication) where it is clear the matter does not give rise to disciplinary concerns. This pathway will not focus on investigation or discipline but be designed to support dispute resolution through a fast, flexible and informal resolution service provided by the regulator. Consumer complaints about their lawyer's fees will no longer prompt disciplinary investigations and sanctions, other than in the most egregious cases.

The regulator will prioritise its resources towards those matters which, if proven, would amount to 'unsatisfactory conduct' or 'misconduct'. The regulator, through its specialist complaints staff, will be able to make a determination of unsatisfactory conduct, and will investigate cases that appear to reach the threshold of misconduct and require prosecution before the Lawyers and Conveyancers Disciplinary Tribunal (LCDT). Some disciplinary matters – in particular those being prosecuted before the LCDT – may continue to need external legal advice on complicated professional standards issues.

Our consultation highlighted that part of the reason for the current protracted and adversarial complaints process is that any complaint can result in a lawyer being publicly identified as falling short of professional standards. In practice, the power to publicly name a lawyer who has engaged in unsatisfactory conduct is rarely used (in less than 2 per cent of upheld complaints in the past five years), but the potential to be named contributes to lengthy delays and is a black cloud over lawyers caught up in the complaints process. We recommend that the identity of a lawyer not be publicly disclosed if the regulator makes an unsatisfactory conduct determination, other than in accordance with the regulator's Naming Policy for exceptional cases. The identity of lawyers may continue to be publicly disclosed in disciplinary proceedings before the LCDT.

With the establishment of the new independent regulator, there will no longer be a need for an independent Legal Complaints Review Officer. This function can be replaced by a new review mechanism for disciplinary matters, facilitated by the regulator, that would draw upon external members or an external adjudicator to undertake the review.

We recognise that many of the complaints currently being considered by the Law Society do not require the active intervention of the regulator. In line with other professions, we recommend that lawyers be subject to a new duty to ensure that complaints are dealt with promptly, fairly and free of charge.

Cultural challenges: improving diversity, inclusion, conduct and mental health

Although the make-up of the legal profession has changed greatly in recent years, significant diversity issues remain. A career as a lawyer is out of reach for many in society. There is a lack of gender equality in many senior positions, a striking lack of ethnic diversity across the profession and barriers for lawyers with disabilities. Coupled with the well-documented issues of harassment and bullying, it is no surprise that many lawyers see an urgent need to improve the culture of the legal profession.

A legal services regulator cannot change the culture of the profession by itself. But more can be done, building on the recent work of the Law Society. The lack of diversity and the exclusion of

some groups from the profession will not change without continued focus. Some of the proposed changes will make a difference, including setting out objectives for the regulator in legislation (which include encouraging an “independent, strong, diverse and effective legal profession”), a more diverse and competence-based membership of the regulator’s board, a Tiriti o Waitangi section in the new Act, and entity regulation.

Some current regulatory requirements create barriers to participation and progression within the profession. For example, the minimum hours that lawyers must recently have worked to be admitted as a sole practitioner unjustifiably penalises those who have taken time off paid work; current admission and character referee requirements can be exclusionary; and there are concerns about how the Law Society requires candidates for admission and lawyers renewing their annual practising certificate to disclose mental health conditions.

The regulator, alongside representative groups, has a role in removing those barriers and encouraging a diverse and inclusive profession. We also recommend that the regulator be able to collect new information on the diversity of the profession with a view to regularly publishing aggregate data on trends within the profession.

Recommendations

1. Establish a new independent regulator to regulate lawyers in Aotearoa New Zealand.
2. Ensure the independence and effectiveness of the new regulator by institutional arrangements that include:
    a. establishing an independent statutory body, which is not a Crown Entity and not subject to direction from Ministers
    b. a board of eight members, with an equal split between lawyer and public members, chaired by a public member, and at least two members with strong te ao Māori insights
    c. appointment of board members by the Minister of Justice, following advice from a nominations panel comprising a mix of consumer representatives, governance experts and members of the legal profession.
3. Incorporate Te Tiriti and regulatory objectives in the new Act and update the fundamental obligations of lawyers, by:
    a. including a Tiriti o Waitangi section, requiring those exercising powers and performing functions and duties to give effect to the principles of Te Tiriti o Waitangi
    b. setting out regulatory objectives, with an overarching objective to protect and promote the public interest
    c. updating the fundamental obligations of lawyers, requiring lawyers to promote as well as protect their clients' interests and adding a new obligation on lawyers to maintain their competence and fitness to practise.
4. Reform the scope of regulation, by:
    a. maintaining the current focus of the regulatory framework on lawyers and conveyancers, rather than extending it to cover other unregulated legal service providers
    b. introducing a new 'freelance' practising model that allows lawyers to provide services to the public in non-reserved areas, without requiring prior approval from the regulator
    c. permitting employed lawyers to provide pro bono services to the public in non-reserved areas
    d. permitting new business structures, to allow non-lawyers to have an ownership interest in law firms and lawyers to enter into legal partnerships with non-lawyers
    e. directly regulating law firms, with new firm-level obligations.
5. Enable the regulator to better protect consumers, support practitioners and assure competence, by:
    a. giving the regulator new tools, including powers to suspend practising certificates, require practitioners to undergo a health or competence review, undertake practice reviews and impose bespoke conditions on a practising certificate
    b. reviewing CPD requirements, including the current 10-hour CPD requirement, and specifying key mandatory components of CPD to be undertaken every three to five years.

6. Reform the system for handling complaints about lawyers and introduce a model in which:
    a. complaints will be assessed and determined by in-house specialist staff, rather than by volunteers on Standards Committees
    b. formal investigative and disciplinary processes will be reserved for those matters that require a disciplinary response from the regulator. Complaints about 'consumer matters' (eg, fees, delay, poor communication) will instead go through a dispute resolution process
    c. the identity of a lawyer who engages in 'unsatisfactory conduct' will not be publicly disclosed other than in exceptional circumstances, with naming reserved for cases where the Lawyers and Conveyancers Disciplinary Tribunal finds the lawyer guilty of 'misconduct'
    d. the independent Legal Complaints Review Officer will be replaced by a small review committee convened by the regulator and staffed by external members or an external adjudicator
    e. lawyers will be subject to a new duty to ensure complaints are dealt with promptly, fairly, and free of charge.
7. Encourage diversity and inclusion in the legal profession, by:
    a. creating a regulator with a specific objective of "encouraging an independent, strong, diverse and effective legal profession" and a competence-based board that reflects diversity
    b. removing regulatory barriers that are having a discriminatory effect
    c. giving the regulator new powers to collect diversity data from law firms and publish aggregate data on trends within the profession.
8. The Law Society should continue as the national representative body. It should have a single governance layer, with a board comprising 8-10 members, including public members.

Whakarāpopototanga tāpae

I kōkiritia tēnei Arotake Motuhake e te Kāhui Ture o Aotearoa | New Zealand Law Society (e mōhiotia nei ko te Law Society, te NZLS rānei).

I tīmata ngā mahi a te Pae Arotake Motuhake, ko ōna mema ko Ahorangi Ron Paterson (Heamana), rātou ko Jane Meares, ko Ahorangi Jacinta Ruru i te marama o Māehe 2022. He torowhānui, he tiro ki pae tawhiti te āhua o tā mātou mahi nui - kia arotakea te anga mō te whakarite ture me te tū hei kanohi mō ngā ratonga ture i roto i Aotearoa.

Te horopaki mō te Arotake Motuhake

Ko te pūtake tūturu o tēnei arotake ko te putanga mai o ngā pūrongo mō te mahi whakaito ki ētahi rōia taiohi, ki ētahi kaimahi ture raumati i te tau 2018. Nā ēnei āhuatanga i akiaki te Kāhui Ture o Aotearoa kia whakarewaina tētahi uiuinga Horopaki Wāhi Mahi ā-Ture torowhānui, i kitea i reira ehara ēnei i te mahi pokerehū noa. He maha tonu ngā rōia kua tūpono ki te mahi whakaito, ki te whakaweti, ki te makihuhunu me te kaikiri, i ō rātou ara mahi. Nā te pūrongo a te Rōpū Mahi motuhake a Te Kāhui Ture o Aotearoa i puta ake i muri (te pūrongo Cartwright) i tūtohu tētahi rārangi panonitanga kia pai ai ake te whakapūrongo, te ārai, te kite wawe me te tautoko mō ngā āhuatanga o te whanonga wāhi mahi hē i roto i te umanga ture.

I tua atu i ngā āwangawanga mō ngā mana e wātea ana ki te whakarite hei urupare ki te whanonga hē, tērā anō tētahi atu horopaki hira mō te whakatau a Te Kāhui Ture o Aotearoa mō tēnei arotake motuhake, arā: te maninohea whānui i roto i te pūnaha ture mō te urupare ki ngā whakapae mō ngā rōia; te hiahia kia anga atu ki ngā wero ahurea, kia whakawhānui kanorau, te haonga i te katoa me te hauora hinengaro i roto i te umanga ture; me te āwangawanga mau tonu mō te āhua o te kawe haepapa a tētahi rōpū whai mema mō ngā mahi whakarite ture mō te umanga ture, mehemea hoki ka taea e ia te āta whakatairanga i ngā pānga o te hunga rōia, mehemea koia te kaiwhakahaere ture.

Ka tae tēnei ki te 14 tau o te Lawyers and Conveyancers Act 2006 (te Ture) e mana ana. I roto i ngā rau o waenganui, kua puta ētahi panonitanga hira ki te horanga ratonga ture, te tūranga o te hunga ehara i te rōia, me te whakamahinga hangarau.

Kua tino panoni hui hoki tō tātou whenua. Kua kaha ake te ahurea-tini o Aotearoa, he mea mīharo tōna kanorau ā-momo iwi, ā-momo reo hoki. Kua tino kaha kē atu te whakaaetanga ki ō tātou pūtake kākano-rua, ki te iwi Māori hei tangata whenua hoki, ā, kua piki haere te rongonga o te reo Māori i roto i ō tātou mahi o ia rā. E whakaatatia ana te wāhi ahurei, puka taketake hoki o Te Tiriti o Waitangi i roto i ngā ture me ngā kaupapa here. Kua whakaaetia nuitia ngā tikanga Māori hei wāhi o te ture o Aotearoa, ā, kei te piki tōna whakaurunga ki ngā marautanga o te tohu rōia.

Ngā Whakaritenga Mahi

Nā tētahi rōpū arataki i kopoua e Te Kāhui Ture o Aotearoa i tuhi ngā Whakaritenga Mahi[4] mō tēnei arotake, ā, i puta te karanga i aua whakaritenga kia tū tētahi wetekanga mō te anga ā-ture katoa

4 Tirohia te puka a Te Kāhui Ture o Aotearoa *Independent review of the statutory framework for legal services in Aotearoa New Zealand: Terms of Reference* (Mahuru 2021).

mō te whakarite ture mō te hunga rōia. I herea te Pae kia wewete i ngā wāhanga taketake e whai ake nei o te anga ture mō ngā rōia i Aotearoa: te whanonga, ngā amuamu me te whakawhiu, ngā ratonga e herea ana e ngā rekureihana, me te tauwehenga pānga, tūranga hoki e tika ana. I uru ki te hōkai o te arotake:

- mehemea me wehewehe ngā mahi māngai a Te Kāhui Ture o Aotearoa i te katoa, i ētahi rānei o ana tūranga whakahaere ture
- He pēhea i āraia ai ngā whanonga hē, he pēhea hoki i whakatikaina
- He pēhea i tukua ai ngā whakapae, he pēhea i uruparetia hoki, tae atu ki ngā pūtake e pā ana ki te pūataata
- ko ēhea ngā ratonga ture e herea ana e te ture, e wai hoki
- ngā whakaritenga o te taha whakahaere me te taha whakaruruhau mō Te Kāhui Ture o Aotearoa
- te wāhi ki te Tiriti o Waitangi me te kākano-rua i roto i te anga ā-ture, me ngā whakaritenga o te taha whakaruruhau
- Me pēhea te whakaurunga me te kanorau e whakaahuatia ai i roto i te anga whakaritenga ture, i roto hoki i ngā whakaritenga whakahaere, i roto hoki i ngā whakaritenga o te taha mana.

Ko te tono ki te Pae kia whiria ngā panonitanga o te horopaki, kia wetekina hoki ngā panonitanga e tika ana kia pai ake ai te whakaruruhau i ngā kiritaki ratonga ture, kia tino ōrite ai te whakataetae, kia taea te mahi auaha i roto i te umanga, kia whakatairangatia hoki Te Tiriti o Waitangi me ngā tūāpapa kākano rua o Aotearoa – New Zealand.

Te tukanga arotake

E ai ki te whakamārama a Te Kāhui Ture o Aotearoa ka noho tēnei arotake ‘hei whāinga wāhi kotahi i roto i tēnei whakatupuranga’ kia tāreia houtia te whakarite ture me te whakaahua i te umanga. Ko tētahi tino whāinga a te Pae he tāpae whāinga wāhi huhua mō te hunga pupuru pānga kia whakaputa kōrero i roto i te toronga whakaaro mō te arotake.

I tukua whānuitia tei tuhinga whakawhitiwhiti whakaaro a te Pae i te 14 o Pipiri 2022, me te whānui o te tuku, me te pōwhiri urupare mā te whakakī i tētahi uiuinga tuihono, mā te whakatakoto tāpaetanga hoki / rānei. Nā konei ka puta ētahi urupare uiuinga 1,308 (ko te nuinga nā ngā rōia i whakatakoto), 183 ngā tāpaetanga, kei roto i tērā neke atu i te 30 kanohi rōpū ture, me ngā rōpū kiritaki. I takaina ētahi pukapuka mahi ruarua, e rangahau ana i ētahi kaupapa whāiti e whakaarahia ana i te tuhinga, i whakaputaina hoki ki www.legalframeworkreview.org.nz.

Mai i te marama o Hune ki te marama o Hepetema 2022, i whakauru te Pae ki ētahi wānanga ipurangi e toru, me ētahi hui ā-peka e ruma, i whakatūria e ia ētahi hui 55 ki ētahi tāngata pupuru pānga 250, ki ētahi rōpū arotahi e whā ki ngā rōia mahi takitahi, ki ngā rōia mai i ngā kamupene iti, me ētahi mema ehara i te rōia me ētahi mema rōia o ngā Komiti Paerewa. I haere hoki te Pae ki tāwāhi ki te tūtaki ki ngā tāngata whakahaere ture me ngā rōpū whakakanohi i te umanga i Ingarangi, i Wēra, i Airangi, i Kotirani, i Kānata, i Ahitereiria (Niu Haute Wēra me Wikitōria).

Mō te kaupapa whānui, i harakoa te Pae mō te kaha o te whakaurunga mai o te hunga i roto i te umanga rōia, me ngā rōpū whakakanohi matua, tae atu ki Te Hunga Rōia Māori o Aotearoa, ki te Pacific Lawyers Association, ki NZ Asian Lawyers, ki te New Zealand Bar Association, Aotearoa Legal Workers’ Union, te ADLS, te Government Legal Network, ki te Large Law Firms Group, te New Zealand Law Students’ Association, me te huhua o ngā rōpū rōia wāhine. I tino rangona ngā whakaaro kiritaki i roto i ngā tāpaetanga mai i Community Law Centres o Aotearoa, Consumer NZ me Te Pokapū Whakahoki Pātai, ā, mai i tētahi uiuinga Kantar hoki ki ngā whakaaro katoa o ngā tāngata o Aotearoa.

Tā tēnei pūrongo he hora mai i ngā hua o ngā marama 12 o te tuituinga, o te rangahau, me te tātari torowhānui. I ahu mai ana kitenga i te taunakitanga, ā, ka whakaaria i roto ko ngā tikanga mahi pai, me ngā mea i ākona nā te mahi whakarite ture mō ētahi atu umanga i Aotearoa, me ngā rōia i tāwāhi. Ka noho tēnei hei tauira mō te whakahoutanga o ngā ture whakahaere, whakakanohi hoki i te umanga rōia.

Te kitenga torowhānui: kāore te tauira ture whakahaere o nāianei i te whai hua

Ahakoa he pai tonu te haere o te tauira whakahaere ture, whakakanohi hoki mō ngā rōia mō ētahi āhuatanga, kāore i te pai mō ētahi atu.

Ko te pūtake e whakaritea ai he ture whakahaere ao mahi, he tautiaki i ngā kiritaki me te iwi whānui. Ahakoa tērā, i tēnei wā kei te kawe Te Kāhui Ture o Aotearoa i ngā tūranga e rua i raro i te tauira ture whakahaere o nāianei, ā, kāore e āta tiakina, e āta whakatairangatia hoki e ia ngā pānga o mō ngā kiritaki. E taupatupatu ana te haepapa o Te Kāhui Ture o Aotearoa ki te whakatairanga i ngā pānga o te umanga ki tana here kia whakarite ture tautiaki i ngā pānga o te iwi whānui.

E horoa ana te whakapono o te tangata ki Te Kāhui Ture o Aotearoa, nā ōna haepapa e rua, tō kē tētahi, tō kē tētahi. Kei te whakaputa whakaaro ngā rōpū kiritaki mō tō rātou kore e whakapono ki te Kāhui Ture o Aotearoa, nā ōna tūranga taupatupatu, me te tirohanga a te tangata 'he rōpū rōia tēnei kei te wawao i ētahi atu rōia'. Ko ētahi rōia kāore i te tino whakapono ka taea e Te Kāhui Ture o Aotearoa te whakatikatika i ngā wero kei mua i te aroaro o te umanga.

Kāore i te tutuki i tētahi tauira kore kakama, utu nui hoki ngā hiahia o ngā kiritaki, o te umanga rānei. Nā ngā whāinga taupatupatu, me ngā haepapa taukumekume, kua kore Te Kāhui Ture o Aotearoa e tino kakama, e tino whai take hoki hei kaiwhakahaere ture. He kaha rawa te whakahau tikanga a te anga ture o nāianei. Hei here tēnei anga i te wātea o Te Kāhui Ture o Aotearoa ki te hoehoe i tōna waka, kāore hoki i te kakama, he nui rawa hoki ōna utu whakahaere.

He tatari kia whakaohongia te āhua o ngā mahi whakarite ture o Te Kāhui Ture o Aotearoa, kāore e wātea kia pūhia e te hau, kia whitikia e te rā. E parori kē ana tāna tū, e anga kē ana ki te pupuru i ngā ture o nāianei, he āhuatanga tēnei i ētahi wā o te herenga o te Kāhui Ture o Aotearoa kia noho haepapa ki te umanga. Kāore e ōrite ana ki te tini o ngā kaiwhakahaere ture o nāianei, arā, he iti iho te aronga ki ngā kōkiri hei whakatika i ngā āwangawanga kiritaki, te arataki kaupapa here mō ngā take tauhokohoko whānui kē atu, me te whakaraupapa rawa hei tautohu, hei whakahaere hoki i ngā mōrearea. Mō ētahi āhuatanga, kua tītaha kē te titiro o Te Kāhui Ture o Aotearoa ki ngā pānga roiā, i runga ake i ō te kiritaki.

Nā tā mātou toronga whakaaro ka kitea ko te take i uaua tonu ai tana kawe i ngā pānga o te hunga rōia kia whai hua, ko ana tūranga matua e rua. He maha ngā rōia e whakapono kāore he rōpū mema kiritaki pakari ka taea e ia te whakahau whakahoutanga o ngā hātepe ture, me te tū hei kaitautoko mō ngā rōia e whakapaetia ana. Nā ngā tūranga matua e rua kua kore ngā rōia e kimi āwhina mai i tō rātou rōpū whakakanohi mō ngā āhuatanga pēnei i ngā take hauora hinengaro, kei ara ake he take ture mō rātou.

Kāore kē te pūnaha whakauru whakapae o nāianei i te whai take. He pōturi tāna mahi, ka puta i muri he whakatau hārakiraki, e ai ki te titiro kei te tītaha kē ana whakaaro ki ngā rōia, kāore i aronui ki te kiritaki, ki te whakaea wharanga rānei. Kāore i te tutuki i a ia ngā hiahia on gā kiritaki, o ngā rōia rānei. Ehara nā Te Kāhui Te Kāhui Ture o Aotearoa te hē, engari he hua i whānau pū mai tēnei nā ngā whakaritenga ture, i whakarite i tētahi pūnaha whakapae mārō rawa.

Kāore hoki ō te kaiwhakahaere ture taputapu ture tōtika hei tautiaki i te iwi tūmatanui, hei urupare wawe ki ngā taunakitanga wharanga kiritaki i runga i te hohoro, ki te kōkiri mahi hoki mehemea ka ara ake he āwangawanga matatau, hauora rānei mō te āhei o tētahi rōia ki te kawe i te mahi rōia. Kua tautohutia e mātou ētahi herenga ture, herenga rekureihana hoki kāore he tino āwhina i roto

mā ngā kiritaki, tae atu ki ngā here takekore mō ngā momo tauira pakihi e wātea ana ki ngā rōia, he herenga painga-kore hoki mō te wā ka taea e te rōia te kawe mahi mōna anō, me te kore arotahi ā-ture ki ngā kamupene rōia.

He tika te kī a te tangata me tū tētahi kaiwhakahaere ture hou

Ka whai hua pea te umanga tūmatanui, me te umanga rōia i Aotearoa, i tētahi kaiwhakahaere ture motuhake hou. He mea taunaki tēnei kitenga e ngā mātāpono whakahaere ture pai rawa, e ngā rōpū kiritaki me tētahi wāhanga nui o te kāhui o te umanga, me te mōhio anō, he ia tēnei i te ao whānui kia kaua te hunga rōia o tēnā whenua, o tēnā whenua, e whakarite ture mō tō rātou umanga.

Kua tatū ngā whakaaro o ngā arotakenga nui o te whakarite ture rōia i tāwāhi, me noho mai he kaiwhakahaere ture motuhake mō te umanga rōia, ā, me rapu ara mahi kia kore ai e waimeha te tūranga hira o te umanga rōia kia hāpaitia te mana o te ture, kia whakaputa kōrero hoki hei tauwhāinga ki te kāwanatanga o te rā. He whai painga nui ngā hinonga motuhake e kawe nei i ngā tūranga whakarite ture, whakakanohi hoki mō ngā rōia i Wikitōria, (Ahiterereira), i Kānata, i Ingarangi me Wēra, me Airani. He mea tōtahi te tauira whakarite ture mōna anō mō te rōia i roto i te whakarite ture ā-umanga i Aotearoa.

He tini ngā rōia e kī ana, kāore te pūnaha o nāianei ‘i te pākaru rawa’ me te whakaputa whakaaro he nui te utu o te whakahou tikanga. Ahakoa ērā whakaaro, ki ā mātou tātaritanga, kāore i te tika. Ahakoa ka uaua tonu te matapae i te utu mō te whakahou tikanga, nā tētahi tātaritanga o ngā painga o te utu, i kitea te pūtake e tika ai te tahuri ki te whakarite ture motuhake.

Ehara i te mea e kauwhau ana mātou kia tukua mā te kāwantanga tonu e whakarite ture mō te umanga rōia. Me whakatū te kaiwhakahaere ture hei rōpū ā-ture motuhake. E kore e tū hei hinonga Karauna, e kore hoki e here e ngā mana, e tohutohutia rānei e ngā tauākī kaupapa here mai i te kāwanatanga. Ko tētahi whāinga ā-ture o te kaiwhakahaere ture motuhake hou he “āta whakamau i te mana o te tau, he whakangāwari hoki i te whakatutukitanga o te tika” ā, ko ētahi hoki o ana tūranga he kawe tonu i te haepapa kia tohutohu i ngā tikanga whakahou ture.

Kua hīrawerawe, kua tawhito hoki te anga whakaruruhau o te Kāhui Ture o Aotearoa o nāianei, me tana kaunihera nui ka pōtitia, me tana poari ka pōtitia. Ka hiahiatia he tikanga whakaruruhau hou mō te kaiwhakahaere ture hou, ko te hiahia nui kia tū he poari iti, kāore i pōtitia, i takea mai i ngā pūkenga ōna whakarite kopou tangata, he kanorau hoki te āhua. E tūtohu ana mātou ki tū mai he poari tokowaru ana mema i āta kōwhiria mō ō rātou pūkenga whakaruruhau, me ētahi tauwehenga taurite i waenga i ngā rōia, me ngā mema tūmatanui. Te tikanga kia noho mai he mema tūmatanui hei heamana, hei tūtohu e tū motuhake ana te kaiwhakarite i te umanga. Kaua e iti iho i te rua ngā mema poari i āta ākona i roto i te ao Māori. Ka ekee pea te whā tau ngā kopounga mema, kia kaua e roa atu i te 10 tau. Kāore e pōtitia he tūranga rōia mō te poari.

Hei tautiaki i te noho motuhake o te hātepe kopou tangata, mā te Minita mō ngā Ture e kopou ngā tāngata i muri i ngā tohutohu mai a tētahi pae whakarewa ingoa, ko ōna tāngata he whānui ngā momo, nā ngā rōpū kiritaki me ngā rōpū whakakanohi ā-ture i whakarewa ngā ingoa (hei tauira, Te Kāhui Ture o Aotearoa me Te Hunga Rōia Māori). Kaua ngā Minita e huri kē i ngā tohutohu kopou a te pae whakarewa ingoa mō te kore take tōtika, ā, me he take, me āta pānui ā-tuhi, ki te iwi tūmatanui, i te wā o ngā kopounga hou.

Te Kāhui Ture o Aotearoa hei rōpū whai mema hou

Te tikanga o te whakatū kaiwhakarite ka kore anō Te Kāhui Ture o Aotearoa e whai mama ā-ture, ka huri hei rōpū whai mema anake. Ahakoa tērā, kē whai tūranga take nui a Te Kāhui Ture o Aotearoa mō te umanga otirā mō Aotearoa hei reo pakari, hei reo motuhake kauwhau tikanga mō te mana o

te ture. Me noho tonu a Te Kāhui Ture o Aotearoa hei rōpū mātāmua tūturu hei māngai mō ngā rōia o Aotearoa.

Me tino whakaari te anga me te whakaruruhau mō Te Kāhui Ture o Aotearoa i ngā hiahia o ana mema, me ngā ara e tino tutuki ai ō rātou matea. Ki a mātou hei aha te whakanoho mai i tētahi kaunihera whakaruruhau me tētahi Poari. E marohi ana mātou i tētahi whakapaparanga whakaruruhau kotahi, kia 8-10 ngā mema poari, tae atu ki ōna mema tūmatanui, hei tautoko i ngā pūkenga o ngā mema i pōtitia.

Ngā whāinga me ngā here ā-ture hou

Me uru ki tētahi ture hou mō te whakarite ture mō te rōia tētahi rerenga torowhānui tū motuhake mō Te Tiriti: "Ko ngā tāngata katoa e kawe ana i ngā mana, e whakaoti ana i ngā mahi me ngā haepapa i raro i tēnei Ture me mātua whakatutuki i ngā mātāpono o Te Tiriti o Waitangi." Hei waitohu tēnei i te hira o Te Tiriti ki te tūtohi taketake o Aotearoa me tōna pūnaha ture, hei arataki hoki tēnei i te tuituinga o te kaiwhakarite ki te umanga, me te iwi tūmatanui, i tāna whakatutukitanga hoki i ana haepapa.

Me āta tātaku te anga whakarite ture hou i ngā whāinga o te kaiwhakahaere ture hou. Ko te whāinga tuatahi ko te tautiaki me te whakatairanga i ngā pānga o te iwi tūmatanui, me ōna whāinga whāiti mō te:

1. te hāpai i te mana o te ture, te whakangāwari hoki i te whakatutukitanga o te tika
2. te whakawātea i te ara ki te mahinga o te tika me ngā ratonga ture
3. te whakatairanga me te tautiaki i ngā pānga o ngā kiritaki
4. te whakatairanga i ngā whanonga pono matatika, te whakaū i te matatau ngaio, tae atu ki te matatau ahurea, i roto i ngā mahi a te ture
5. te whakamanawa i tētahi umanga rōia tū motuhake, pakari, matahuhua, whai hua hoki.

E kawea tahitia ana ngā whāinga tuatahi e toru e te tini o ngā kaiwhakahaere ture ā-umanga. Hei whakaata ngā whāinga whakamutunga e rua i te hiahia mō te arotahitanga ture i Aotearoa: te ārainga i te whakaito hōkakatanga, te whakaweti me te makihuhunu i te wāhi mahi; te whakapūmau i te matatau o te kaimahi, tae atu ki te matatau ahurea – he noho mataara tonu ki ngā hiahia, ki ngā whanonga pono me ngā whakapono o ngāi Māori, me ngā kiritaki o ētahi atu ahurea, tae atu ki ō Te Moana-nui-a-Kiwa, o Āhia hoki; me te urupare ki ngā āwangawanga mai rā anō, ehara te umanga rōia i te umanga hao mai i te katoa kia whai wāhi ki roto, ehara hoki i te matahuhua ōna tāngata.[5]

I roto i te anga whakarite hou, e marohi ana mātou kia whakarerekētia ngā herenga taketake o tēnei mea te rōia. Me homai tētahi herenga kua whakahoutia "hei *whakatairanga*, hei tautiaki" hoki i ngā pānga o ō rātou kiritaki – i raro anō i ngā herenga o runga rawa i te katoa, hei āpiha o te Kōti Matua, i raro hoki i te ture. E marohi ana hoki mātou kia homai tētahi herenga taketake hou ki ngā rōia katoa "kia whakapikia tonutia tō rātou matatau, tō rātou tōtika hoki ki te mahi i ā rātou wāhanga mahi ake".[6]

Te hōkai o te whakarite ture: ko wai e tika ana hei kaihora i ngā ratonga ture, me here rānei e te ture?

I tēnei wā, kāore he pūtake mō te panohi i te hōkai o te ture, arā, tōna pānga ki ngā rōia, mō te whakawhānui rānei i aua ture kia kapi hoki ngā ratonga ture kāore e herea ana e te ture ināianei.

5 E ai ki tētahi whakaaro nō te tokoiti, me tāpiri ētahi atu whāinga e torua, e pā ana ki te tautoko i te whakamahi i te reo Māori me ētahi atu reo tuatahi o te tangata, te whakarauoratanga i ngā tikanga ā-iwi, me te whakatairangatanga i te māramatanga panonitanga āhuarangi i roto i ngā mahi a te ture.

6 E ai ki tētahi whakaaro o te tokoiti i marohi, me noho tētahi aronga ki Te Tiriti hei wāhanga o tētahi herenga taketake o te rōia kia hāpainga te mana o te ture, me tētahi herenga taketake hou e pā ana ki ngā tikanga.

Nā te tini o ngā kaituku tāpae i homai tauira - pēnei i ngā kaikauwhau tikanga i te wāhi mahi - i kore ai e tino whai hua ngā mahi mā te kiritaki, nā te whakamahi kaihora ture kāore e herea ana e te ture. Ki te whakaaro tētahi kāwanatanga ki te whai i ētahi ara mō te whakarite ture mō ēnei kaihora, arā ngā tikanga tōtika kē atu, ngāwari kē atu te tāmitanga, tēnā i te whakawhānui i te hōkai o ngā ture e pā ana ki ngā rōia. Ki a mātou he tōtika tonu ngā wāhanga mahi o nāianei e whakaritea ana mō ngā rōia (ko te nuinga e pā ana ki ngā whakahaere ā-kōti).

He tauira ‘rōia mahi takitahi’ hou

Ko te herenga kia haere ngā rōia ki te kimi whakaaetanga mai i te kaiwhakahaere ture i mua i te āhei ki te haere ki te mahi takitahi tētahi herenga kua tawhitotia, ahakoa mā ngā kiritaki, ahakoa mā ngā rōia, kāore he hua. Hei whakatū maioro kau tēnei mā ētahi rōia ka hiahia pea ki te hoki ki te kāhui kaimahi, hei tāmi hoki i ngā whakaritenga mahi pīngawingawi. Ka pā tēnei ki te kanorau o te umanga, ka aukati i te wairua whakataetae, auaha hoki nā te whakakāhore i te mahi kirimana, ā, he kaha rawa ki te tautiaki i ngā wāhanga he iti noa iho te mōrearea ki te kiritaki.

E tūtohu ana mātou kia hāpainga te tauira ‘rōia mahi takitahi’ e haere ana i tēnei wā i Ingarihi me Wēra. Me āhei tonu ngā rōia ki te hora ratonga ture ki te iwi tūmatanui kāore he whakaaetanga i mua, hei kaimahi takitahi, mehemea e pā ana ā rātou mahi ki ērā wāhanga mahi ehara i te wāhanga i ata wehea, ka mahi mahi takitahi ia kāore he kaimahi i tua atu, ka mahi me te whakamahi i tō rātou ingoa, kei te hāngai te mahi kirimana mā ngā kiritaki, kāore hoki e whāwhā i ngā pūtea moni kiritaki.

Te whakaae ki ngā rōia kua whiwhi mahi kia homai ratonga pūāroha

Ehara ngā ratonga kore utu i te whakautu tika ki ngā raruraru nui o te wātea mai o te mahinga o te tika e whakararu nei i ngā tāngata o Aotearoa. Ahakoa tērā, tērā ētahi maioro ki te horanga o ngā ratonga ture kore-utu ka taea te muku atu me te haumaru anō o te mahi.

He whānui rawa, he take-kore te whakakāhoretanga torowhānui ā-ture mō ngā rōia kua whai mahi e whakahau nei kia kaua e hora ratonga i waho i tō rātou tūranga mahi tūturu. I kitea i roto i ā mātou toronga whakaaro te hīkaka o ētahi rōia tino matatau i hiahia ki te āwhina i te tangata i tō rātou hapori e hiahai ana ki ngā ratonga ture, engari kāre e tae i tēnei wā, nā ngā katinga a Te Ture. E tūtohu ana mātou kia āhei ngā rōia kua whai tūranga kē kia hora ratonga kore utu ki ngā kiritaki, mehemea kei ngā rohe kāore i āta wehea, kāore he utu mō ngā ratonga, ā, kāore te rōia e whāwhā i ngā moni a te kiritaki. I roto i te wā, me tahuri pea te kaiwhakahaere ture hou mehemea ka taea tēnei te whakawhānui atu ki ngā rohe kua wehea, me ētahi tikanga tautiaki i te taha.

Te whakaae ki ētahi hanganga pakihi hou me te whakatenatena i te mahi auaha

Ka whakatūturutia e te Ture ētahi herenga matua e rua ki ngā ritenga pakihi ka taea te whakamahi e te rōia: kei te whakakāhoretia ngā tāngata katoa ehara i te rōia āta mahi i roto, kia kore ai e āhei ki te pupuru hea, ki te noho rānei hei kaihautū i tētahi kamupene rōia kāporeita, ā, kei te whakakāhoretia te whakaurunga mai o ngā rōia ki ngā kōtuitanga ki te hunga ehara i te rōia. Me muku ēnei herenga e rua.

Ka maha kē atu ngā hua mā te kiritaki mehemea he ngāwari te ara mā te rōia ki te kimi i te anga rangatōpū e whakamahia ai e rātou hei hora ratonga. Ka whakataimaha ngā herenga pakihi o nāianei i te āhei o ngā kamupene rōia e hiahia ana kia auaha, kia rapu kaihaumi moni o waho, kia kimi hoa kōtui rānei i waenga i ētahi atu tāngata ngaio (hei tauira, ngā kaikaute) hei hora i ētahi atu ratonga whānui kē atu, ki ngā kiritaki. Ina tātaritia ngā rohe o tāwāhi ōrite e whakaaetia ana te rōia kia mahi i raro i ngā anga rangatōpū, kāore e kitea ana he wharanga mā te kiritaki, nā ngā anga pakihi hou.

Te āhua nei ka whai painga ngā kiritaki i te whakamahinga o ngā hangarau hou hei whakapiki i te wātea o ngā ratonga ture, hei tauira, mā te wetewete ratonga kia āhei anō ngā kiritaki ki te mahi i ētahi mahi e hiahiatia ana mō tētahi whakawhitinga. E ai ki ngā mātanga whakawhitiwhiti whakaaro

o tāwāhi, ehara i te mea ka 'whakapōroritia' te umanga i ēnei mahi, kāti, mā ngā hangarau hou e whakatutuki pea ngā hiahia mō te ture kīhai i tutuki mai rā anō, ka tupu hoki te tukunga ratonga rōia hei painga mō te iwi tūmatanui me te umanga anō hoki. Ahakoa tērā, kāore mātou i tautohu i ētahi take i ara ake i ngā panoni hangarau e tika ai kia whiria katoatia te āhua o te whakarite ture mō ngā ratonga ture.

Te whakarite ture mō ngā kamupene rōia, i te taha o whakarite ture mō ngā rōia

E arotahi ana Te Ture ināianei ki te whakaritenga ture mō ngā rōia takitahi, ā, te tikanga o tērā kua kore e kitea e te kaiwhakahaere ture, mō ngā āhuatanga katoa tēnei mea te kamupene rōia. Te tikanga o tēnei korenga 'whakaritenga ture whakahaere' i Aotearoa kua noho ko te whakawhiu i te rōia takitahi a Te Kāhui Ture o Aotearoa hei tohu mō te whakatika i ngā āhuatanga takitahi e kitea ana i waho, me te wareware ki te whakatika i ōna pūtake tūturu, e whakararu nei i te kiritaki. Ka taea e tētahi kamupene ture, rā roto i ōna hononga whiwhinga mahi e ahu whakarunga nei te mana, te tino kawe i te whānui o te āhei o ngā rōia takitahi kia whakatutuki i ā rātou herenga ngaio.

E tūtohu ana mātou me whakautu mai te whakaritenga ture mō te hinonga ki Aotearoa. Ka riro mā te whakarite ture hāngai ki ngā kamupene rōia e whakanoho mai tētahi tūāhanga matatika i roto i ngā kamupene, me te whāinga painga mō ngā kiritaki, mō te iwi tūmatanui me te umanga ture.

Te tautiaki, te mōhiotanga me te whakaūnga matatau whai kounga

E tika ana kia nui kē atu ngā mahi kia tōia ngā kiritaki ki te pūtahi o te anga whakarite ture mō ngā ratonga ture.

E hiahiatia ana ētahi panonitanga hei whakatairanga i ngā pānga o ngā kiritaki, hei kawe kē hoki i te tūtika i roto i te hononga o te kiritaki ki te rōia, me te anga atu ki ngā tika o te kiritaki ki te tautiakitanga me ngā mōhiotanga whai kounga tae atu ki ngā kōrero mō te utu. Me whai te kaiwhakahaere ture i ngā wheako kiritaki me ngā tūmanako kiritaki, me whakaraupapa hoki ki mua ngā pānga kiritaki i roto i tōna rautaki whakarite ture, i runga anō i ngā tohutohu a tētahi pae kiritaki i a ia.

Ētahi taputapu whakarite ture hou

Ko tā te tauira o nāianei he tatari kia whakaohongia, kātahi ka whakatika i ngā takahanga takitahi o ngā paerewa ngaio. Me whakawātea te anga whakarite ture i te kaiwakarite ture kia tahui i te tatari kia whakaohongia, e tahuri mai ki ngā take matatau me te aronga ki ngā mahi whakawhiu, ki tētahi tauira tautohu i ngā rōia 'noho mōrearea', me te tuku tautoko, rauemi hoki ki a rātou i mua i te wharanga o te kirikaki.

E tūtohu ana mātou kia hāpainga ētahi taputapu whakarite ture hou, me te aro ki te tautiaki i te kiritaki, me te whakapūmautanga o te noho matatau. Kei roto i ēnei:

- te mana whakatārewa i tētahi tiwhikete mahi i te tāringa ki tētahi hātepe whakawhiu, mehemea e mōhio ana te kaiwhakahaere ture e noho ana taua rōia hei mōreareatanga taumaha ki te iwi tūmatanui, ki te whakapono rānei o te iwi tūmatanui ki te umanga
- te mana ki te aukati i ngā mahi, kāore he taimahatanga ki te hoki ki tētahi kitenga whakawhiu rānei, kitenga mō te mahi rānei, kia whakaarahia mai he āwangawanga mō te tika o tētahi rōia ki te mahi i ana mahi. Ka uru ki konei te mana ki te tohutohu i tētahi rōia kia uru ki tētahi arotakenga hauora, matatau rānei, me te whai i ngā ritenga ka tūtohutia hei rongoā, me te mana kia tohu tētahi rōia kia whakangungu anō (ahakoa kāore he whakapae e whakaūngia ana)
- te mana kia kawea he arotakenga mahi hei aroturuki i te ūnga o ngā rōia me ngā kamupene ki ngā paerewa ngaio, matatika hoki me te
- mana kia whakaritea hoki ētahi here whāiti ki tētahi tiwhikete mahi a tētahi rōia (hei tauira, hei whakaiti i ngā hōkaitanga momo mahi, he here rānei kia tirohia ngā mahi e tētahi atu).

Te whakapakari ngaiotanga haere tonu

E mārama ana ngā rōia ki te hiahia kia whakatairangatia, kia whakawhanaketia hoki ō rātou pūkenga, kia whakatutukitia hoki ngā hiahia o ō rātou kiritaki, me ō rātou here ngaio. E pono ana te nuinga o ngā rōia ki te whāinga i ngā whanaketanga hoki o ngā ture.

E whakahau ana ngā ture whāiti kia puritia e ngā rōia tētahi mahere i āta tuhia mō ō rātou whakapakari ngaiotanga haere tonu (CPD) kia whakaotingia hoki ētahi hāora pāhekoheko, ka taea te taunaki, o ngā mahi whakangungu, whakawhanake, ia tau. He toki pūhuki tonu tēnei hei whakahau i te matatau. E whakaae ana te nuinga kua hoki haere te CPD hei mahi 'tohu pouaka' noa iho.

Kāore mātou e tūtohu ana me tino whakahou taketake i ngā mahi whakapakari ngaiotanga haere tonu i tēnei wā. Ahakoa tērā, kia noho mai he kaiwhakahaere ture hou, me arotake e ia te anga whakapakari ngaiotanga haere tonu. Me whai whakaaro pea te kaiwhakahaere ture ki te whai i tētahi tauira i whakaurungia i Ingarangi me Wēra, kua nuku atu i te tūtohu kia whakaoti ngā rōia i tētahi taumata hāora akoranga ia tau, ki tētahi anga i takea mai i ngā pūkenga e tautuhi ana i ngā āhuatanga o te matatau e hiahiatia ana mō ngā rōia katoa.

E tūtohu ana mātou i ētahi pananoitanga hou, pēnei i te waiho mārire i ngā rōia kia whai i a rātou hāora 10 mā te akoranga nā rātou i whakaraupapa, (nā reira kāore e taea te whakaū). E tūtohu ana anō hoki mātou kia whāia ngā mahi o Wikitōria (Ahitereiria) e whakahau nei te kaiwhakahaere ture kia uru ētahi kāwai whakangungu whakahau, ka taea te whakarerekē i tēnā wā, i tēnā wā, pēnei i ngā take matatika me ngā tikanga.

He pūnaha whakatau whakapae kua whakahoutia

Kāore kē te pūnaha whakatau whakapae o nāianei i te whai take.

E kī ana ngā kiritaki me ngā rōia kāore kē te pūnaha whakauru whakapae o nāianei i te whai take. Ehara tēnei i te whakahounga ka taea te whakatika mā te whāwhā nui i ngā taha. Me āta ruku ki te manawa o te raruraru, mā te panoni i te ture, e whakatikaina ai ngā raruraru kua puta i te Ture he kaha rawa nei ki te tohutohu tikanga.

E whakahau ana t etauira o nāianei kia whiria ia whakapae e tētahi o ngā Komiti Paerewa 22 kei roto kē i te nuinga he rōia tūao, ā, e mahi ana ki waho rawa i te Kāhui Ture o Aotearoa. He pōturi noa iho te hātepe, he taupatupatu te mahi, kāore i te whakaea wharanga, kāore i te ōrite ngā whakatau, ā, he kaha ake ki te tūhura whakapae (ina kautehia ngā rōia) i ngā kaiwhakahaere ture ture ōrite i tāwāhi. Ka pau tētahi tau katoa mō te whakapae iti noa, me te utanga mai o ngā taumahanga ki te hauora hinengaro o te hunga whai wāhi. Kua whakatahangia atu ngā kiritaki me te whakataunga take ki tahaki, kāore i te pūtahi o ngā hātepe whakarite ture. Ko tētahi āwangawanga nui, kei te whakawā ngā rōiā i ētahi atu rōia, kei te kī ngā kiritaki ko te hātepe Komiti Paerewa kei te tītaha ki te taha ki Rōpū, ahakoa kāore he taunakitanga kei te 'ngāwari' te whakawā o ngā rōia ki a rātou anō.

I kitea i roto i tā mātou kōrerorero, me waiho ngā whakawākanga whakawhiu ōkawa mō ngā whakapae tino taumaha. He tini anō i kōrero mō ngā whāinga wāhi ki te whakaheke i te taumata, ki te whakatau hoki i ngā whakapae, nā ngā ritenga ōpaki pēnei i te whakawhiti kōrero, i te takawaenga, me ngā ara e whai ana i ngā tikanga.

Te whakanoho mai i tētahi pūnaha whakatau whakapae whai hua kē atu

E marohi ana mātou i tētahi tauira whakapae hou e whakakore ai te tūranga Komiti Paerewa, me te hoatu i te mana ki te kaiwhakahaere ture hou kia tūhura, kia whakatatū whakapae hoki mā te whakamahi kaimahi o roto. Ka hangaia he ara hou mō ngā whakapae mō ngā'take kiritaki' (pēnei i ngā nama, te pōturi, me te whakawhiti kōrero hē) mehemea he mārama ki te katoa

kāore he āwangawanga whakawhiu tō te take. E kore tēnei ara e aronui ki te tūhuratanga, ki te whakawhiunga rānei, engari ka hoahoatia hei tautoko whakaeanga whakapae, mā tētahi ratonga whakatika whakapae hohoro, pīngawingawi, ōpaki hoki mā te kaiwhakarite e hora. E kore ngā whakapae kiritaki mō ngā nama mai i ō rātou rōia e whakaoho tūhuratanga, whakawhiu rānei, hāunga ngā mea tino taumaha.

Ka whakaraupapatia e te kaiwhakahaere ture ana rawa ki ērā take e ara ake ai he kī, 'he whanonga kāore i te pai' 'he whanonga tino hē rānei', me ka taunakitia. Ka kaha te kaiwhakahaere ture, mā roto i ana kaimahi mātanga, ki te whakarite kitenga o te whanonga kāore i te pai, ā, ka tūhuratia e ia ngā take ka eke ki te taumata o te whanonga tino hē, me te whakahau i te hāmene ki mua i te Rūnanga o ngā Rōia me ngā Rōia Whakawhiti Whenua (Lawyers and Conveyancers Disciplinary Tribunal, LCDT). Ko ētahi take whakawhiu – me kī, ērā e tūhuratia ana ngā whakapae i mua i LCDT – me kimi tonu he whakamaherehere whakawaho mō ngā take paerewa ngaio matatini.

I kitea i roto i ā mātou toronga whakaaro ko tētahi take i takaroaroa ai te hātepe whakatau whakapae o nāianei, i taupatupatu ai hoki, ko te hua tērā pea ka puta, ka whakaingoatia tūmatanuitia te rōia mō tana korenga e eke ki ngā taumata paerewa ngaio. I te ao tūturu, he ruarua noa iho ngā whakamahinga o te mana whakingoa rōia kua taka ki te whanonga tino hē (kotahi rau ōrau o ngā whakapae i te whakaaetia i ngā tau e rima ka hipa ake nei) engari e noho ana ko te āhei kia whakaingoatia hei wāhi nui o ngā pōroritanga nui, ā, he kapua pouri hoki mō te rōia ka mau i te hātepe whakapae. E tūtohu ana mātou kia kaua e whakapuakina te ingoa o tētahi rōia, ki te kite a te kaiwhakahaere ture kua taka ki te whanonga kāore i te pai, hāunga i runga i ngā Kaupapa Here ā-Motu mō ngā take tino hē. Ka taea tonutia te whakapuaki i te ingoa o ngā rōia i roto i ngā whakawākanga whakawhiu i mua i te LCDT.

Kia whakatūria he kaiwhakahaere ture hou, ka kore e hiahiatia tētahi Āpiha Arotake Whakapae Rōia motuhake i muri. Ka taea tēnei tūranga te whakakapi ki tētahi taputapu arotake hou mō ngā take whakawhiu, mā te kaiwhakahaere ture e whakangāwari, ka rapu āwhina mai i ngā mema o waho, mai i tētahi kaiwhiriwhiri o waho rānei, māna te arotake hei kawe.

E whakaae ana mātou tērā te tini o ngā whakapae e whiria ana e Te Kāhui Ture o Aotearoa ināianei, kāore e tino hiahiatia te hāpainga mai o te kaiwhakahaere ture. Rite tonu ki ētahi atu umanga, e tūtohu ana mātou me here ngā rōia e tētahi haepapa hou kia āta mahi kia whakatauria ngā whakapae i runga i te kamakama, i te tōkeke, i te koreutu hoki.

Ngā pīkauranga ahurea: te whakapiki i te kanorau, i te haonga o te katoa, i te whanonga pono me te hauora hinengaro

Ahakoa kua huri te hunga i roto i te umanga rōia i ēnei tau tata, tērā tonu ētahi take kanorau nui kei mua i a tātou. Kāore e taea e te tini o te tangata te haere hei rōia. Kāore i te ōrite ngā ira i roto i ngā tūranga mātāmua maha, ā, kei te tino kitea te korenga e ōrite o ngā momo iwi puta noa i te umanga, me ngā maioro anō ki ngā rōia whai hauātanga. I te taha o ngā take e tuhia nuitia ana, o te whakaito me te whakaweti, kāore e kore ka kī te tini o ngā rōia me tahuri wawe te ao rōia ki te whakapiki i te ahurea o te umanga rōia.

E kore tētahi kaiwhakahaere ture kotahi e panoni i te ahurea o tētahi umanga. Heoi anō, tērā anō ngā āhuatanga ka taea te panoni, i runga anō i ngā mahi o nakuanei a Te Kāhui Ture o Aotearoa. E kore te korenga kanorau me te aweretangā o ētahi rōpū e panonitia, ki te kore e aro nuitia. Engari ka puta he painga i ētahi o ngā panonitanga e maro hiria ake nei, tae atu ki whakatakoto whāinga mō te kaiwhakahaere ture i roto i tētahi ture, (ka uru ki ēnei painga ko te whakatenatena i "tētahi umanga rōia tū motuhake, pakari, matahuhua hoki") tētahi kāhui mema poari kaiwhakahaere ture kaha ake te kanorau, i whakatūria i runga i te aronga pūkenga, tētahi wāhanga hāngai ki Te Tiriti o Waitangi i roto i te Ture hou, me te herenga o te hinonga e te ture.

Tērā anō hoki ētahi whakaritenga ā-ture o nāianei e puta ai he ārai mō te whāinga wāhi, me te pikinga whakarunga hoki i roto i te umanga. Hei tauira, hei tāmitanga hē te here mō te maha o ngā hāora kua mahia e tētahi rōia, kia whakaurua hei rōia motuhake, mō ērā kua okioki i te mahi mō te moni mō tētahi wā; i ētahi wā hē au kati tangata te āhua o ngā whakaritenga whakauru, kaitautoko āhuatanga tangata hoki; ā, kua puta hoki ētahi āwangawanga mō te ritenga a Te Kāhui Ture o Aotearoa kia whāki ngā kaitono mō te whakaurunga, me ngā rōia e whakahou nei i tā rātou tiwhikete mahi mō te tau, i ō rātou māuiui hinengaro.

He wāhi anō tō te kaiwhakahaere ture, i te taha o ngā rōpū whakakanohi, ki te turaki i aua ārai, ki te akiaki hoki i te huri ngā hei umanga mātahi hua kē atu, hao hoki i te katoa. E tūtohu ana hoki kia āhei te kaiwhakahaere ture ki te kohikohi mōhiotanga mō te kanorau ranga o te umanga, i runga i te whakaaro kia pānuitia auautia ngā tataurangā tōpū me ngā raraunga mō ngā ia i roto i te umanga.

Ngā Tūtohu

1. Me whakatū tētahi kaiwhakahaere ture motuhake hou hei whakarite ture mō ngā rōia i Aotearoa.
2. Me whakarite tātou kia noho motuhake, kia whai take tūturu hoki te kaiwhakahaere ture mā ētahi ritenga hinonga tae atu ki:
   a. te whakatū i tētahi rōpū ā-ture motuhake, ehara i te Hinonga Karauna, kāore hoki e herea e ngā tohutohu a ngā Minita
   b. tētahi poari tokowaru ana mema, kia taurite tonu te wehenga, he rōia ētahi, he mema tūmatanui ētahi, he heamana mema tūmatanui, ā, ētahi mema tokorua, kaua e iti iho, i āta ākona i roto i te ao Māori
   c. te whakatūranga o ngā mema poari e te Minita mō ngā Ture, i muri i ngā tohutohu mai i tētahi pae whakarewa ingoa kei roto nei te hanumitanga o ngā kanohi kiritaki, ngā mātanga whakaruruhau, me ētahi mema o te umanga rōia.
3. Me whakauru ngā whāinga i raro i te Tiriti, me ērā o te whakarite ture ki roto i te Ture hou, me te whakahou i ngā here taketake o ngā rōia, mā te:
   a. te Whakauru i tētahi wāhanga motuhake mō Te Tiriti o Waitangi, e whakahau ana kia whakatinana ērā e kawe nei i ngā mana me ngā haepapa, kia whakatinana i ngā mātāpono o Te Tiriti o Waitangi
   b. te takutaku i ngā whāinga whakarite ture, me tētahi whāinga i runga rawa hei tautiaki, hei whakatairanga hoki i ngā pānga o te iwi tūmatanui
   c. te whakahou i ngā here taketake o ngāi rōia, kia tahuri ngā roiā ki te whakatairanga, otirā ki te tautiaki i ngā pānga o ō rātou kiritaki, me te uta herenga hou ki ngā rōia kia puritia e rātou tō rātou tōtika, pakari hoki kia mahi hei rōia.
4. Me whakahou te hōkai o ngā whakaritenga ture mā te:
   a. whakaū i te arotahi o te anga whakarite ture ki ngā rōia me ngā rōia whakawhiti whenua anake, kia kaua e whakawhānuitia hei whakakapi i ētahi atu kaihora ratonga ture kāore i te herea e te ture
   b. te whakauru mai i tētahi tauira ‘mahi takitahi’ hou, e taea ai e te rōia te hoatu ratonga ki te iwi tūmatanui i ngā rohe kāore i āta wehea, kia kaua e herea kia kimi whakaaetanga mai i te kaiwhakahaere ture mō tēnei mahi
   c. te whakaae kia tuku ratonga kore-utu, i runga i te ngākau pai ki te iwi tūmatanui i ngā wāhi kāore i āta wehea
   d. te whakaae ki ētahi anga pakihi hou, e āhei ai te hunga ehara i te rōia kia hoko hea i roto i ngā kamupene rōia, kia āhei hoki ngā rōia kia mahi kōtui ā-ture ki te hunga ehara i te rōia
   e. te āta whakarite mārire i ngā kamupene ture, me ētahi herenga taumata kamupene hou.
5. Me whakamana i te kaiwhakahaere ture kia pai ake tana tiaki i ngā kiritaki, tana tautoko i ngā kaimahi ture, me te whakaū i te matatau, mā:

a. te hoatu taputapu hou ki te kaiwhakahaere ture, tae atu ki ētahi kahanga kia whakatārewatia ngā tiwhikete mahi, kia herea ngā kaimahi kia uru ki tētahi arotake hauora, matatau rānei, kia kawea hoki e ia ngā arotakenga mahi, kia whakaritea hoki e ia ētahi here whāiti ki tētahi tiwhikete mahi

b. te arotake i ngā herenga o whakapakaritanga pūkenga ngaio, tae atu ki te herenga whakapakaritanga pūkenga ngaio 10-hāora o nāianei, me te whakahau me haere ngā wae whakahau o te whakapakaritanga pūkenga ngaio ia toru tau ki te rima tau.

6. Me whakahou te pūnaha mō te whakatau whakapae mō ngā rōia me te whakauru mai i tētahi tauira e:

   a. arotakea ai ngā whakapae, e whakatauria ai hoki e ngā kaimahi mātanga nō roto i te hinonga, kaua e ngā tūao i ngā Komiti Paerewa

   b. wehea ai ngā hātepe tūhura, whakawhiu hoki mō ērā momo take e hiahiatia ai he urupare whakawhiu mai i te kaiwhakahaere ture. Me haere kē ngā whakapae mō ngā ‘āhuatanga kiritaki’ (hei tauira, ngā nama, te pōturi, te hē o te whakawhiti kōrero) ki tētahi hātepe whakatau tautohe

   c. kore ai e whakaputaina ki te marea te ingoa o tētahi rōia ka whai ki tētahi ‘whanonga hē’, hāunga ngā mea tino taumaha, me te waiho i te whakaingoatanga o ngā take e kite ai te Rūnanga Whakawhiu o ngā Rōia me ngā Rōia Whakawhiti Whenua i taka te rōia ki te ‘whanonga hē’

   d. whakakapia ai te Āpiha Arotake Whakapae Rōia motuhake e tētahi komiti arotahi iti, mā te whakarite ture e tīmata, ko ōna kaimahi he mema nō waho, he kaiwhakawā nō waho rānei

   e. herea ai ngā rōia e tētahi haepapa hou kia āta mahi kia whakatauria ngā whakapae i runga i te kamakama, i te tōkeke, i te koreutu hoki.

7. Me whakatenatena i te noho kanorau me te haonga i te katoa i roto i te umanga rōia mā te:

   a. waihanga i tētahi kaiwhakahaere ture he whāinga tūturu tōna kia “whakatenatena i tētahi umanga rōia tū motuhake, pakari, matahuhua, whai hua hoki”, me tētahi poari i tohu mō ngā pūkenga o ana mema, he kanorau te āhua

   b. tango i ngā maioro ā-ture e noho nei hei makihuhunu ki ētahi

   c. hoatu mana hou ki te kaiwhakahaere ture hei kohikohi raraunga kanorau mai i ngā kamupene rōia, kia pānuitia ngā raraunga tōpū mō ngā ia i roto i te umanga.

8. Me haere tonu ngā mahi a Te Kāhui Ture o Aotearoa hei rōpū whakakanohi ā-motu. Me noho mai he whakapaparanga whakaruruhau kotahi, kia 8-10 ngā mema poari, tae atu ki ōna mema tūmatanui.

1. Introduction

This independent review was commissioned by the New Zealand Law Society | Te Kāhui Ture o Aotearoa (the Law Society).

The Independent Review Panel, consisting of Professor Ron Paterson (Chair), Jane Meares and Professor Jacinta Ruru, commenced work in March 2022. Our task was wide-ranging and ambitious – to review the framework for the regulation and representation of legal services in Aotearoa New Zealand.

Context for the review

The Law Society's decision to commission the review was prompted by three main drivers, described below.

Responding to unacceptable conduct by lawyers

In 2018, the legal profession was confronted by the disclosure of reports of sexual harassment of young lawyers and summer clerks. A comprehensive Legal Workplace Environment Survey undertaken by the Law Society highlighted that these were not one-off incidents and that many lawyers had experienced harassment, bullying, discrimination and racism during their careers.

These issues 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 Law Society should also be the regulator of the profession.

These questions arose 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. Some are choosing to leave firms they find unwilling or unable to adapt to changing expectations, or leave the profession entirely.

Ensuring the regulatory framework is fit for purpose

There have been significant changes in the 14 years since the Lawyers and Conveyancers Act 2006 (the Act) came into force, including:

- an increase in legal services provided by non-lawyers
- the growing use of technology to deliver legal services
- a significant growth in the number of in-house lawyers.

This review takes place at a time when a number of overseas jurisdictions are reconsidering their models for regulating lawyers in response to community expectations, or have recently done so. This review is an opportunity to take stock of whether the Act gives the regulator the necessary tools and flexibility to do its job effectively.

Positioning the legal profession for the future

The review was also prompted by a need to look ahead and examine what is needed to:

- ensure there is fair competition for legal services and that the statutory framework enables innovation in the legal profession
- strengthen the profession's commitment to the bicultural foundations of Aotearoa New Zealand and the importance of Te Tiriti o Waitangi to our constitution and legal system.

New Zealand's demographics are changing. Over five million people reside here, with a high proportion of foreign-born people from around the world, including from Pacific Island nations and Asia. Māori, Pacific and Asian populations are young and fast-growing. By 2042 these three population groups are projected to comprise 58 per cent of New Zealand's population (up from 39 per cent in 2018).[7] The growing Māori population is coupled with a Māori economy, estimated to be worth $70 billion and steadily increasing at 5 per cent per annum.[8] As our population make-up changes and consumers' expectations evolve, the legal profession needs to position itself for the future.

Terms of Reference

In March 2020 the Law Society appointed a seven-member steering group to develop terms of reference for this review. The independent steering group consulted with the profession and other stakeholders on its draft terms of reference[9] and published the Terms of Reference in September 2021.[10]

The Terms of Reference required the Panel to examine the following key aspects of the regulatory framework for lawyers in Aotearoa New Zealand: conduct, complaints and discipline, regulated services and appropriate separation of interests and roles. The scope of the review included:

- whether the Law Society's representative functions should be separated from all or some regulatory functions
- how unacceptable conduct is prevented and addressed
- how complaints are made and responded to, including issues relating to transparency
- which legal services are regulated and by whom
- optimal organisational and governance arrangements for the Law Society
- the role of Te Tiriti o Waitangi and biculturalism in the statutory framework, and in organisational and governance arrangements
- how inclusion and diversity should be expressed in the regulatory framework, and in organisational and governance arrangements.

The purpose of the review is to identify what changes are needed for modern and well-functioning regulation and representation of the legal profession in Aotearoa New Zealand, to promote:

1. public trust and confidence in the provision of legal services
2. the protection of consumers receiving legal services
3. innovation and a well-functioning market for legal services
4. a culture of safety, health and wellbeing of legal professionals

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7 Stats NZ "Subnational ethnic populations: 2018(base)–2042" (press release, 29 March 2022). At present these population groups comprise only 20% of the legal profession.

8 BERL *Te Ōhanga Māori 2018: The Māori Economy 2018* (28 January 2021).

9 The steering group received 624 survey responses and nine written submissions on its draft terms of reference.

10 The New Zealand Law Society Independent review of the statutory framework for legal services in Aotearoa New Zealand: Terms of Reference (September 2021).

5. the rule of law and access to and the administration of justice in Aotearoa New Zealand
6. a commitment to honouring Te Tiriti o Waitangi and the bicultural foundations of Aotearoa New Zealand, including Te Ao Māori concepts
7. inclusion and diversity, including reflecting Aotearoa New Zealand's multicultural society.

Although the review was commissioned by the Law Society, the Terms of Reference made it clear that the Panel was independent and had a free hand to identify necessary reforms to the statutory and regulatory framework – recognising that any legislative changes will ultimately be a matter for government.

How we went about our work

All three Panel members brought different skillsets to the review. Collectively we had practical and commercial experience from practising as a lawyer, in-depth knowledge of Te Tiriti and the law, governance experience and insights, expertise in legal ethics and the regulation of professions, and experience in operating a professional complaints and disciplinary regime.

As outlined in more detail in chapter 3, we made it a focus of our work to be accessible and to consult extensively. We travelled around the country to meet with stakeholders and provided multiple avenues through which people could engage, including face-to-face, an online survey, videoconferencing, and large webinars.

It was important to assess what has worked well overseas in the regulation of lawyers, in particular where there has been regulatory reform. Panel members travelled to meet regulators and representative bodies in Canada, England and Wales, Ireland, Scotland and Australia (Victoria and New South Wales). These trips and what we learnt proved invaluable. Although the various countries have gone down slightly different paths in how they regulate the legal profession, there are distinct trends in what works well and pitfalls to be avoided.

We were supported in our work by Sapere Research Group, which provided secretariat and research support. Considerable research work has been done to support our analysis and the conclusions in this report. This material has been collated into a number of working papers published at www.legalframeworkreview.org.nz.

This review was described by the Law Society as a "once in a generation" opportunity. We have taken up that challenge. We are confident that our conclusions are robust – they are well-researched, evidence-based and reflect best-practice approaches to regulation.

Acknowledgements

We wish to thank all those who completed the online survey, made submissions, engaged through webinars and branch events, and met with us throughout the year. We especially acknowledge a few individuals: Dame Silvia Cartwright, Dale Clarkson (Chair of the LCDT), Rex Maidment (LCRO), Samantha Barrass (CEO of the FMA and former Executive Director of the Solicitors Regulation Authority), Mary Ollivier (former GM Regulatory and Acting CEO of the Law Society), Baden Vertongen (Co-President, Te Hunga Rōia Māori) and former presidents of the Law Society, Justice Christine Grice (also former Executive Director of the Law Society), Chris Darlow, Chris Moore, Judge Kathryn Beck, Tiana Epati and Jacque Lethbridge.

We are grateful for co-operation and assistance from the CEO of the Law Society, Katie Rusbatch, and her team. We are indebted to Jeff Loan and colleagues at Sapere Research Group for their research and secretariat support.

We also acknowledge the staff of regulators and experts from the UK and Ireland, Australia and Canada who generously gave their time, knowledge and expertise to our review.

UK and Ireland: Professor Andy Boon; Harry Cayton; Professor Stephen Mayson; Professor Richard Moorhead; Crispin Passmore; Esther Roberton; Paul Philip (CEO, Solicitors Regulation Authority, England and Wales); Mark Neale (Director-General, Bar Standards Board, England and Wales); Matthew Hill (CEO, Legal Services Board, England and Wales); Sarah Chambers (Chair, Legal Services Board Consumer Panel, England and Wales); Stephanie Boyce and Robert Bourns (former Presidents, Law Society of England and Wales); Elisabeth Davies (Chair, Office for Legal Complaints, England and Wales); Sharon Horwitz (Director, Sector Regulation) and Paul Kellaway (Assistant Director, Advocacy, Nations and External Relations), Competition and Markets Authority; Dr Brian Doherty (CEO, Irish Legal Services Regulatory Authority); Neil Stevenson (CEO, Scottish Legal Complaints Commission) and Jim Martin (Chair, Scottish Legal Complaints Commission).

Australia: Fiona McLeay (Victorian Legal Services Commissioner and CEO of the Victorian Legal Services Board); Catherine Wolthuizen (Chair of the Consumer Panel, Victorian Legal Services Board); Adam Awty (CEO, Law Institute of Victoria); Libby Fulham (Executive Director, Legal Practice Board of Western Australia); John McKenzie (New South Wales Legal Services Commissioner); Megan Pitt (former CEO of the Legal Services Council and Commissioner for Uniform Legal Services Regulation).

Canada: Jonathan Herman (CEO, Federation of Law Societies of Canada); Drew Lafond (President, Indigenous Bar Association); Brooks Arcand-Paul (Vice-President, Indigenous Bar Association); Koren Lightning-Earle, former President, Indigenous Bar Association); Minister Murray Rankin (Minister of Indigenous Relations and Acting Attorney-General, British Columbia Legislature); Adam Whitcombe (Deputy Executive Director and Deputy CEO, Law Society of British Columbia); Lindsay LeBlanc (Law Society of British Columbia Bencher), Professor John Borrows, Professor Val Napoleon, Professor Hadley Friedland.

Next steps

We have set out a blueprint for the legislative and regulatory reforms we consider necessary for the effective regulation and representation of the legal profession in Aotearoa New Zealand. Although this marks the end of our review process, it will begin a new conversation about how lawyers in New Zealand should be regulated – potentially culminating in policy work and legislative reform.

Our conclusion is that legislative reform is needed to better protect consumers and enable a more responsive and modern legal profession. The shape of future reforms will doubtless be the subject of further discussion and debate. We hope this report will provide a sound evidence base and platform for change.

Structure of this report

This report has three main parts.

Part A describes where we are now: a history and description of how lawyers are regulated in New Zealand (chapter 2) and a summary of the main themes we heard from our consultation process (chapter 3).

Part B focuses on the single most important issue for the regulation of lawyers in New Zealand – whether there should be a new independent regulator. It examines the case for changing the current model (chapter 4), alternative options and the case for a new regulator (chapter 5) and describes the institutional arrangements required for any new regulator (chapter 6).

Part C sets out our conclusions on what needs to happen in the other key areas examined during the review. These topics include:

- new statutory objectives and obligations (chapter 7)
- the scope of regulation, including who should be able to provide legal services and who should be regulated (chapter 8)
- how to ensure quality service and competence assurance in a new regulatory model (chapter 9)
- a reformed complaints and disciplinary system (chapter 10)
- how to address cultural challenges, including diversity, inclusion, conduct and mental health (chapter 11).

Part A

Where we are now
Kei hea tātou ināianei

2. Regulating lawyers: the current state

This chapter outlines why the legal profession is regulated, how regulation has evolved over time, and describes the current role, structure and functions of the Law Society.

There are over 16,000 lawyers in Aotearoa New Zealand, a 46 per cent increase since 2010. The growth in the number of lawyers means that there is now one lawyer for every 326 New Zealanders[11] compared to 50 years ago when there was one lawyer for every 1,094 New Zealanders. The legal services industry is estimated to be worth $3.9 billion annually.[12]

Why do lawyers need to be regulated?

The aim of regulating an occupation is broadly "to protect the public from the risks of an occupation being carried out incompetently or recklessly".[13] Occupational regulation recognises that, for many professions, professional standards, traditional consumer protection laws and contractual remedies are unlikely to be sufficient to protect the public. Occupational regulation is common in New Zealand and is estimated to cover 28 per cent of workers' primary occupations.[14]

Several characteristics of the legal profession mean that occupational regulation has been seen as essential in New Zealand and overseas:

- The nature of legal services makes it difficult for many consumers to assess the competence of practitioners and the quality of services provided.
- Incompetence or negligence on the part of practitioners may result in significant and irreversible harm (including loss of freedom) to consumers. This risk is higher when the transaction is involuntary and the public must rely on lawyers (eg, when facing a criminal charge).
- The role lawyers play in the justice system and the effective and efficient operation of the courts means there is a strong public policy interest in ensuring competent legal practice.
- Lawyers are granted a monopoly over the provision of some legal services. There is a need to ensure that this privilege is exercised for the public benefit.

The difficulty many consumers have in assessing the quality of legal services is often exacerbated by the fact they may be in a vulnerable position when engaging a lawyer. Consumers often interact with lawyers in highly sensitive situations (eg, a relationship separation, death of a family member, facing a criminal charge, an employment issue, bankruptcy) and have a high degree of trust that their lawyer is competent.

Protecting consumers from substandard legal services is typically achieved through a multifaceted approach to regulation. At its most basic it requires a regulator that sets minimum standards of competence and imposes disciplinary measures on professionals who fall short of those standards. However, in regulating lawyers it is also important to maintain public confidence in the provision

11 By comparison the ratio of lawyers per head of population is 1:349 in England and Wales, 1:304 in Australia, 1:286 in Canada and 1:251 in the United States.

12 IBISWorld "Legal Services in New Zealand" (2 September 2022) <www.ibisworld.com>.

13 Cabinet Office Circular "Policy Framework for Occupational Regulation" (8 June 1999) CO 99/6 at [2].

14 Simon James Greenwood and Andrea Kutinova Menclova "Analysing the extent and effects of occupational regulation in New Zealand" (2018) 52 New Zealand Economic Papers 21.

of legal services. This requires the regulator to support well-functioning markets, to be responsive to systemic risks to consumers and emerging trends, and to continually monitor whether its rules remain appropriately targeted.

A brief history of regulation of the legal profession

The Law Society was established in 1869 by the New Zealand Law Society's Act 1869.[15] That Act made all barristers and solicitors of the Supreme Court lawfully practising within the colony of New Zealand members of the Law Society. By a majority vote the Law Society's members could make such bylaws and orders as necessary "for the regulation and good government of the Society and of the members and affairs thereof" and the admission and removal of members.[16]

Regulation of the profession prior to 2008

Immediately prior to 2008, lawyers were regulated under the Law Practitioners Act 1982. Under the 1982 Act, the Law Society's functions included promoting the interests of the legal profession, the interests of the public, proper conduct among members of the profession, and assisting in and promoting the reform of law.[17]

Operating under the 1982 Act, the Law Society and the 14 District Law Societies were the governing bodies of the profession. District Law Societies had the functions and statutory powers of the Law Society, with the additional functions to maintain law libraries and manage admissions.

Lawyers were subject to disciplinary oversight from the Law Society, the District Law Societies, the New Zealand Law Practitioners Disciplinary Tribunal (LPDT), and the High Court. A complaint could be made to a District Law Society (or its complaints committee), which could investigate and lay a charge before the District Disciplinary Tribunal or the LPDT directly. A practitioner charged in the District Disciplinary Tribunal could then appeal their case to the LPDT. There was also a right of appeal from the LPDT to the High Court.

However, this structure was recognised as having notable deficiencies, including:

- A lack of uniformity resulting from the 14 geographically spread District Law Societies. Under this highly decentralised model there was a lack of consistent policy and regulatory procedures, particularly in relation to complaints and disciplinary processes. What resulted, for example, was certain practices being an offence "in Dunedin, not done in Christchurch, frowned upon in Wellington, and standard practice in Auckland".[18]
- Regulation was not efficient. The 14 District Law Societies, each with regulatory powers, meant economies of scale and cost efficiencies could not be achieved.

Reform via the Lawyers and Conveyancers Act 2006

In recognition of these issues, the Lawyers and Conveyancers Act 2006 (the Act or LCA) reformed the regulatory and representative structure of the legal profession. It was described at the time as "a massive leap in the direction of consumerism for the New Zealand profession".[19]

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15 A history of the legal profession in New Zealand – and the men who dominated it – was published on the centenary of the Law Society: see Robin Cooke (ed) *Portrait of a Profession* (AH & AW Reed, Wellington, 1969).

16 New Zealand Law Society's Act 1869, s 13.

17 Law Practitioners Act 1982, s 4(1).

18 E-DEC Ltd *Purposes, Functions and Structure of Law Societies in New Zealand: Final Report to the New Zealand Law Society* (1 September 1997).

19 Duncan Webb "The Lawyers and Conveyancers Act: catching up with consumerism" [2007] NZLJ 13 at 16.

A co-regulatory model

The development of the Act considered various options for reforming the regulatory model, including continuing with self-regulation (albeit centralised under the Law Society), a co-regulatory model with significant government oversight, and a new board to oversee and be accountable for regulatory functions.

A Cabinet paper at the time noted that establishing a new independent board would improve transparency and accountability, reduce the risk of regulatory capture by the profession, and recognise consumers as stakeholders by including consumer representatives on the board.[20] Ministers were advised, however, that there was strong resistance to this proposal from within the profession:

> The New Zealand Law Society model which proposes a significant degree of self-regulation, has found favour across the legal profession. It is likely that the profession would not accept a statutory board model, and that more extensive consultation with the profession will be necessary than is currently adopted.

In the end Cabinet chose what has been described to us by some former Law Society presidents as "a compromise". The Law Society was designated as a self-regulatory body for the profession, but with government oversight of key functions. This outcome was seen as harnessing the advantages of self-regulation (including cost-effectiveness and internalising regulatory costs by using volunteers), while providing new safeguards with the Minister of Justice having to approve key regulatory decisions, such as new practice rules and the level of practising fees.

The Law Society's regulatory and representative functions were made distinct. Regulatory functions were to be funded via levies and representative functions via subscriptions, with the latter being voluntary.

From District Law Societies to Law Society branches

As part of the reform, District Law Societies were disestablished. Following significant debate, 13 of the 14 District Law Societies voted to combine their assets with the Law Society. The Auckland District Law Society (ADLS) chose instead to become an independent incorporated society.

In effect these District Law Societies then became branches of the Law Society, with no regulatory powers.

A new complaints model

The Act provided for the Law Society to appoint members to one or more Standards Committees, which were given the power to consider complaints about lawyers, make final determinations and apply sanctions.

To placate those concerned about the loss of the District Law Societies, it was agreed that local lawyers in each region would still be able to exercise disciplinary powers over their fellow lawyers. The Law Society established 22 Standards Committees, with committees operating around the country. The Standards Committees make decisions independently from the Law Society; the Law Society Executive has no ability to discipline lawyers.

The Act established the Legal Complaints Review Officer (LCRO), an independent office under the Ministry of Justice, which can review decisions made by a Standards Committee. The Lawyers and Conveyancers Disciplinary Tribunal (LCDT) was also established to hear and determine the most serious disciplinary charges against lawyers, conveyancers and employees of law firms.[21]

20 Memorandum to the Cabinet Policy Committee "Regulation of Lawyers & Conveyancers: Strategic Decisions" (2000).

21 Including charges of 'misconduct' and applications to remove a practitioner's name from (or restore it to) the roll.

Council of Legal Education

The New Zealand Council of Legal Education (Council of Legal Education) was established in 1930. It was continued as an independent statutory entity under the 2006 Act with responsibility for setting the qualification and educational requirements for admission as a barrister and solicitor in Aotearoa New Zealand.

The Council of Legal Education's membership comprises three judges, five legal practitioners nominated by the Law Society, six law school deans, one lay member and two students or young lawyers nominated by the New Zealand Law Students' Association. It is outside our terms of reference to examine any changes that might affect the Council of Legal Education.

The structure of the Law Society

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

On 1 January 2023, the Law Society had 171 staff, including 90 regulatory staff, 47 representative staff,[22] and 34 support staff. The Law Society is heavily reliant on the numerous volunteers who commit significant time to work in Standards Committees, Practice Approval Committees, law reform committees, and in the Society's sections, branches and groups.

Over the past three years the Law Society has received on average $23 million annually for its regulatory functions (from fees and levies on the profession) and $6 million annually 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 9 per cent since 2010.

The governance of the Law Society

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

The Law Society Council

The Council has delegated most of its powers to the Board. Its retained powers include electing the President and Vice-Presidents of the Law Society, 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),[23] the Chair/President of the New Zealand Bar Association, a representative from the Large Law Firms Group, and a representative from each of Te Hunga Rōia Māori o Aotearoa (Te Hunga Rōia Māori) and the Pacific Lawyers Association,[24] and an observer from the New Zealand Institute of Legal Executives.

Voting at the Council is by majority vote unless a member requests a vote by 'poll'. Under a poll each member of the Council gets one vote, with each branch representative having an extra vote

22 The number of representative staff includes 15 library staff funded by regulatory and dual regulatory and representative roles.

23 The Law Society has three specialist representative groups for lawyers (sections): the Property Law Section, the Family Law Section and the In-house Lawyers Association of New Zealand.

24 These two associations joined the Council as members in 2020.

for every 500 members in excess of the first 500 members in that branch. A successful poll vote requires at least four branches to vote in favour.

The Law Society Board

The Law Society Board consists of the President and four Vice-Presidents. The Board has governance and oversight responsibilities. Most of the Law Society's regulatory functions delegated by the Council to the Board have been delegated to the Chief Executive and other office holders, for example approving practising certificates and issuing certificates of character, and to Practice Approval Committees.

The Law Society's regulatory functions

The Law Society's 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.

As part of its regulatory functions the Law Society maintains three staffed libraries (and 33 kiosks for online access) for practitioners, and funds significant wellbeing initiatives under its Practising Well programme (partially funded as part of its representative functions). There is also a Law Society 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 pay a levy set by the Law Society to fund the independent LCRO, and pay a Council of Legal Education levy. Lawyers practising on their own account pay an inspectorate fee and those operating a trust account also contribute to the Lawyers' Fidelity Fund.

The Law Society's member services

As a membership organisation the Law Society 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 continuing legal education).

Membership of the Law Society is voluntary and lawyers with a practising certificate can become members at no charge. In the year ended 30 June 2022, 98 per cent of practising lawyers chose to become members. The Law Society membership services are funded via its sections (the Property Law Section, the Family Law Section and the In-house Lawyers Association, 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, the New Zealand Bar Association, the Pacific Lawyers Association, NZ Asian Lawyers, ADLS, the Aotearoa Legal Workers' Union, the Government Legal Network, the In-house Lawyers Association, and various women lawyers' associations.

3. What we heard from consultation

A key part of our Terms of Reference was to "consult with appropriate stakeholders and the wider community, taking reasonable care to ensure engagement and input reflects the diversity of the profession and the community".

We embarked on intensive consultation between April and October 2022. We published a discussion document on 14 June 2022 that sought stakeholder views on some of the key issues facing the profession in Aotearoa New Zealand. To ensure depth and breadth of consultation, we engaged in many different ways and provided multiple opportunities for people to have their say.

What we did:	We received views from:
An anonymous online survey	1,308 responses that answered at least one question, with the majority of responses being from lawyers.
An open call for submissions on our discussion document	183 email submissions, including from over 30 representative groups. These groups collectively represented over 20,000 members.[25]
Three webinars and five branch events for the profession	Approximately 375 attendees.
Meetings with individuals and representative groups	55 meetings with over 250 stakeholders.
Focus groups	We held four focus groups with 40 attendees. Separate sessions were held for sole practitioners, lawyers from small firms, and lay and lawyer members of Standards Committees.
A representative survey	We commissioned Kantar to include questions in its regular omnibus survey of New Zealanders.
Fact-finding missions overseas	We had fact-finding trips to meet regulators and representative bodies in England and Wales, Ireland, Scotland, Australia and Canada.

There was a good level of engagement during our consultation. We thank everyone who took time out of their busy lives to contribute to this review.[26] However, we acknowledge that most submissions came from lawyers currently in practice, rather than from people who have left the profession. We appreciate that many lawyers did not have the time or motivation to respond. And, although we heard from consumer representative groups, it has also been difficult to ensure a strong consumer voice.

Unless permission was granted by the submitter, the submissions received have been kept confidential. We have separately published a document that provides a thematic analysis of the key submission themes.[27] Where this report quotes percentage figures for or against a particular issue, those figures reflect the views expressed by the 1,308 survey respondents rather than the views of those who made written or oral submissions.

25 Many lawyers are members of multiple representative groups.

26 The individual and organisational submitters who agreed to be named are listed in the Appendix.

27 See <www.legalframeworkreview.org.nz/independent-legal-review-resources/>

Main consultation themes

Although we received polarising views on many issues in our consultation document (particularly on what changes might be needed), in many of the responses there was a degree of commonality, which we outline below.

Consumer groups called for changes to the regulatory model, although the profession was divided

We heard from several national groups with a consumer focus, including Community Law Centres o Aotearoa New Zealand (the Community Law Centres), Consumer New Zealand and Citizens Advice Bureau. They noted issues with consumers not perceiving the Law Society as fair and independent. No consumer group submitted that the current regulatory arrangements worked well for consumers.

The profession appears split on whether there should be an independent regulator. Some lawyers felt the current arrangements were working, others felt problems could be addressed through institutional reform of the Law Society, while a sizeable portion considered there was sufficient evidence to establish a new regulator.

Those wanting a change to the current regulatory model typically submitted that the Law Society faced an unmanageable conflict between its competing objectives to regulate in the public interest and to promote the interests of the legal profession, and that because the regulator was also a membership body it had been slow to confront the key challenges facing the profession. Others felt that current arrangements constrained the Law Society from being able to effectively represent the interests of the profession.

Some lawyers considered there to be a strong case for the Law Society to continue both to regulate lawyers and to represent lawyers' interests, on the basis that it promotes a sense of connectedness within the profession, encourages the profession to reflect on its shortcomings and take ownership of solutions, and produces more effective regulation by allowing lawyers' input into the detail.

Culture change remains an issue for the profession

While the profession was split on many topics, the need to change aspects of the culture of the profession – such as a preference for hierarchy, tradition and preservation of the status quo over change – was the topic that elicited the most consensus among stakeholders. People acknowledged that there has been progress, but expressed concern that bullying and harassment are still occurring in the profession. Some criticised the Law Society for its slow response to conduct issues.

A common theme was that the profit-driven culture is one of the barriers to creating change. The long working hours of junior staff were highlighted and there was concern that burnout is becoming more frequent:

> A lot of the issues with overwork and burnout come from the model itself – we bill in units, and firms make more money if their employees are working at 100%+ capacity all of the time. There is constant uncertainty as to where the next big new instruction will come from. There is no financial incentive to turn down work, reduce billable targets and promote a healthy work-life balance. Therefore, within firms, wellbeing is heavily dependent on individual leaders and partners and their philosophy of team culture, and their prioritisation of team wellbeing over other goals.

We also heard a perception that the Law Society, with its governance consisting of elected members and reliance on volunteers for the performance of some regulatory functions, was seen as defending the status quo and was resistant to leading, or even facilitating, any cultural change within the profession.

One lawyer recounted their difficulty dealing with the Law Society when applying to practise on their own account. The lawyer wanted to operate on a fixed-fee basis; however, the Law Society pushed back, advising that it was not a suitable way to operate as it was not profit-focused. The lawyer stated they were accused of "treating the law as a hobby and not a proper job". The lawyer's application was referred to another committee and, in the end, the lawyer had to sign an undertaking to be able to proceed in practising law the way they wanted.

Diversity deficits and regulatory barriers

We heard that, despite recent improvements, there is still a lack of diversity within the legal profession and that many lawyers do not see the profession as welcoming and inclusive.

Stakeholders told us of specific issues with Law Society processes and how these are not helping certain groups to stay within the profession or advance to higher positions. A common complaint concerned the rules requiring applicants to become a partner or a sole practitioner to have worked a high number of hours in the past five years. This was described as a barrier that falls disproportionately on women, Māori, Pacific peoples and disabled people – further hindering diversity in the profession:

> People wonder why, in a profession which has so many women, women are still underrepresented at the partnership level – and this is certainly a barrier. Part-time workers are essentially seen as less competent and are "othered" before they can be seen the same way as their peers.

We heard that Māori, Pacific and Asian lawyers experience discrimination and racism within the legal profession. They are more likely to experience bullying in the workplace and encounter barriers to progressing to senior positions. Many feel isolated within law firms, leading to poor mental health and decisions to leave the profession. Māori, Pacific and Asian lawyers in particular feel that the Law Society and the profession do not engage on issues of concern to them.

We heard that current rules created barriers around the admission processes for some people.[28] Some young Māori lawyers find it hard to get a reference from a 'person of sufficient standing' to get admitted and feel extremely isolated when trying to obtain a certificate of character.[29] This makes their first interaction with the Law Society a negative one.

Māori lawyers call for fundamental change

We received powerful submissions from individuals and representative groups of Māori lawyers.

28 Some submitters noted Māori felt excluded from the current admission ceremonies and would prefer marae and community-based ceremonies.

29 We heard that applicants (particularly those from lower socio-economic groups and smaller rural communities) sometimes struggled with an admission requirement to find someone who met the Law Society's standard for a preferred referee. The Law Society's examples of preferred referees include personal relationships with the likes of lawyers, registered professionals such as doctors, nurses, church elders, Justices of the Peace, and Members of Parliament.

Te Hunga Rōia Māori stated that the structure of the profession is exclusive and elitist, and called for fundamental change:

> The legal profession is failing to provide an inclusive environment for Māori lawyers. This is demonstrated by a number of factors including the continued lack of Māori representation at the upper-end of our profession (such as judges, partners, and [KCs]), and research indicating that Māori lawyers are at higher risk of sexual harassment, bullying and discrimination than their peers. These issues are structural and deeply-rooted.

Te Hunga Rōia Māori and many other submitters argued for Te Tiriti o Waitangi to sit at the centre of all changes to the regulatory environment for lawyers.

Strong calls to change the complaints system

> It is broken – for lawyers and complainants alike. I was recently involved in a matter that took many years from investigation through to an "on the papers" hearing to complete. It was truly exhausting ... I have no doubt the volunteers on the Standards Committees do their best. The system needs better resourcing. The consequences of these processes for professionals are hugely significant and stressful. An efficient and fair process is crucial for all and engenders respect from all participants.

One of the most common themes was that the Law Society's complaints process is not working, for lawyers or consumers. The biggest concern is that it simply takes too long for a complaint to be resolved. The most minor of complaints can take nearly a year to be addressed, with significant adverse effects on the mental health of the parties involved. Many also highlighted the lack of transparency and consistency of decision-making. Of particular concern is that, with lawyers judging other lawyers, the Standards Committee process is seen by consumers as lacking independence.

While stakeholders had different ideas about how to fix the system, ranging from tweaks to the current system through to establishing an independent complaints body, most agreed that change was required.

From a consumer perspective, we heard that the process was fraught with issues. We heard concerns that the complaints system may be seen as inaccessible by Māori and Pacific peoples, and by vulnerable consumers. The requirement for complaints to be in writing[30] was highlighted as creating a significant barrier to consumers being able to lay a complaint, with the Community Law Centres noting:

> They may have low literacy, English may be their second language, they may struggle to express the problem properly in writing, they are often stressed and do not have time or the emotional capacity to write up a complaint.

Our consultation processes identified a degree of consensus that formal disciplinary proceedings should be reserved for only the most serious of complaints. Many noted there were opportunities to de-escalate most complaints about poor service (eg, delays, poor communication) and to

30 As required by the Lawyers and Conveyancers Act, s 134 and Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008, reg 8.

facilitate complaint resolution by more informal procedures that promote negotiation, mediation and tikanga-based approaches. Some lawyers expressed concern that Standards Committees had become too eager to commence an own-initiative inquiry into relatively minor conduct issues, which could have been resolved without a formal investigation.

The Law Society is constrained in its ability to protect consumers

A key issue raised by stakeholders was that the Act does not provide the Law Society with the flexibility and tools it needs to effectively protect the public, including by ensuring the competence of lawyers.

The Act also does not provide the Law Society with the tools to respond to risks of consumer harm in a timely manner. For example, the Law Society Executive and Standards Committees cannot suspend a lawyer's practising certificate, even in the most compelling instances of ongoing consumer harm.[31]

Unlike some other regulators, the Law Society has no statutory powers to undertake a competence review of a lawyer or to impose conditions on a lawyer's practising certificate.[32] This means that the Law Society is limited in its ability to address lower-level competence and health concerns, including concerns about practitioners' mental health, cognitive abilities and drug/alcohol addiction.

The Act also focuses regulation on individual lawyers, meaning that law firms have become, for all intents and purposes, functionally invisible to the regulator. We heard strong support for the concept of 'entity regulation', which would place new outcome-based obligations on law firms:

> An individual lawyer's ability to properly fulfil their professional obligations is sometimes reliant on the extent to which they are allowed to fulfil those obligations.

The Law Society operates within a rigid statutory framework

In the chapters that follow we are occasionally critical of the way in which the Law Society regulates the profession and of "Law Society regulations" and "requirements". As regulator, it has responsibility for ensuring that regulations remain fit for purpose. We acknowledge that the hands of the Law Society staff are tied by restrictive regulations and that the statutory process for amending regulations is complex and time-consuming. As noted by the Board of the Law Society in response to our draft report:

> The legislative regulatory framework for lawyers is perceived as being a low priority. The Law Society has requested and promoted changes to the regulatory framework, but the Government has not been able to prioritise the work required due to resourcing constraints within the legislative programme (the recent amendments the Law Society has sought to the Act are the good example). The Law Society understands the need for prioritisation, but this has led to some frustration when the Law Society then receives criticism regarding the current regulatory framework.

We acknowledge the frustration expressed by the Law Society. It operates within a rigid statutory framework. The Law Society has shown that it can prompt regulatory reform and act when it

31 There is a somewhat convoluted process requiring an autonomous Standards Committee to formally lay a charge with the LCDT and then apply for an order for an interim suspension.

32 Orders may be issued by a Standards Committee following a finding of unsatisfactory conduct. A lawyer may also agree to voluntary undertakings at the time of renewing their practising certificate.

appreciates a pressing need for change and is able to convince the Minister of Justice and officials that reform is essential – as occurred in response to the need to address unacceptable workplace behaviour, leading to rule changes in 2021. However, more often the reported experience of the Law Society has been that reform of the regulatory framework for lawyers is not a government priority.

A solid foundation to build on

Aotearoa New Zealand is well served by many lawyers who enjoy their work, who are passionate about their profession and their place within it, and who seek to make a positive difference for their clients. We observed a strong sense of service – lawyers who see themselves as part of a unifying profession with shared values, who want to give back to their profession and community, and who are clearly driven to help members of the public in need.

Lawyers volunteer their time to serve on Standards Committees and advise on law reform, for the benefit of the public. On 1 January 2023, there were 178 volunteers on Standards Committees, 12 volunteers on Practice Approval Committees, and 160 lawyers volunteering to support the Law Society's law reform work. Their willing contribution is a valuable service to the public and the profession.

The success of the Law Society has, over many decades, benefitted from a team of highly professional and dedicated staff. Its Executive Leadership Team is committed to ensuring that the Law Society operates as a modern, responsive regulator. The theme of the Law Society's 2022 Annual Report is 'Transforming for the future'.[33] We are confident that the staff and leadership of the Law Society will welcome the reforms heralded by this report.

In summary, there is a solid foundation to build on. The challenge is to preserve the best of what has been achieved to date, remedy the problems highlighted in this review, learn from the experience of modern regulators internationally, adapt those lessons to our unique circumstances – recognising our bicultural foundations and the constitutional significance of Te Tiriti o Waitangi – and create new, fit-for-purpose legislation to regulate lawyers in Aotearoa New Zealand.

33 New Zealand Law Society *Transforming for the future: Annual Report 2021/2022.*

Part B

A new independent regulator

He kaiwhakahaere ture motuhake hou

4. The case for changing the regulatory model

This chapter focuses on whether the current regulatory model, where the Law Society has dual functions to regulate the legal profession and to represent the interests of its lawyer members, is working well. It concludes:

- There is evidence the Law Society's dual regulatory and representative functions have come into conflict, leading to poor outcomes for consumers and lawyers.
- The perception of a conflict of interest is compromising public and professional trust in the regulator.
- The current arrangements constrain the Law Society's ability to effectively represent the interests of lawyers.
- Regulation of the legal profession should no longer be done by an entity that has a duty to promote the interests of lawyers.

The current model for regulating lawyers is best described as co-regulatory. The Minister of Justice has significant supervisory responsibilities (including a requirement to approve proposed practice rules and annual practising fees) while the Law Society regulates the profession. The Law Society has dual responsibilities: as a regulatory body it has a duty to the community, while as a representative body its function is "to represent its members and to serve their interests".[34]

Our framework for analysing the regulatory model

There is no single framework of best practice against which to determine the optimal model for the regulation of lawyers in Aotearoa New Zealand. We have drawn on principles distilled by New Zealand policymakers across several key documents, including the Treasury's *Government Expectations for Good Regulatory Practice*,[35] the Productivity Commission's *Regulatory Institutions and Practices* paper,[36] and the Cabinet Circular *Policy Framework for Occupational Regulation*.[37] We agree with the submission made by the Ministry of Business, Innovation & Employment (MBIE)'s Occupational Regulation Experts Group:[38]

> The touchstone or reference point that guides the design and implementation of an occupational regime … is that occupations are regulated to protect the public from the risk of harm by ensuring that services provided by those in an occupation are performed with reasonable skill and care.

34 Lawyers and Conveyancers Act 2006, s 66.
35 New Zealand Treasury *Government Expectations for Good Regulatory Practice* (April 2017).
36 New Zealand Productivity Commission *Regulatory institutions and practices* (30 June 2014).
37 Cabinet Office Circular, above n 13.
38 Submission from the Ministry of Business, Innovation & Employment [MBIE] received 31 August 2022, responding to the discussion document: Independent Legal Review Panel *The Regulation of Lawyers and Legal Services in Aotearoa New Zealand: Discussion document* (June 2022). MBIE has responsibility for advising government on occupational regulation.

The framework we have applied to help guide our analysis (and which informed our cost-benefit analysis) includes the following key categories:

Key components for protecting the public	Assessment criteria
1. Perception and trust	a) The public has trust and confidence in the regulator and providers of legal services
	b) The profession has trust and confidence in the regulator
	c) The regulator has sufficient accountability structures and transparency mechanisms
2. Regulatory efficiency and effectiveness	a) The regulatory purpose and organisational objectives are clear and prioritised (mandate clarity)
	b) The regulator is independent, with the authority to make decisions without interference, undue influence, or conflicts
	c) The regulator has access to the necessary knowledge and skills to carry out its functions
	d) The regulator has adequate funding to carry out its functions efficiently

The case for whether there should be a change in the regulatory structure cannot be made in the abstract. We have undertaken this review with an open mind and explored whether there are any instances of harm or problems arising from the status quo of co-regulation. Any change to the current arrangements will have cost implications, and it is important to test whether these costs would be outweighed by benefits from any change to the current model.

The dual interests that the Law Society is seeking to serve will inevitably create tension and occasionally conflict. We have identified a number of examples that highlight the difficulty the Law Society has in reconciling its dual duties – both to protect consumers and to promote the interests of its members. In this section we examine concerns in two key areas:

1. Perception and trust
2. Regulatory efficiency and effectiveness

We also consider the separate but important matter of representative effectiveness.

Trust in the Law Society as regulator is eroded by its dual functions

A key consideration for the Panel is whether the Law Society's dual representative and regulatory functions are undermining the public's and the profession's trust in the regulator. It appears that the Law Society is perceived as an organisation that is inherently conflicted.

There is a perception that the Law Society acts in the interests of lawyers rather than consumers

The Panel commissioned Kantar to survey 1,000 New Zealanders about their perceptions of the Law Society as part of its regular omnibus survey. The results indicated a level of concern:

- 33 per cent of respondents were not confident that the Law Society (as the regulator and representative body for lawyers) could effectively protect consumers of legal services, while

29 per cent were confident.

- Significantly, the lack of confidence in the Law Society worsened amongst those consumers who had recently engaged lawyers (within the past two years), with 37 per cent of recent consumers not having confidence (32 per cent had confidence).

Consumer groups consider the Law Society lacks independence

A common theme of many submitters in favour of changing the current arrangements was that having both regulatory and representative functions co-existing within the same organisation undermined public confidence in the regulator and in the legal profession. The regulator is essentially perceived as a compromised entity by many consumers and even by lawyers:

> [T]here is a strong public feeling that the current framework results in "lawyers judging their own"... The profession is, fundamentally, here to serve the public and if there is diminishing or little confidence in the framework because the perception is that it looks to protect its own, then the reality is that reforms are necessary.

This view – that consumers do not perceive the Law Society as fair and independent – was strongly endorsed by several national consumer bodies. Tellingly, no consumer group submitted that the current regulatory arrangements worked well for consumers.

The Lawyers Complaints Service, the most common way consumers interact with the Law Society, is perceived by consumer groups as lacking sufficient independence. All consumer groups noted that the integrity of having a complaints process for consumers is undermined by allowing lawyers to judge the conduct of their colleagues. The perception that the complaints process is unfair is supported by the Law Society's survey of complainants, with only 27 per cent of complainants feeling that their complaint had been dealt with fairly.[39]

A dispute between lawyers and conveyancers highlights the perception problem

The question whether the Law Society is perceived as a fair regulator is revealed in a public dispute between the Law Society and the Society of Conveyancers as to whether lawyers could rely on undertakings made by conveyancers during a property transaction. This matter continues to have a material impact on conveyancers, with two major banks refusing to instruct conveyancing practitioners due to lawyers refusing to accept undertakings. The independent LCRO has labelled the inability of these two entities to resolve this issue over many years as "somewhat disappointing".[40]

This is an example where it is not clear that the Law Society is acting as a regulator, rather than a representative body looking out for the interests of lawyers.

The Law Society does not have widespread trust within the legal profession

It almost goes without saying that an effective regulator needs to have not only the trust of public, but also the trust of those whom it regulates. It needs to be connected to those it regulates, but also to be seen as a trusted and independent arbiter and responsive to the issues facing a regulated profession.

Our consultation highlighted that some members of the legal profession see the Law Society as a trusted institution, with high standards, and a commitment to maintaining standards and collegiality within the profession.

39 We recognise there will be outcome bias among those who completed the survey. Only 7.5% of complainants completed the survey.

40 "Lawyers and Conveyancers need to co-operate, says LCRO" (2017) 913 LawTalk 59 at 60. More recently the Law Society and the Society of Conveyancers have sought amendments to the Lawyers and Conveyancers Act 2006 to ensure that conveyancer undertakings are enforceable by a Court in the same manner as undertakings given by lawyers.

But we also heard from significant numbers of lawyers that the Law Society is not viewed as a regulator they can trust to protect their interests. The lack of confidence in the Law Society as a regulator was clearly visible in the submissions we received from interest groups and other representative groups for lawyers. With only one or two exceptions, nearly every representative and interest group made the case that the Law Society should no longer be both a regulatory and representative body for lawyers.

The Law Society is seen as conservative and a defender of the status quo

a) A slow response to sexual harassment and conduct allegations

Throughout the review we heard many troubling personal stories from lawyers who have experienced unacceptable conduct in the workplace, including sexual harassment, sexual assault, discrimination, racism and bullying. For many lawyers, significant distrust in the Law Society stems from its inability to effectively address these issues.

A common theme from lawyers directly affected by these issues was that they felt let down by the Law Society – overlooked by a regulator and let down by a membership body not interested in advocating for their interests. We heard time and again that the Law Society had become irrelevant to many within the profession.

We note the same finding was made in the Law Society's Working Group Report (the Cartwright Report), which noted "There is a lack of confidence that NZLS will act against perpetrators and concern that in such cases 'nothing has happened'."[41] The Law Society's dual regulatory and representative functions have contributed to its slow response to these issues and led to distrust from some in the profession. A joint submission from five women lawyers' associations reflects this view:[42]

> We are concerned that a significant number of our … members are disenfranchised from NZLS. For our women members, we believe that is at least partly due to NZLS' failure to address sexual assault and bullying for so many years, the ongoing failure to follow up on the Gender Equality Charter, the Gender Equitable Engagement and Instruction Policy, the Women's Panel and the Working Group findings and the failure to address the lack of diversity and inclusion in any systematic way. In our discussions with members over this submission, they have often said "the Law Society doesn't represent me".

b) A reluctance to make the profession more accessible and supportive

We also repeatedly heard how difficult many parents found it to re-enter the profession after taking parental leave and their frustration with the Law Society's unwillingness to address the regulatory barriers they were encountering.

The Law Society currently requires lawyers wanting to commence practising on their own account (either as a sole practitioner, a partner/director in a firm or as a barrister) to have met a high threshold of recent legal experience. This threshold cannot be met if a lawyer has worked less than the equivalent of two and a half years full-time over the preceding five-year period.[43] Lawyers who have taken more time off work need to convince the Law Society that 'special circumstances' apply (a term that many felt was demeaning) and some applications may go through an additional

41 *Report of the New Zealand Law Society Working Group* (New Zealand Law Society, December 2018) at 30.

42 Auckland Women Lawyers' Association, Canterbury Women Lawyers' Association, Otago Women Lawyers' Association, Waikato Bay of Plenty Women in Law Association, and Wellington Women Lawyers' Association.

43 Lawyers and Conveyancers Act (Lawyers: Practice Rules) Regulations 2008, reg 12(3). The minimum work requirement is for 4,830 hours (at a maximum of 40 hours a week) in at least three different years in the preceding five years: r 3(1) definition of "required minimum amount of recent legal experience". Assuming a 40 hour week over a standard working year (including 20 days annual leave), a lawyer must work in excess of two and a half years full-time to be eligible.

process with the Practice Approval Committee.[44] We heard that this additional step creates uncertainty and discourages people from applying, that lawyers feel stigmatised about having to 'prove' themselves, that this is an incredibly labour-intensive process, and that many feel they were starting this leg of their career on the back foot. The Law Society has confirmed it does not provide lawyers with any 'provisional approval' or indication that their application is likely to be accepted before the lawyer incurs the not insignificant time and costs associated with completing the prerequisite Stepping Up course.

The current regulations strongly disincentivise lawyers taking parental leave, discourage the use of part-time and flexible working arrangements, and indirectly discriminate against women, who are more likely to take time off work to care for dependants:

> One of the particular frustrations I came up against was the NZLS reluctance to equate a year spent working part time with a year spent working full time – as if there was some sort of qualitative difference between the two. In my view, the current regulatory emphasis on time worked as a proxy for experience/ability reinforces one of the profession's most damaging myths – that the only way to practice law 'properly' is full time and at full tilt. Anyone who does anything else is not a 'serious' lawyer and can't be practising at a 'high level'.[45]

> Stepping Up is a huge hurdle for women (in particular) trying to re-enter the legal market after having children – and the focus is on setting up your own firm, when in many cases all they want to do is contract. The current model does not reflect the needs of lawyers or the evolving way that legal services are provided.[46]

The difficulty that lawyers experience re-entering the workforce was often raised by lawyers all over the country. The current rules are clearly a relic of the past and need to be amended.[47] We would expect a modern and responsive regulator to have identified that its rules were creating a significant barrier to access and participation, for no demonstrable consumer benefit.[48]

That such a hugely significant barrier for so many in the legal profession has not been addressed is seen as evidence by many affected individuals that the self-regulatory model is failing. The Law Society is seen as a conservative defender of the status quo and out of touch with the issues facing many younger lawyers. We also heard that the self-regulatory model, where lawyers need to be interviewed and approved by their peers before being permitted to practise on their own account, helps to entrench the status quo and is less accepting of new innovative and flexible ways of working.

Barrister Dhilum Nightingale recounted her experience of applying to become a sole practitioner. At the time of the interview she had had a 20-year career and was interviewed by two lawyers appointed by the Law Society. She described the interview and process afterwards as "uncomfortable, frustrating and distressing". We capture below some excerpts from her submission.

44 Lawyers and Conveyancers Act (Lawyers: Practice Rules) Regulations, reg 12A.
45 Joint submission from Sophie Gladwell, Julia Batchelor-Smith and Arla Kerr.
46 Submission from Sophie Gladwell.
47 Prior to the 2006 Act, s 55(2)(a) of the Law Practitioners Act 1982 required lawyers to only have at least three years' experience in the previous eight years to be eligible to be a sole practitioner with the right to practice on one's own account. The current regulations have made it harder for parents to re-enter the workforce.
48 The Law Society made some changes in 2018 to deal with more of these applications administratively so that they do not all have to go through the Practice Approval Committee.

NZLS are comfortable with traditional ways of practicing law but do not seem to support alternative ways, even when those ways result in obvious public good and also meaning and impact for lawyers.

The interviewers said that the Chambers I was going to work in … was "a bit unusual" as it doesn't have physical offices. They then went on to talk at me about how the key thing about Chambers is collegiality and a remote chambers can't offer that because you can't interact with people personally or daily …

The interviewers expressed what I thought were quite prejudiced attitudes by saying that "I may not get paid if so many of my clients were migrants". This is a gross and unfair generalisation … Not every person practising law does so for wealth generation purposes and it was unfortunate that the interviewers did not recognise or value this.

This power imbalance in the circumstances made me feel vulnerable and even caused me to question whether I wanted to practise on my own account in a profession that seemed so antiquated and prejudiced.

Lawyers are deterred from raising concerns

A fundamental problem with the current regulatory model is that lawyers are discouraged from seeking help or raising concerns with the Law Society as they are not sure who they would be engaging with – the regulator or their representative body.

We repeatedly heard from lawyers lamenting that there was no avenue for them to raise low-level matters with the Law Society about a colleague, a friend, or even to seek help for themselves, on topics such as mental health concerns and alcohol and drug dependency.

Lawyers are reluctant to approach the Law Society and seek assistance out of fear the matter will be viewed as a complaint or disciplinary matter and referred to a Standards Committee. The situation is not helped by the fact there are currently three branch managers/convenors at the Law Society (representative positions) who also work within the Law Society's complaints service (a regulatory position). One submitter stated:

> A member feeling under pressure, for instance with a large workload, is unlikely to talk freely with someone who is employed by the institution that is also their profession's regulator. In doing so they may fear some form of regulatory action or an impromptu inspection which of itself would cause more stress (and not necessarily protect the consumers of legal services).

The Law Society has been trying to address these concerns. For example, it has made a free counselling service available for lawyers (and anyone who works in the legal profession), in addition to the National Friends Panel, which is made up of lawyers who can be contacted on a confidential basis to discuss matters of concern.

While the Law Society's initiatives are commendable, the conflation of complaint and disciplinary functions with support functions within one entity deters lawyers from feeling safe and confident to raise concerns with the Law Society.

Lack of accountability and transparency

An effective regulator should be accountable – both to those it regulates and to the wider public. Both the public and a regulated profession rightly expect that a regulator will properly apply its

resources to achieve desired regulatory outcomes. However, trust alone is not sufficient. There needs to be a sufficiently high degree of transparency about the regulator's internal processes and decision-making to enable people within the regulatory framework to have confidence that the right decisions are being made.

A key concern raised by many through our consultation process was that the Law Society was seen as a black box. Decision-making processes are opaque, and there is no ability to interrogate decisions made by the Board or Council or by delegated Law Society staff, due to a complete lack of public information.

A lack of transparency about the Law Society's exercise of regulatory functions

Unlike many occupational regulators, the Law Society does not publish the minutes from its Board or Council meetings.[49] It also does not publish its regulatory priorities or regulatory targets.[50] It is also not subject to the Official Information Act 1982.[51]

One submitter commented:

> NZLS should also be subject to scrutiny for its financial management, value for money, efficiency and effectiveness. This is to ensure that the regulatory objectives are being pursued in a responsible way and that NZLS is exercising appropriate governance and decision-making in a cost-effective way.

The lack of transparency about how the Law Society makes its decisions (and the trade-offs factored in) falls well short of regulatory best practice. The perception that the current model is run "by lawyers, for lawyers" is not helped when elected members are making decisions behind closed doors. Our view is that there should be much more transparency around the Law Society's regulatory activities. In December 2022, the Law Society began consultation on how to "provide members with sufficient, relevant and timely information about the Law Society in a cost-effective and transparent manner".[52] We observe that transparency about regulatory activities is important not only for lawyers but also for the public.

An opaque complaints model, perceived as unfair

Many of the issues with the current complaints model stem from the fact that it lacks transparency and is perceived as unfair by consumers. The problems include the fact that decisions on complaints are primarily made by lawyers, that Standards Committees very rarely name lawyers who have met the standard of 'unsatisfactory conduct',[53] that complainants are required to participate in a highly adversarial process (in which they are provided with limited support and can only provide written submissions), and that the model focuses on disciplining lawyers rather than trying to address the poor outcomes received by a complainant.

The Law Society's survey of recent complainants supports the view that one of its key regulatory functions is not seen as fair or transparent. Among complainants who provided feedback about the Lawyers Complaints Service since 2020, only 27 per cent felt their complaint had been dealt with fairly, while only 26 per cent stated that, regardless of the outcome, they were able to understand

49 Unlike many other occupational regulators, including the Teaching Council, the New Zealand Registered Architects Board, and the Plumbers, Gasfitters and Drainlayers Board. The Electrical Workers Registration Board has a policy of making its minutes available on request.

50 The Law Society recently published its regulatory strategy for the period 2022–2025, which is a welcomed development. However, it is a document that outlines how the Law Society wishes to reorient its way of working and how its staff can become more effective in their current activities. It is not a set of regulatory priorities.

51 Unlike, for example, the Teaching Council, the New Zealand Registered Architects' Board, the Plumbers, Gasfitters, and Drainlayers Board, the Building Practitioners Board, and the proposed new regulator for the engineering profession.

52 New Zealand Law Society *Access to Information: Consultation Document* (1 December 2022) at 1.

53 In less than 2% of instances in the past five years where a lawyer's conduct has met the threshold of 'unsatisfactory conduct' has the lawyer's identity been publicly disclosed by a Standards Committee.

the reasoning of the determination. Amongst the general population, the survey the Panel commissioned from Kantar found that 31 per cent of the population lacked confidence that the Law Society could deal with a complaint fairly, with only 31 per cent having confidence in the fairness of the procedures.

Elected Board members can overrule independent decisions on naming censured lawyers

We heard from lawyers that the current model, while self-regulatory in nature, had separated the most important aspect of regulatory decision-making (complaints and discipline) from the Law Society's representative functions. As one submitter wrote:

> There is already separation between the elected members and the regulatory / enforcement function in that the latter (essentially the complaints service) is handled by Standards Committees which are not the elected members and are subject to specific statutory obligations.

While the Standards Committees largely operate and are supported independently from the Law Society's elected members and representative functions,[54] there is still some overlap between the decision-making of the autonomous Standards Committees and the elected Law Society Board.

Under the Act a Standards Committee may publish the identity of a lawyer who it determined met the threshold of unsatisfactory conduct "as it considers necessary or desirable in the public interest".[55] This general power to publish decisions has been qualified by a subsequent regulation that requires a Standards Committee to seek prior approval from the Law Society Board before it can direct publication of the identity of the lawyer.[56]

Board minutes provided by the Law Society to the Panel show that since 2015 the Law Society has overruled two of the 25 determinations made by Standards Committees that it was in the public interest to publicly identify a sanctioned lawyer.

While this prior-approval mechanism obviously recognises the significance of name-publication for the censured lawyer, the requirement that the elected Board must approve such decisions undermines the independence of the Standards Committees in the regulatory process.

The Law Society's dual functions undermine its regulatory efficiency and effectiveness

There is evidence the Law Society's lack of independence from the profession has limited its ability or willingness to make changes that could benefit consumers. While each example discussed below is not definitive in itself, cumulatively they support the conclusion that the current regulatory model needs to adapt.

The Law Society has competing and unclear objectives

When regulatory and representative functions are combined within an organisation it can be unclear how that body should weigh competing objectives or prioritise activities when objectives conflict.

In the case of the Law Society, it is readily apparent that its duties to the public and to its members

54 As noted, some Professional Standards Officers who handle complaints and support the Standards Committees also have representative functions.

55 Lawyers and Conveyancers Act, s 142(2).

56 Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008, reg 30(1). The Regulations are enacted under the Lawyers and Conveyancers Act 2006, s 131(f).

can come into conflict. The Law Society has recognised the potential for conflict and endeavours to strictly separate the operation of these functions. Yet no matter the degree to which regulatory and representative functions can be separated at the operational level, key regulatory[57] and representative decisions will ultimately be made at a governance level within the Law Society by the same people – members who are elected from within the profession.

The Law Society has not amended its constitution to appoint lay members (with decision-making powers) onto its Board and Council. The use of elections to select members of the Board and Council and the lack of lay members and competence-based appointments is indicative of an institutional structure that sees itself as accountable to the legal profession.

When it comes to resolving the tension between its conflicting duties, the Law Society appears more likely to give priority to the interests of the profession than the public. Particularly when considering possible changes to the Conduct and Client Care Rules, the Law Society's focus tends to be on identifying and evaluating the views of the profession (ie, the regulated parties), rather than consumers:

- There is minimal research on consumer concerns, outreach to consumer groups, or external engagement on what is required to regulate in the interests of consumers.
- Unlike similar regulators overseas, the Law Society has not established a consumer panel or other mechanism (such as large-scale consumer surveys) for eliciting the views of consumers on regulatory reform and professional initiatives. One consumer group noted "A consumer voice is missing in this country, whether it is about complaints, concerns, conduct, or shaping the values of the legal profession".
- As one example, we note the Law Society recently sought the Minister's approval to introduce a legislative amendment to allow it to dismiss some types of consumer complaints without referring these complaints to Standards Committees. This would be a significant improvement to the complaints process, but it represents a major change that could adversely affect some consumers. The Citizens Advice Bureau raised concerns from a consumer perspective, but these views were not reflected in the Law Society's submission to the Minister[58] – with the Law Society simply noting the change was supported by 90 per cent of respondents (nearly all of whom were lawyers).

As one senior member of a Law Society committee observed in their submission:

> The existing range of responsibilities cannot all be adequately performed. They conflict with one another to a degree. The Society cannot effectively be the regulator and promote the interests of its members. It seems clear to me that the Society should cease being the regulator.

The problems with the current dual function model were highlighted by a submission from the Society of Conveyancers. The Society of Conveyancers was also established under the Act and has a regulatory model that includes both regulatory and representative duties. In its submission to the Panel the Society noted the "inherent conflict" between these duties.

The Law Society's conflicting duties limit its ability to regulate effectively

A key feature of any effective regulator is its ability to make decisions without interference, undue influence or conflicts. A number of examples lead us to conclude that the Law Society has been

57 Such as setting the budget, practising fees and levies, and approving regulatory changes.
58 The Law Society did provide the Minister with all submissions.

unable to regulate effectively due to its competing objective to champion the interests of lawyers.

Systematic underfunding of regulatory functions

One issue that gives an insight into how the Law Society manages its dual functions is how it sets its budget and lawyers' annual practising fees. An effective regulator should set its budget on the basis of what is needed to effectively and efficiently regulate members of the profession (and thereby protect consumers), rather than placing undue weight on the interests of professionals, who are obviously interested in having a lower practising fee.

In the case of the Law Society, decisions on funding reside with the Law Society Council, with approval ultimately required by the Minister of Justice. The 25-person Council of elected representatives does not have non-lawyer representatives.

In the discussion document we noted that the Council may be reluctant to set practising fees at a level needed for the Law Society to effectively fulfil its regulatory functions. Despite increases over the past two years, in real terms the practising fee ($1,290 in 2022) has declined by 9 per cent since 2010. It was not until 2020 that the Law Society looked to increase the practising fee in nominal terms, which was eventually delayed until 2021 due to Covid-19.

The discussion document also noted that, given the lengthy delays resolving complaints at both Standards Committees and the LCRO over the course of many years, one might expect the Law Society to have identified the growing backlog of complaints and significantly scaled up the resourcing required to ensure the timely resolution of complaints.[59]

A former Law Society president acknowledged to the Panel that the complaints service has been starved of resources because "the group sitting around the table are self-interested" in keeping the practising fee low. In their view, the practising fee has been too low for the Law Society to be able to effectively fulfil its functions.

Another submitter observed that the Law Society has been "glacial" in terms of supporting the LCRO to be sufficiently resourced to address its lengthy backlog of cases. The submitter noted that regular requests for additional funding had been rejected and that the practising fee remained unchanged for many years – "I can't understand the Law Society's reluctance to impose an additional levy increase on practitioners." The budget for the LCRO is set by the Minister of Justice after consulting with the Law Society,[60] but an argument can certainly be made that an effective regulator would be monitoring the experience of consumers and lawyers across the complaints system and seeking necessary additional funding.

In our view, a governing model where membership is dependent on winning elections is unlikely to provide the correct incentives for the governing body to prioritise the interests of consumers over those of lawyers.

The Law Society has recently acknowledged that practising fees had, for some time, been set lower than what was required for the Law Society to effectively fulfil its functions:

- In mid-2019 "the Board was apprised of historic underinvestment in Law Society infrastructure and personnel over a significant period and the need for long-term reinvestment".[61]
- In April 2022 the minutes from a Council meeting noted, "There is now a significant difference between what we collect and what we need. There has been a total lack of investment in infrastructure."[62]

59 The Law Society advised it has made significant resource investments in establishing an in-house investigations team and reforming its early resolution service in the past 12 months.

60 Lawyers and Conveyancers Act, s 217(4)(a).

61 Extract from Law Society Council minutes (22 April 2020).

62 Extract from Law Society Council minutes (8 April 2022).

However, when reading through earlier Board and Council minutes one is left with a clear impression that the Law Society's governors were very conscious of keeping the cost burden on lawyers as light as possible. While it is commendable for any regulator to pursue cost efficiencies, the Law Society's minutes capture the prominence that was placed on the interests of lawyers in not facing fee increases – rather than focusing on consumer interests:[63]

- "while the Board expressed a desire to decrease the fees again it was done so after careful consideration. It was important to the Board that it be the fiscally responsible decision."
- "Reducing practising fees benefitted the whole profession."
- "he noted that the practising fee had probably been taken down as much as possible for the present."

A reluctance to challenge the status quo

One feature of the Law Society's self-regulatory model – being governed by elected lawyers – is that it is not sufficiently responsive to a rapidly changing environment and is unlikely to take a leadership role on challenging the status quo. We highlight below five specific examples where we consider the Law Society's dual representative and regulatory functions have limited its willingness to respond quickly and effectively.

a) An inability to identify and respond appropriately to sexual harassment allegations

One well-documented matter was the Law Society's response to the allegations of sexual harassment within the law profession. In the summer of 2015–16 five young women at Russell McVeagh were subject to sexual harassment and assault, with the Law Society becoming aware of the allegations in September 2016.[64] It wasn't until February 2018, following widespread media reporting of the allegations, that the Law Society appears to have been prompted into action – commissioning a survey of the experiences of those within the legal profession, initiating a working group to report on culture within the profession (chaired by Dame Silvia Cartwright), and ultimately introducing new rules defining harassment and bullying and new reporting obligations (in force in 2021).

As indicated by both the survey and the Cartwright Report, harassment and bullying were certainly not limited to one firm, yet these issues went undetected by the regulator for a considerable period of time. While the #MeToo movement has prompted an increase in disclosure of historic events, it appears the legal profession in Aotearoa New Zealand has been slow to respond.

The Law Society's initial response to these issues was slow and reactive. This may be due, in part, to the profession's self-regulatory model. The Ministry of Justice also reached this conclusion, advising:[65]

> We identified that the key regulatory problem in responding to unacceptable behaviour is related to the New Zealand Law Society (NZLS) itself. The problem with the NZLS as an occupational regulator is both structural – it has both regulatory and representative functions – and cultural.

b) No debate over introducing professional indemnity insurance

New Zealand is an outlier in not requiring lawyers to have professional indemnity insurance, despite the Law Society having power under the Act to introduce it.[66] Our research has been

63 Extract from Law Society Council minutes (13 April 2018).

64 Margaret Bazley *Independent Review of Russell McVeagh* (5 July 2018).

65 Ministry of Justice *Regulation of the legal profession in response to unacceptable behaviour: Report to the Minister of Justice* (5 July 2019) (obtained under Official Information Act 1982 request to the Ministry of Justice).

66 Lawyers and Conveyancers Act, s 99.

unable to identify any comparable jurisdiction where the regulator has not required lawyers to hold such insurance.[67] The absence of this important consumer protection mechanism can likely be attributed to the Law Society's reluctance to push a measure that would be controversial and would increase the regulatory burden on the legal profession.

The Law Society has not led any debate or consultation on whether there is even a case to require lawyers to have a minimum standard of cover. It is not difficult to envisage a scenario in the future where clients will be adversely affected by lawyers not having cover for professional negligence.[68] In the absence of professional indemnity insurance consumers risk being left without appropriate financial compensation to cover the consequences of a lawyer's negligence.[69]

Lawyers are only required to disclose to clients if they do not have an insurance policy that meets a certain threshold.[70] The focus of these disclosure requirements is on minimising any burden on lawyers rather than protecting consumers. The Law Society has acknowledged that, "When the rule was being drafted, the Law Society was concerned to ensure that the disclosure obligation was not too onerous."[71]

c) A lack of policy leadership on wider market issues

While the Law Society has played an important general law reform role, it has not played a leadership role in identifying and debating options for reform within the sector. A tendency to be reactive and to defer to the status quo means that New Zealand has failed to tackle some of the significant areas of regulatory reform adopted by legal services regulators overseas. The Law Society does not have a policy unit to research and identify areas for market reform.

Examples of regulatory reform that are becoming increasingly common overseas include cost transparency (requiring lawyers to provide consumers with upfront price estimates, with a duty to provide updates should the cost estimate change) and the removal of restrictions on corporate form for law practices and income sharing with non-lawyers. There are pros and cons to these debates, but the Law Society has not undertaken any work to seek the views of lawyers and consumers on such important topics.

d) Subsidising the use of law libraries

While the Law Society's law libraries are an important research tool for some lawyers, the Law Society's view that this is part of its 'regulatory' rather than 'representative' functions means all lawyers have been required to fund the service through their practising fee.

Since 2010 the legal profession has been required to contribute approximately $36.1 million to fund library services,[72] which surveys show are used by only 21 per cent of the profession.[73] While the availability of library services may help some lawyers provide high-quality legal services, it is not a core regulatory function that should be subsidised by non-users. We would expect a modern regulator to see it as an opt-in service that can be taken by up those lawyers who value it and to look to reduce the regulatory costs on the profession.

67 Lawyers are required to hold professional indemnity insurance in all Australian states and territories, England and Wales, Scotland, Ireland, Northern Ireland, all Canadian provinces and territories, and South Africa. The requirements vary across the United States, with many states not requiring professional indemnity insurance.

68 One Law Society Inspectorate officer advised that the risk of cyber breaches and phishing had increased substantially in recent years and that significant client losses from lawyer negligence were almost inevitable. One known example resulted in a lawyer being personally liable for $30,000 that was unrecovered after they transferred conveyancing funds into a hacker's account. See "Acting on hacker's instructions" (2017) 906 LawTalk 36.

69 The Lawyers' Fidelity Fund will pay consumer claims up to $100,000 in cases of theft: Lawyers and Conveyancers Act (Lawyers: Fidelity Fund) Regulations 2008, reg 11.

70 Currently the minimum threshold for disclosure is whichever is the greater of $1.2 million per practice or $900,000 per partner within the practice: New Zealand Law Society "Insurance disclosure" (21 July 2020) <www.lawsociety.org.nz>.

71 New Zealand Law Society, above n 70.

72 As calculated by Sapere Research Group from data provided by the Law Society. The annual regulatory cost of the library service has increased from $2.2 million in 2010 to $3.7 million in 2022. This is partially offset by a small amount of revenue; for example, the library service cost $3.7 million in 2022 and generated $900,000 in revenue (a net cost of $2.8 million).

73 New Zealand Law Society *Survey of Lawyers 2019: Report to the NZLS Board* (August 2019).

Interestingly, when the Select Committee was considering legislative reforms in 2004, the Law Society requested that the Bill be amended to compel it to fund libraries as a regulatory service.[74] This request was rejected. The Ministry of Justice advised the Select Committee (which also did not accept the Law Society's submission):[75]

> [It would be] inequitable that all practitioners should contribute to a [library] resource that is used by a few .... Government regulation of what are essentially private arrangements for lawyers' 'tools of trade' does not appear to be necessary or appropriate .... The New Zealand Law Society in the exercise of its representative function would more appropriately perform such a role and could in fact do so.

The Law Society has taken the view that the provision of library services is needed to support the administration of justice and the delivery of legal services and is therefore part of its regulatory functions.

e) Reactive regulation rather than identifying and managing risk

Modern regulators seek to apply a 'right-touch' approach,[76] applying risk-based analysis to identify and respond to risks. The Law Society is charged with upholding professional standards and protecting consumers, yet the prescriptive nature of the legislative framework and the inability of the Lawyers Complaints Service to triage complaints means it is limited in its ability to prioritise risk. Instead, all complaints have to be referred to a Standards Committees. This also limits the Law Society's ability to undertake 'root cause' analysis and commence initiatives to address specific areas of concern. Current regulatory practice is reactive.

Research funded by the legal services regulator in Victoria, Australia found that complaints about lawyers "were higher among lawyers who were male, older, had trust account authority, and whose legal practices were smaller, in nonurban locations, and incorporated".[77] The regulator in New Zealand should be undertaking similar research and using the data to target interventions at practitioners who appear most at risk of failing to meet professional standards and in need of support rather than simply focusing on disciplinary action arising from complaints.

Similarly, the likely fees are often uppermost in the mind of a client when engaging a lawyer, and complaints about overcharging and poor communication are consistently two of the main areas of concern. The Law Society does not appear to have considered regulatory options to improve practice in this area, whereas in many comparable jurisdictions there are requirements for lawyers to provide consumers with an estimate of their total costs at the beginning of an engagement,[78] or to prominently provide pricing information for certain services.[79]

74 "The New Zealand Law Society submit that it should be under an explicit obligation to assist in ensuring that, in the public interest, information concerning the law is available and disseminated": Ministry of Justice *Departmental Report for the Justice and Electoral Committee: Lawyers and Conveyancers Bill* (February 2004) (obtained under Official Information Act 1982 request to the Ministry of Justice).

75 Ministry of Justice, above n 74.

76 United Kingdom Professional Standards Authority *Right-touch regulation: Revised* (October 2015).

77 Tara Sklar and others "Characteristics of Lawyers Who Are Subject to Complaints and Misconduct Findings" (2019) 16 Journal of Empirical Legal Studies 318 at 318.

78 In Australia, see Legal Profession Uniform Law Application Act 2014 (Vic), sch cl 174. For Ireland, see Legal Services Regulation Act 2015, s 150. In New Zealand, sch r 3.4(a) of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 simply require provision to the client of information on 'the basis on which the fees will be charged'.

79 In England and Wales, see Solicitors Regulation Authority "Transparency in price and service" (3 August 2021) <www.sra.org.uk>.

The Law Society is constrained in its ability to represent the interests of lawyers effectively

From a public policy perspective, whether the Law Society is able to represent the interests of its members effectively is much less relevant than whether it is able to protect the interests of the public. However, it is worth documenting that many in the profession feel the Law Society's role as a regulator is restricting its ability to support and advocate for the profession.

As MBIE submitted, a membership body is expected by its members to have a very distinct focus from that of a regulatory body:

> Representing the interests of the members of a particular occupation, on the other hand, requires a different focus. Advocating for the interests of members may include challenging the way the occupation is being regulated or commenting on proposed rules being made by the regulator. A representative body is also more likely to be focused on issues such as well-being and the public perception of the occupation as a whole.

While we have highlighted our concern that the Law Society defers to the interests of the profession over those of the public, there are also areas where it is constrained in what it can do as a membership body. As one former Law Society Board member noted, "At present there seems to be a slight undercurrent that the Society is losing its relevance to its members." We have highlighted three examples below where there is arguably a case that the Law Society's dual functions are limiting its ability to be an effective membership body.

Lack of advocacy for the profession

It is self-evident that, because the Law Society is its regulator, the profession has lost the opportunity for the peak membership body to be a public advocate for its interests. Unlike jurisdictions that have separated out their regulatory and representative functions (eg, Victoria (Australia), Canada, Ireland and England and Wales) we may be missing the healthy dynamic created when a regulator is publicly challenged and held to account by the regulated profession.

One submitter noted:

> NZLS' role as regulator and advocate comes into conflict usually (I imagine) at the detriment of its advocacy function. I think NZLS therefore misses important opportunities to support, encourage and inspire its members as it is more focused on its regulatory function.

It may be that the profession would benefit from having a more forceful advocate for its interests if the Law Society were solely focused on supporting and advocating for its members and their interests.

Limited support for lawyers in the complaints and disciplinary system

To its credit the Law Society endeavours to be scrupulously independent in how it handles consumer complaints. It provides a Complaints Advisory Panel made up of lawyers who can be contacted on a confidential basis by lawyers who are subject to a complaint. We heard from lawyers who found the experience of going through the complaints and disciplinary process to be isolating and detrimental to their mental health. They would have liked some advice and support on

how to navigate the process. A representative body separate from the regulator would be able to offer more support to lawyers caught up in a complaint or facing disciplinary proceedings.

We also heard from lawyers and representative groups who felt there was a lack of support for lawyers who were making complaints of a sensitive nature against colleagues, including allegations of sexual harassment and bullying. The Community Law Centres submitted:

> Some of our lawyers have supported complainants through the complaints process and observed that the complainant was retraumatised by the process, largely due to the responses by those addressing the complaint…
>
> There can be a significant power imbalance between the complainant and the perpetrator of the behaviour and this is a strong disincentive to pursuing a complaint. Our lawyers recommended that the Law Society provide a support person or a representative or advocate in such circumstances. This would be easier to implement if the regulator was independent from the membership body.

Lack of interest from the Law Society in pro bono reform

At present 63 per cent of the legal profession[80] is prohibited from providing pro bono services outside of their employment unless they do so as volunteers at a Community Law Centre or through Citizens Advice Bureau. Our consultation made it clear that this restriction is a major issue for many lawyers. Capable lawyers who want to help people in their community with legal issues face significant impediments under the current Act.

In February 2022 Parliament narrowly voted down the Lawyers and Conveyancers (Employed Lawyers Providing Free Legal Services) Amendment Bill. The Bill would have allowed employed lawyers (those in law firms or in-house) to do free legal work outside of their employment, subject to their meeting any conditions required by the Law Society. The Select Committee, in recommending against the Bill proceeding, placed considerable weight on the submission from the Law Society:[81]

> [The Law Society] believes further policy analysis is needed to determine whether the proposals set out in this bill are the most effective way of helping to increase access to justice. It told us that, if the bill were to continue in its current form, without any policy analysis, there could be a risk of channelling free legal services away from those who need them most.

None of the issues the Law Society raised in its submission to the Select Committee was insurmountable. In our view this was a missed opportunity for the Law Society to provide wholesale support for reform that might enable thousands more lawyers to provide free legal support more easily within their communities.

It may now take years for a similar opportunity for legislative reform to arise. Tellingly, one year on, the 'further policy analysis' the Law Society called for has not happened. The Law Society has shown no willingness to support further reform in this area.

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80 63% of the profession are employed or in-house lawyers: James Barnett, Marianne Burt and Navneeth Nair "Snapshot of the Profession 2021" (2021) 948 LawTalk 36 at 42.

81 Lawyers and Conveyancers (Employed Lawyers Providing Free Legal Services) Amendment Bill 2021 (311-1) (Report of the Justice Committee) at 4.

This particular issue encapsulates the problem the Law Society faces in attempting, as a regulator, to also be an effective advocate for its members. Rather than supporting the clear preference of its members for reform,[82] it focused instead on the regulatory challenges it might face from this change. The outcome may well have been different if the Law Society did not have both regulatory and representative functions.

Conclusion: the Law Society should no longer both regulate lawyers and promote their interests

Our conclusion is clear: the exercise of regulatory functions over the legal profession should no longer be done by an entity that also has a duty to promote the interests of its lawyer members.

The current regulatory model is not delivering satisfactory outcomes for consumers. The Law Society's responsibility to promote the interests of the profession conflicts squarely with its duty to regulate in the interests of the public – and this tension is affecting its regulatory decision-making.

Regulatory issues should be examined, not against the interests of the legal profession, but against the test of what is in the public interest. Protecting consumers should be the primary objective of the regulatory body. However, we note that the public interest is not limited to the consumer perspective. It includes what will help ensure an effective legal profession.

The Law Society has sometimes prioritised the interests of the profession over those of the public. Particular concerns include the historic underfunding of regulatory functions and the lack of compulsory professional indemnity insurance for lawyers, which exposes consumers to significantly higher risks than consumers overseas face.

Under its current framework the Law Society is not meeting the standards expected of a modern and responsive regulator. A lack of a consumer focus has meant it has not adopted a systematic approach to identifying key areas of consumer harm, developing an evidence base and targeting regulatory resources appropriately to prevent and address systemic issues. It is fair to classify the Law Society as a reactive regulator. If it is made aware of breaches of professional standards it will refer the matter to a Standards Committee, which may lead to an investigation and prosecution. Despite having a mandate to uphold professional standards and protect consumers, the Law Society's regulatory activities are very narrow.

Even if one believes the Law Society puts the public interest above those of lawyers, there remains an issue of perception. It does not matter that the Law Society is comprised of well-intentioned and highly competent staff; it is seen by many as an inherently conflicted organisation. Consumer groups see the profession as "protecting its own", and many lawyers lack confidence that the Law Society can effectively address the challenges confronting the profession.

Finally, we note the Law Society's regulatory functions have also constrained its ability to support, and advocate on behalf of, the legal profession. For example, the Law Society's role in upholding professional standards means it is unable to provide representative assistance to those lawyers subject to a complaint, and its dual functions deter lawyers from seeking assistance from their representative body on matters lest a regulatory intervention be triggered.

82 52% of survey respondents to our consultation supported changes to encourage pro bono services, while 23% disagreed.

5. Options analysis: the case for a new independent regulator

This chapter examines a number of options for regulating lawyers and concludes:

- A new independent regulator should be established to regulate lawyers in Aotearoa New Zealand.
- The case for establishing a new independent regulator is supported by best-practice regulatory principles, informed by a clear international trend away from lawyers regulating their own profession, backed by consumer groups and a significant part of the profession, and underpinned by an independent cost-benefit analysis that confirms an independent regulator as the preferred regulatory model.
- Concerns that establishing an independent regulator might allow government to undermine the work of lawyers and the 'rule of law' are unfounded.

Recommendation: establish a new independent regulator

The Law Society faces an irreconcilable conflict that arises from its statutory duties both to regulate lawyers and "to represent its members and to serve their interests".[83] There is a compelling case for legislative reform to establish a new independent regulator of legal services in Aotearoa New Zealand.

In the end our decision was clear-cut. There is evidence that the Law Society's dual functions are leading to poor outcomes for consumers and lawyers. The case for establishing a new independent regulator is supported by best-practice regulatory principles, informed by a clear international trend away from lawyers regulating their own profession, backed by consumer groups and a significant part of the profession, and underpinned by an independent cost-benefit analysis that confirms an independent regulator as the preferred regulatory model.

It is clear that the status quo is not working. We have grappled with whether there is any scenario under which the Law Society might be able to remain in its current position as a regulator. We are unanimous in our view that it cannot.

Independent regulation is supported by regulatory best practice

The guiding principle we have applied to our deliberations reflects the well-accepted purpose of occupational regulation – that occupations are regulated to protect the public from harm.[84]

When assessing potential models for regulating the legal profession, there is a consensus among policy-makers that the public's interests are likely to suffer when a regulator also has a statutory purpose to promote the interests of the profession it is regulating.

As MBIE submitted, in principle regulatory and representative functions should not be undertaken by the same organisation:

83 Lawyers and Conveyancers Act, s 66.

84 See, for example, Cabinet Office Circular, above n 13.

> Bearing in mind the reason why an occupation is regulated, our view is that the conflicts inherent between regulatory and representative functions mean that they are best performed by different entities. It is particularly important that the regulatory function be independent from, and seen as independent from, the interests of the regulated occupation.

There is a fundamental tension between the aims of a regulator and the aims of a membership body. The UK's Competition and Markets Authority reached the same conclusion about the regulation of lawyers, observing that "Regulatory objectives to maintain appropriate standards, protect consumers and open up the sector to competition and innovation do not necessarily align with members' interests."[85]

The Productivity Commission's inquiry into regulatory institutions and practices also highlighted the value of having an independent regulator, with the Commission emphasising the value that an independent regulator can bring to promoting public confidence in the entire regulatory system:[86]

> There is widespread agreement of the importance of regulation being undertaken by independent regulators....
>
> Independent regulators are free from the direct control of politicians and regulated parties. Such independence prevents the bodies from being used for partisan purposes and promotes public confidence in regulatory decisions .... A culture of independence and impartiality also promotes consistent decisions that engender public trust and confidence in the regulatory body and regulatory system.

Finally, we note the OECD has also highlighted that a factor weighing in favour of setting up an independent regulator is whether it is important for the regulator to be viewed as objective in its decision-making:[87]

> independent regulatory agencies should be considered in situations where: ... there is a need for the regulator to be seen as independent, to maintain public confidence in the objectivity and impartiality of decisions.

The New Zealand legal profession is increasingly an outlier with regulatory and representative functions

In our discussion document we noted the international trend towards separating regulatory and representative functions, with many jurisdictions establishing independent regulators of legal services. The legal profession is also increasingly an outlier among profession regulators in New Zealand in having a membership body exercising both regulatory and representative functions.

85 United Kingdom Competition and Markets Authority *Legal Services in Scotland: Research report* (24 March 2020) at [5.11].

86 New Zealand Productivity Commission, above n 36, at 8.

87 *OECD Best Practice Principles for Regulatory Policy: The Governance of Regulators* (29 July 2014) at 49.

Table 1: 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 complaints are dealt with independently (as indicated)	New Zealand Scotland* Northern Ireland** Australian Capital Territory and Northern Territory Queensland, New South Wales, South Australia and Tasmania (all of which have an independent complaints body)	Teachers[88] Accounting (non-auditing functions only)
Separate entities provide regulatory and representative functions	England and Wales Ireland Victoria and Western Australia Canada***	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 recommended establishing an independent legal regulator in Scotland.[89] The Scottish Government instead decided to pursue more modest reform, with the Law Society of Scotland continuing to regulate legal services provided by solicitors, but with regulatory functions required to be delegated to an independent regulatory committee comprised of legal and non-legal members, chaired by a non-legal member ('Legal Services Reform in Scotland: Scottish Government response to the findings of the consultation analysis report', Scottish Government, December 2022).

** There is also oversight by the Lord Chief Justice of Northern Ireland and a Lay Observer.

*** Law Societies in Canada are partly self-regulatory, but do not have representative functions. The Attorney-General of British Columbia recently announced that a new independent regulator is to be established for all legal professionals in the province.

Major reviews of legal regulation overseas all reach the same conclusion

We are aware of four government-commissioned reviews of the regulation of lawyers undertaken in common law jurisdictions overseas in the past 20 years: in England and Wales (2004), Ireland (2006), Scotland (2018), and British Columbia (2022). The reviews are summarised in a working paper.[90] On each occasion these in-depth reviews reached the same conclusion, that it was not in the public interest to have a legal regulator with both regulatory and representative functions.

Sir David Clementi was appointed by the UK Government to undertake a wide-ranging review of regulation of legal services and the legal profession in England and Wales.[91] He recommended a splitting of regulatory and representative functions, concluding "There is a conflict of interest between the two roles which should be tackled."[92]

88 The Teaching Council is highlighted in Table 1 as an example of a membership body that exercises regulatory functions. However, it is important to note that the Minister can appoint 6 of the 13 members of the Teaching Council and can also appoint the Chair.

89 Esther A Roberton *Fit for the Future: Report of the Independent Review of Legal Services Regulation in Scotland* (Scotland Government, 23 October 2018).

90 Sapere Research Group *A summary of international reviews of how legal services are regulated: A working paper* (June 2022). The working papers are accessible via <www.legalframeworkreview.org.nz/independent-legal-review-resources/>.

91 David Clementi *Review of the Regulatory Framework for Legal Services in England and Wales: Final Report* (December 2004).

92 At 27.

A 2006 review by Ireland's Competition Authority concluded there was a need to replace self-regulation with an independent regulator.[93] The establishment of the Legal Services Regulatory Authority took until 2015 and required the intervention of the European Union, the International Monetary Fund and the European Central Bank, who insisted upon an independent legal regulator as a condition for providing funding to Ireland.[94] Those bodies noted that an independent regulator for the profession was required as part of a broader move to "remove restrictions to trade and competition in sheltered sectors".

Esther Roberton was appointed by the Scottish Government in 2017 to chair a review of the regulation of the Scottish legal services sector.[95] She concluded that the Law Society should not exercise both regulatory and representative functions and that "those who use legal services, and those that deliver these services, will be best served in the future by independent regulation that meets internationally recognised regulation principles and standards".[96]

A governance review undertaken by Harry Cayton for the Law Society of British Columbia in 2021 also noted the trend away from regulators having representative functions.[97] He noted: "These two roles are frequently in conflict and when governance structures give dominance to the profession over the public then the interests of the profession take precedence."[98]

The New Zealand Law Society's governance by elected lawyers is far removed from regulatory best practice and is likely a contributing factor to the observed reluctance to upset the status quo. However, it is the Law Society's conflicting duties under the Act that are the real driver of the problems. This can only be resolved through legislative amendment. As the rest of this report outlines, setting up a new regulator must be part of a broader legislative package that includes a wholesale reform of how complaints against lawyers are handled.

There was support for an independent regulator from consumer groups, external experts and parts of the profession

The option of new independent regulator equally divided survey respondents during our consultation, with 44 per cent favouring establishing an independent regulator and 45 per cent opposed.

While the profession may be split on whether an independent regulator is needed, views from outside the profession (notably consumer groups, regulatory experts and legal professional regulators from other jurisdictions) almost universally supported establishing a new regulator to protect the interests of the public.

Those in favour of an independent regulator typically saw it as the only means of addressing the Law Society's inherent conflict of interest in its functions. Submitters noted that an independent regulator would lead to improved regulatory effectiveness, transparency and public trust, and confidence in the regulator and the legal profession.

As highlighted in the previous chapter, many of those who wanted a new regulatory body submitted that the Law Society's conflicting duties and governance by elected members had contributed to it being slow to tackle the major issues confronting the profession, such as harassment, bullying and a lack of diversity.

93 Ireland Competition Authority *Competition in Professional Services: solicitors & barristers* (December 2006).
94 European Union, International Monetary Fund and European Central Bank *Ireland Memorandum of Understanding on Specific Economic Policy Conditionality* (3 December 2010) at 8.
95 Roberton, above n 89. As noted, the Scottish Government decided not to opt for independent regulation of lawyers in Scotland.
96 At 32.
97 Harry Cayton *Report of a Governance Review of the Law Society of British Columbia* (November 2021).
98 At [4.3].

> It appears that the Law Society is too conflicted and constrained to respond to the challenges the profession faces … we consider independent regulation would be a more effective way of driving culture change within the profession.[99]

Our response to submissions against independent regulation

The most common argument for the Law Society to continue to regulate the legal profession was that it would be the lowest-cost form of regulation. However, Sapere's cost-benefit analysis makes clear that New Zealand currently has a relatively high-cost model for regulating lawyers. Not only will an independent regulator lead to improvements in regulatory effectiveness and improved trust and perception of the regulator – the cost-benefit analysis indicates these benefits can potentially be achieved at a lower cost than the current Law Society model.

We do not agree with those submitters who considered that independent regulation would result in less effective regulation. The line of reasoning we heard was that an independent regulator would be too removed from the profession, which would lead to poor decision-making and lawyers lacking trust in the regulator. Submitters also raised the prospect that lawyers would no longer be willing to volunteer their time to support the regulator in providing submissions on matters such as law reform. One former Law Society Board member said that "effective regulation of a profession depends on the goodwill of the bulk of the profession".

Our proposal for independent regulation may seem radical to some in the legal profession, but it is commonplace in many professions in New Zealand, including for health professionals, architects, auditors, electricians, plumbers, real estate agents and vets. All those professions also have entry requirements, professional standards of competence, education requirements, and complaints and disciplinary mechanisms. These professions have regulators with skilled staff familiar with (and often qualified in) the profession they are regulating and are governed by competence-based Boards appointed by a Minister, with a mix of lay and professional members. The legal profession is not so innately complex and different that its regulator must be governed exclusively by lawyers or that it can only be regulated effectively by a membership body.

In our view, a significant number of the profession will welcome the opportunity to engage with a newly established body and the risk of widespread loss of confidence and trust in the regulator is small.

Independent regulation of lawyers will not undermine the 'rule of law'

There was also concern from some opposing independent regulation that permitting a Minister of the Crown to make appointments to the Board of any new regulator could potentially allow a government to undermine the legal profession's commitment to upholding the rule of law. It was argued that the role of lawyers is unique and that self-regulation is essential to prevent political interference within the legal profession:[100]

> Having a new independent regulator, likely with members appointed by the government of the day, may impede on the ability for lawyers to fearlessly uphold the rule of law, challenge the government, and as a result diminish access to justice. Indeed, any arrangement other than the legal profession self-regulating may lead to such an unintended perceived and/or actual outcome.

99 Submission from Aotearoa Legal Workers' Union.
100 Submission from ADLS.

The legal profession plays an essential role in holding power to account and speaking up when a government seeks to undermine key principles of the rule of law and the administration of justice. However, we doubt that having an independent regulator would materially change whether the profession will be able to speak up against the government of the day.

The starting point for our analysis was to document the existing powers that Ministers can already exert over the regulation of the legal profession. Table 2 below lists some of the powers a government currently has through the Act that could already be used to affect the activities of lawyers.

Table 2: A non-exhaustive list of the current powers of government over the regulation of lawyers

The Minister's powers under the Act	Order in Council powers under the Act
• approving admission fees (s 62) • approving practising fees (s 73) • approving practice rules and requiring the Law Society to consult certain groups of people (ss 100, 103) • directly amending practice rules if he/she considers them 'to be deficient in any respect' (s 104) • appointing the LCRO (s 190) • approving proposed Council of Legal Education regulations relating to education, training and admission of lawyers (s 278) • nominating a member to the Council of Legal Education (s 282) • approving contributions to the fidelity fund (s 312) and approval of any extraordinary levy (s 314)	• defining a class of document that does not need to be drafted by a lawyer in a proceeding (s 26) • requiring the admission of foreign lawyers of specific countries (s 53) • making regulations pertaining to practising requirements, the Lawyers Complaints Service and Standards Committees (s 108) • making regulations relating to trust accounts (s 115) • making regulations setting out the process, duties and conditions of being a KC (s 199) • appointing members of the LCDT (ss 230, 233) • making regulations relating to the duties of LCDT officers, the conduct of matters before the LCDT, and fees (s 339) • appointing members (nominated by others) to the Council of Legal Education (s 282) and removing members (s 284)

In addition to these discrete functions, the Law Society's practice rules for lawyers,[101] constitution[102] and fee resolutions[103] are secondary legislation and are disallowable by Parliament. Government also exercises considerable influence over the legal profession and the rule of law through its power to appoint members of the judiciary – yet the judiciary is fiercely independent of government.

It is apparent government already has significant powers it could use to affect the regulation and behaviour of lawyers directly and indirectly. In particular, government can directly amend the practising rules that govern lawyers' behaviour and the Law Society is unable to set the practising fees it needs to operate without the prior approval of the Minister of Justice.

We are not proposing direct government regulation of the legal profession but an independent, statutory body to regulate lawyers. It will not be a Crown entity and will not be subject to directive powers or statements of policy from government.

The new regulator must be established in a form that enables it to undertake its day-to-day activities independently from the influence of both profession and government. It will also be able

101 Lawyers and Conveyancers Act, s 94(2).
102 Section 72.
103 Section 73(7).

to levy the profession directly and will not be dependent on public funding. As outlined in the following chapter, our preferred governance model for the profession would reserve a number of seats on the regulator for members of the profession and would set out statutory criteria for appointment on the basis of skills and competencies.

Any new power to allow a Minister to appoint members to the board of an independent regulator is not such a substantial departure from current arrangements that it could plausibly be said to threaten the rule of law in Aotearoa New Zealand. We do not consider it credible that any new appointment power would make the regulator beholden to the government of the day or that the regulator would be governed by members who had been appointed for political purposes.

We do not accept that a regulator would ever have so much control that it could use its regulatory powers to restrict the profession's freedom to speak up against a government or its policies. Indeed, establishing an independent regulator could free up the Law Society, as a representative body, to advocate for lawyers and the community.

A cost-benefit analysis highlights the case for independent regulation

We made clear in our discussion document that our decision would not be based on theoretical arguments alone. We asked Sapere Research Group to conduct a cost-benefit analysis of the regulatory structures we had shortlisted.[104]

Sapere's cost-benefit analysis included five distinct options:

1. No change
2. Reform the Law Society (create a semi-autonomous Regulatory Committee)
3. Functionally separate the Law Society's regulatory and representative functions
4. Establish a new independent complaints body
5. Establish a new independent regulator.

The cost-benefit analysis compared the options against the status quo as well as an 'enhanced base case', which reflects a scenario where the Law Society could become a more effective regulator if the Act were amended to enable it to undertake triaging and filtering of complaints.

Sapere's cost-benefit analysis showed that all the options under consideration are likely to cost less than the status quo. The 'least-cost' option, saving $42 million over 20 years, would be to establish an independent regulator, either as a fully independent body (option 5) or by functionally separating the Law Society. Evidence from overseas shows the potential for independent regulation to reduce regulatory costs. However, the majority of the cost savings are likely to come from reforming how complaints about lawyers are handled – allowing filtering of complaints, moving to an in-house complaints model and replacing the Legal Complaints Review Officer with a lighter touch review function.

The challenge with a cost-benefit analysis of this nature is that the benefits that are attributable to different regulatory models are qualitative in nature and cannot be easily quantified. Sapere applied a multi-criteria analysis that scored each option against our weighted evaluation criteria.

The cost-benefit analysis compared the benefits of each option against the associated costs and concluded that the preferred regulatory model is to establish an independent regulator

104 The cost-benefit analysis can be found at <www.legalframeworkreview.org.nz/independent-legal-review-resources/>.

(option 5). We wish to emphasise that, while Sapere's analysis was helpful, it was only one input into our decision-making process. We did not treat the cost-benefit analysis as determinative.

This analysis is consistent with previous research demonstrating that we have a highly inefficient – and therefore very expensive – system for regulating lawyers in Aotearoa New Zealand.[105]

Even after accounting for differences in regulatory functions, the per-lawyer regulatory cost in New Zealand is higher than in many jurisdictions overseas. For example, the per-lawyer regulatory cost in New Zealand is 11 per cent higher than in Ireland, 11 per cent higher than in Victoria (Australia) and 27 per cent higher than in England and Wales – all countries that have established independent regulators.[106]

Although the current regulatory model makes considerable use of volunteers to make key regulatory decisions (such as on complaints), the systems and staff needed to support those volunteers are expensive. In addition, the complaints system is highly inefficient and a key driver of costs.

The key opportunities to reduce regulatory costs identified by Sapere include:

- *A more efficient complaints system*: The current complaints model required by the Act is inefficient. The Law Society projects it will spend $6.76 million on complaints in 2023.[107] As discussed further in chapter 10, legislative reform that enables a regulator to resolve, investigate and adjudicate most complaints in-house would result in a lower-volume and lower-cost model. This cost-saving is common to options 2, 3, 4 and 5. A new in-house complaint resolution system can be expected to reduce costs in three main ways:
    - a filtering process that permits the regulator to take no action on a complaint after preliminary assessment
    - focusing on informal complaint resolution for service complaints (not adjudication)
    - targeting resources required for investigation and written decisions at conduct complaints
- *A streamlined complaint review mechanism:* The LCRO service is designed to provide independent oversight of the profession's complaints regime and is projected to cost the profession $2.165 million in 2023. Options to bring the complaints function in-house within an independent regulator (options 3, 4 and 5) mean the LCRO could be replaced with a much more streamlined review mechanism facilitated by the regulator.
- *Library services become a membership service:* Moving the provision of library services from being a regulatory function to a membership service offers the opportunity for additional cost savings. The Law Society is currently spending $3.7 million each year from its regulatory budget to provide a library service for lawyers and generates $900,000 revenue (a net annual cost of $2.8 million). A decision on library services did not affect the cost-benefit analysis, which assumed this change could be made across all options being considered, including the status quo case.

105 The working papers produced by Sapere show independent legal services regulators in Victoria, Ireland, and England and Wales all have materially lower regulatory costs (on a per-lawyer basis) than the self-regulatory models in New Zealand, Scotland and British Columbia: Sapere Research Group *An international comparison of the cost of regulating legal services: A working paper* (June 2022). The working papers are accessible via <www.legalframeworkreview.org.nz/independent-legal-review-resources/>.

106 Some regulators overseas may have wider income streams than the Law Society (eg, from trust account interest and government funding). This benchmarking analysis includes all eligible regulatory *expenditure* (divided by the number of practising lawyers in each jurisdiction) rather than practising fees paid per lawyer. This is a like-for-like comparison between jurisdictions so, for example, it demonstrates that New Zealand has a higher regulatory cost even after excluding the additional regulatory costs incurred by lawyers in New Zealand in funding library services (which are not a regulatory cost overseas).

107 With projected revenue from fines of $850,000.

Other options considered

Occupational regulation in 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 government (ie, an entity that is publicly funded and/or could be directed to adhere to government policy) is not being considered given the potential consequences for the independence of the profession and the rule of law.

Through our deliberations we considered a number of options for potential reform of the current model, including what reform could be achieved within the current statutory framework, without the need for legislative change.

Option 1: No change (the current model)

For the reasons identified above, we are satisfied there is a strong case for change. Maintaining the current model where the Law Society is responsible for both regulating and advocating for lawyers is not appropriate.

Submitters were fairly evenly split on the question whether there needs to be change, with 46 per cent of respondents to our survey agreeing changes are needed and 41 per cent wanting to keep the status quo. As would be expected, there was support from within the profession for maintaining the status quo of the Law Society having both regulatory and representative functions.

Option 2: Reform the Law Society

Under this option the Law Society would retain its statutory duties as a regulator and a membership body. We have considered many variations of how the Law Society might be able to restructure its functions to address the concerns identified and have outlined two below.

Option 2a: reform the Law Society within the current Act

Our consideration of this option has focused on whether it is possible for the Law Society to amend its constitution and internal structure to establish more autonomy within the Law Society for the exercise of its regulatory functions. This option would focus on the conflict of interest when the Law Society exercises its regulatory functions.

There are some constraints to this option. The Act requires the Law Society to have both a Council and an Executive Board.[108] The Act also specifies that the Council must undertake certain duties, including setting practising fees.[109] We also recognise the need for a membership body to be able to elect representatives to sit in a governance role and to be accountable to its members, which is inconsistent with best practice for a regulator.

The key changes under this option would include:

1. A smaller Council, which would still include some elected representatives.
2. A Board including directors appointed (not elected) for their skills and competence (it may be possible for the Law Society to combine both the Council and the Board).
3. The appointment of lay members to both the Council and Board.
4. A new semi-autonomous Regulatory Committee would be the governance group for regulatory matters:

108 Lawyers and Conveyancers Act, s 70(1).
109 Section 62(1). The Law Society advised that this fee-setting power cannot be delegated.

a. The members of the Regulatory Committee would not be elected but could be appointed following advice of an independent appointment committee.
b. The Regulatory Committee would include a high proportion of lay members (we suggest half), including consumer representatives.
c. All regulatory powers that can be legally delegated by the Council would be delegated to the Regulatory Committee.
d. The Regulatory Committee would have separate branding from the Law Society.
e. The Regulatory Committee would be required to publish statements on regulatory priorities and an annual report of its work and achievements.

5. The constitution would require the Council to give significant weight to the views of the Regulatory Committee on those decisions that could not be delegated (eg, practice fee levels) and the Council would be required to make a statement to the public and Minister if it departed from a decision of the Regulatory Committee.

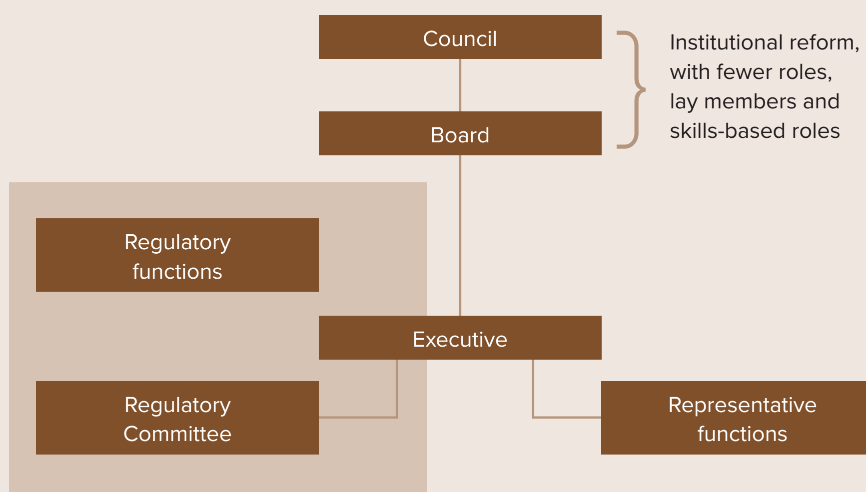
A depiction of this model is outlined below in Figure 1.

This option could be implemented quickly by the Law Society, with no need for legislative change. It might help address consumer views that the Law Society acts on behalf of lawyers and some of the concerns about conflicts of interest affecting regulatory decision-making.

While this option would be an improvement on the status quo, it would not address some other fundamental problems:

- In practice, it is not too different from the status quo, whereby instead of a Regulatory Committee, the Law Society has a Regulatory General Manager and strict separation of funding between regulatory and representative functions.
- This option would do nothing to address a deeply flawed complaints system, with prescriptive legislation that ties the Law Society's hands as to how complaints can be addressed and gives too much prominence to the role of lawyers in resolving complaints.
- The Chief Executive and Executive Leadership team would need to continue to sit across

Figure 1: The Regulatory Committee model



both regulatory and representative functions to manage the Law Society effectively, including through setting budgets, allocating staff, and managing human resources, information technology and legal services.

- The Regulatory Committee would not have autonomy over the regulatory budget, setting the practising fees of lawyers, or allocating and managing resources.

This option mirrors the approach to regulation by the Law Society in Scotland. Since 2010 the Law Society of Scotland has been required to have an independent Regulatory Committee that comprises 50/50 lawyer/lay members and can make regulatory decisions. However, for reasons similar to the issues identified with the New Zealand Law Society, this current structure has been heavily criticised. An independent review by Esther Roberton in 2018 and another by the Competition and Markets Authority in 2020 both concluded that the Scottish model was not meeting the standards of regulatory best practice, was not sufficiently independent of the profession it was regulating, and was undermining trust in the regulator and the profession.[110]

The Competition and Markets Authority highlighted many examples in its report where the Regulatory Committee model provided opportunities for both actual and perceived conflicts of interest to arise. It concluded:[111]

> Moreover, in principle it is not clear that any form of internal separation would be able to deliver proper independence because separation alone cannot resolve the intrinsic conflict of interest between representative and regulatory functions.

Although a Regulatory Committee would be an improvement on the status quo, it would not address the problems with the status quo. The Law Society would remain an organisation with conflicting responsibilities, it would still face conflicts of interests in making decisions that require it to balance the interests of consumers and lawyers, and it would still be perceived by many in the public and profession as a conflicted organisation.

We also considered whether the Law Society should pursue this option as an interim measure, pending legislative reform to establish an independent regulator. Such a staged approach would provide for quicker means of separating regulatory and representative functions and allowing for the appointment of lay members to Law Society governance. However, we concluded that a new process to amend the Law Society's constitution (a temporary solution) would distract from the need to focus on more enduring legislative reform. Furthermore, this option would add an additional layer of bureaucracy and cost into an organisation that requires significant reform to meet the expectations of the public and the profession.

Option 2b: reform the Law Society through legislative change

We also considered whether there was a case for adopting the above Regulatory Committee model as part of a broader package of legislative reform. This would enable Parliament to make changes that go further to address the concerns identified, while still preserving the Law Society as the regulatory and representative body. Improvements that could be made on option 2a, through legislative change, include:

- The Regulatory Committee's functions and powers would be protected by statute
- All regulatory powers (including funding via practising fees) would sit with the Regulatory Committee
- The complaints regime could be substantially reformed, which would generate considerable benefits for consumers and the profession

110 See Roberton, above n 89; and United Kingdom Competition and Markets Authority, above n 85.
111 United Kingdom Competition and Markets Authority, above n 85, at [5.19].

- Important institutional reform (outlined below in chapter 6) could also be adopted, which would remove the requirement to have both a Council and a Board.

This option would represent a material improvement on the status quo. However, as with option 2a, it would still not address the inherent conflict – and the accompanying perception and trust issues – from having a membership body as the regulator of the legal profession. If legislative change is to be pursued, the better option is to establish a new independent regulator.

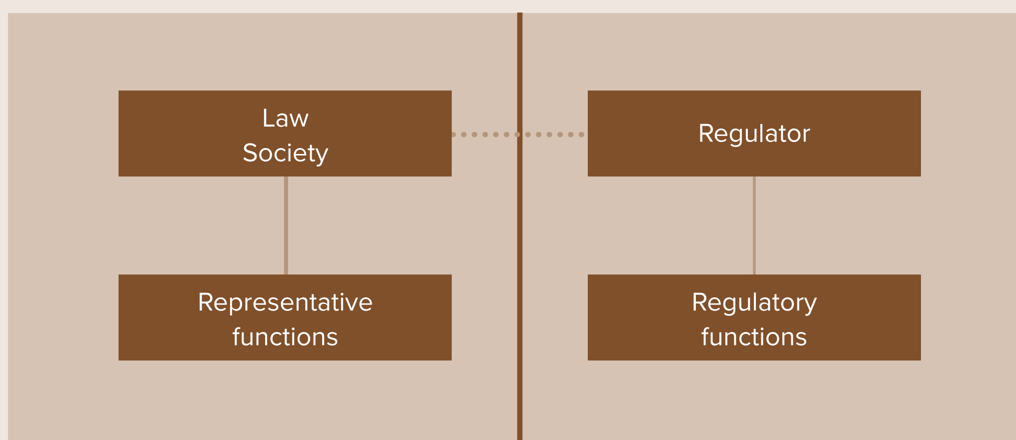
We also considered a variation of this option, as suggested by ADLS and as adopted in Canada, where the Law Society would be stripped of its statutory responsibilities for representative services and would effectively become the regulator only. However, the benefits of such a change would not exceed those that can be achieved through functional separation (option 3) or an independent regulator (option 5). Legislative reform not only needs to address the Law Society's conflicting functions, but also its governance limitations (including a lack of lay appointments to the board), its unwillingness to challenge the status quo, and consumer perceptions that the regulator is more interested in the profession than in the needs of consumers.

Option 3: Functionally separate the Law Society

This option would follow the approach in England and Wales, where the largest legal services regulator, the Solicitors Regulation Authority (SRA), is formally part of the Law Society but is functionally independent. The Law Society remains the approved regulator but all regulatory functions are undertaken by the SRA.

A similar approach in New Zealand would be to pass legislation requiring the Law Society to set up a separate entity to regulate lawyers. Notionally the new regulatory body would be part of the Law Society, but for all intents and purposes there would be two separate organisations undertaking regulatory and representative functions. As with the SRA in England and Wales, this might entail establishing separate brands, separate governance structures and Chief Executives, separate IT systems/access, potentially separate offices, 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 competence-based, includes lay members, and has strengthened powers (including responsibility for rule and fee setting).

Figure 2: The functional separation model



We received relatively few submissions in favour of this option. Submitters tended to support interventions at either end of the spectrum – either improving the Law Society or establishing a new independent regulator.

This option would achieve the advantages of having an independent regulator, including prioritising the interests of consumers, alleviating concerns about conflicts of interest, improved clarity as to regulatory objectives, and improved rigour as to governance and the strategic direction of the regulator.

However, trying to separate an organisation into two is a complex and expensive task, and would duplicate many existing functions. As the cost-benefit analysis demonstrates, there is no reason to believe this option would cost less than establishing a new regulator. Nor is it clear why a regulator should exist as an independent subsidiary of the Law Society rather than as a fully independent entity.

The establishment of the SRA as an independent regulator in England and Wales appears to have resulted from unique circumstances in those countries. At the same time as the SRA was established the Government set up a super-regulator, the Legal Services Board (LSB), tasked with overseeing nine approved regulators,[112] including the SRA. Rather than creating a single unifying regulator, the Government permitted the representative bodies to establish independent regulators, with an overarching regulator of regulators. The functionally separate SRA regulates only solicitors.

We see no benefit in adopting functional separation in New Zealand. We note that calls are increasing in England and Wales to establish a single unified and independent regulator,[113] while the Competition and Markets Authority opposed Scotland following a similar model on the basis that "any incomplete separation will still create internal governance issues that could affect regulatory outcomes".[114]

Option 4: Establish a new independent complaints body

Under this option the Law Society would continue to exercise its representative and regulatory functions, but a newly established body would be established to handle complaints and discipline.

Consistent with the preferred complaints model outlined in chapter 10, this newly established body would be staffed with specialist staff with a mandate to investigate and resolve complaints and able to draw on external legal expertise for technical advice, with parties having a right of review by an external review committee or adjudicator.

We consulted on two different potential forms of the complaints body:

- 4a: the newly established entity would receive and handle all complaints about lawyers. This is the model in place in New South Wales through the Office of the Legal Services Commissioner, albeit it has some discretion and can refer some complaints to the New South Wales Law Society (a relatively rarely used power).
- 4b: the newly established entity would only receive and handle complaints about lawyers regarding consumer matters (poor service or about billing), with complaints about conduct and those that might require a disciplinary process continuing to be directed to the Law Society. This is the model in place in Scotland (the Scottish Legal Complaints Commission) and England and Wales (the Legal Ombudsman).

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112 With a separate regulator for solicitors, barristers, Chartered Legal Executives, trademark attorneys and patent attorneys, conveyancers, costs lawyers, notaries, and probate practitioners. See Legal Services Board "Approved regulators" <https://legalservicesboard.org.uk>.

113 See, for example, the independent review undertaken by Stephen Mayson *Reforming Legal Services: Regulation Beyond the Echo Chambers – Final Report of the Independent Review of Legal Services Regulation* (Centre for Ethics & Law, June 2020).

114 United Kingdom Competition and Markets Authority, above n 85, at [5.20].

Following initial cost analysis and conversations with overseas regulators, we concluded that the option of setting up a new complaints body to handle only consumer complaints (option 4b above) did not merit further in-depth analysis. The experience from overseas demonstrates that it is not easy to direct consumer complaints to two separate organisations based on whether it is a service or a conduct complaint.[115] The cost associated with duplicating infrastructure and resources to handle complaints through two separate bodies is also enough to rule out this option.

There was strong support from submitters for having a body that was independent of the Law Society receiving and investigating complaints, either as a stand-alone complaints body or as part of any independent regulator. 50 per cent of respondents considered there was a need for complaint resolution that was independent of the profession, with 31 per cent disagreeing.

The primary advantage of option 4a over the status quo is that it would allay the concerns about lawyers judging their peers. The complaints process is the public's main interaction with any legal services regulator and establishing a separate body to handle those complaints would improve consumer confidence in how lawyers are regulated. As with option 3, this option would also include a move away from the current Standards Committee model for resolving complaints, to allow a more flexible, best-practice approach to complaint resolution.

The main arguments we heard against establishing an independent complaints body were succinctly summarised by a submission we received from ADLS:

> Moving to an independent entity will result in skyrocketing costs, with laypeople who lack knowledge of the legal profession and the professional obligations of lawyers adjudicating on matters and likely making a wrong decision as a result.

The argument that an independent complaints body (or an independent regulator) will cause escalating regulatory costs wrongly assumes that the current complaints model (with a Standards Committee reviewing every complaint) would be carried forward. New Zealand lawyers are currently contributing to a very expensive and inefficient complaints system. There is considerable opportunity to reduce costs.

We do not accept that lay people lack the knowledge and skills required to adjudicate on lawyers' conduct. This argument has been proven wrong by the performance of the independent complaints bodies in Scotland, England and Wales, New South Wales, Queensland, South Australia and Tasmania as well as those independent legal services regulators with responsibilities to investigate and adjudicate complaints, such as in Victoria, Western Australia and Ireland.

Those complaints bodies are now accepted by lawyers in the various jurisdictions as an integral part of the regulatory framework. Our discussions with overseas regulators did not identify any widespread disquiet with the quality of their decision-making. Under this model staff are appointed with skills in complaints resolution and adjudication, and many also have legal qualifications and backgrounds. The complaints body would seek external advice from lawyers on professional standards and technical matters as required. A similar model operates effectively with the independent, lay Health and Disability Commissioner in New Zealand, handling complaints against health professionals and seeking expert advice when necessary.

The key disadvantage with the independent complaints body option is that it addresses only a small subset of the problems with the Law Society having dual and conflicting functions. The Law Society would remain an inherently conflicted regulator, albeit with reduced regulatory functions.

115 For example, the Scottish Legal Complaints Commission *Annual Report 2020–2021* (SG/2021/275, November 2021) shows that 21% of their complaints have to be redirected to the Law Society of Scotland for investigation and 18% of their complaints are 'hybrid' complaints that require different components of the complaint to be examined by the Scottish Legal Complaints Commission and the Law Society.

It would also introduce new inefficiencies from requiring the regulator and complaints body to co-ordinate their activities across regulatory functions (such as administering the registry and wellbeing interventions).

Regulating conveyancers

Our terms of reference have excluded us from examining the conveyancing profession. We note that there may be a case for any newly established regulator to regulate both lawyers and conveyancers, both of whom are currently regulated separately by their member associations under the Act.

6. Institutional arrangements for the regulator and representative body

This chapter examines the allocation of regulatory and representative functions and sets out our view on the optimal governance arrangements for both the new regulator and the Law Society as a representative body.

It concludes:

- The regulator should be established as an independent statutory body.
- The new regulator should continue to have responsibility for providing advice on law reform, with library services to become a representative service run by the Law Society.
- The board of the new regulator should comprise eight members who are selected for their governance skills, with an equal split between lawyers and public members and at least two members who bring strong te ao Māori insights. The board should be chaired by a public member, who has a casting vote.
- The Minister of Justice should appoint the board of the new regulator, following advice from a nominations panel, which would comprise a mix of consumer, governance experts and members of the legal profession.
- As a refocused representative body, the Law Society should have a single governance layer, not both a Board and Council. The governance layer should comprise approximately 8-10 members, including a mix of elected lawyers and lay members.

Allocation of regulatory and representative functions

We propose that:

- the same regulatory functions, powers and funding sources would apply to the new independent regulator once established
- the Act would no longer need to specify anything in relation to the Law Society as its form, membership, functions, powers and funding would be for it to determine. An exception to this may be needed for transitional arrangements.

Under this approach, the responsibility for assisting with law reform advice (for the purpose of upholding the rule of law and facilitating the administration of justice) would sit with the independent regulator. We would expect the regulator to continue to engage with the profession in this task – but advocacy for the interests of the profession would be a function of the Law Society and other membership bodies.

We recommend that the library assets remain with the Law Society and become a membership service. The Law Society would be free to make decisions about the operation of libraries but it would no longer be funded through a compulsory fee on the profession.

For the avoidance of doubt, we note our view that the regulator should not be funded by the Government. The regulator should have the power to recover its costs by setting an annual practising fee to be recovered from practising lawyers.

The possibility of contracting delivery of services

We note that a number of representative bodies overseas provide regulatory services on behalf of an independent regulator. For instance, the Law Society of Ireland collects practising fees on behalf of the regulator[116] and the Law Institute of Victoria is paid by the Victorian Legal Services Board & Commissioner for services under delegation or contract, including: practice support service, wellbeing referrals and ethics support, CPD audits and providing CPD/training (eg, starting a practice, sexual harassment training).[117]

We would expect the new regulator to be responsible for all regulatory services, but it should have the flexibility, if it chooses, to delegate or contract for the delivery of certain regulatory services, including through the use of membership bodies such as the Law Society, Te Hunga Rōia Māori and other bodies.

Flaws with current governance arrangements

We heard through our consultation process that many submitters considered the Law Society's governance arrangements to be flawed. 47 per cent of survey respondents agreed that changes to the institutional arrangements were required, compared to 23 per cent who were content with the status quo.

Some of the issues raised and suggested changes, noting there was no consensus on each of these, are summarised in Table 3.

Table 3: Overview of governance issues and suggested changes from submissions

Issue raised	Suggested changes (no consensus)
Current system is not ensuring governors have governance experience	Appointments should be skills-based (as is the case for Crown Entities)
Historic lack of diversity in governance, which is dominated by the profession	Diversity to be a consideration in board composition and role of lay people
Query on need for both a Board and Council and size of each	Consider need for both, and size and role if needed
Council and board tenure (two years) too short and turnover causes too much disruption	Increase term lengths and stagger terms
Electoral college voting system is not fair	One vote for each governing member

We heard from former presidents that the Law Society's governance arrangements, with an elected board and council, are unsatisfactory. We note the conclusion of the recent Independent Culture Review of the Law Society: "The governance structure of the Society is at the very least unwieldy and suboptimal."[118]

In our discussion below of optimal governance for a new independent regulator and a purely representative Law Society, we consider how to overcome flaws in the current governance arrangements.

116 Section 95 of the Legal Services Regulation Act 2015 (Ireland) requires the Law Society of Ireland to pay an annual levy to the Legal Services Regulatory Authority (LSRA). This forms part of the practising certificate fees paid by solicitors each year.

117 See Law Institute of Victoria *Annual Report 2021: A stronger profession together* (October 2021) at 62 and 85.

118 Mike Heron *New Zealand Law Society – Te Kāhi Ture o Aotearoa: Independent Culture Review Final Report* (October 2022) at [6(p)].

The Board of the new regulator

The new regulator will need to be an independent statutory entity (not a Crown entity) and not subject to any direction by relevant Ministers.

Our thinking about the composition of the new Board is neatly captured in MBIE's submission on this point:

> In our view, the best practice approach to governance of a regulatory body should reflect the underlying rationale for regulating an occupation, namely the protection of the public. For this reason, representation on the governance board for the regulator should not be dominated by members of the regulated occupation. Rather the emphasis should be on individuals that have the skills needed to oversee an independent regulator. This would mean people with governance experience, not technical expertise related to the regulated occupation.
>
> There may be a case for some members having an understanding of the occupation being regulated, but that should be balanced by those with an understanding of the interests and needs of those who use the regulated services.

We recommend a smaller, simplified governance for the new regulator, with a board that brings the relevant governance and other skills required and reflects diversity.

A governance team selected for their skills and competence

The most important change to the governance arrangements is that the board of the new regulator must have competence-based membership.

We recommend a board charter be established that clarifies its role relative to management[119] and sets out a skills matrix for the skills and insights needed for the board.[120] Core skills would be in the areas of governance, regulatory practice, cultural competence, understanding of Te Tiriti and te ao Māori, and insights into the needs of consumers.

Consideration would also be given in the selection process to diversity in board membership, seeking sufficient diversity across members in gender, age, ethnicity and geographic location (urban and rural). This is consistent with best practice guidance[121] and was supported by a number of submitters, with comments such as:

> In my view, a large part of the current problem is that the people in leadership roles are of a generation ill-equipped to address the current problems, and that could be addressed by ensuring representation from younger lawyers, ALWU [Aotearoa Legal Workers' Union], more diverse lawyers, in particular lawyers from disadvantaged backgrounds.

We note that the 2021 "Report of a Governance Review of the Law Society of British Columbia" recommended that the governing body "move away from geographical diversity towards diversity of skills, lived experience, gender and ethnicity".[122]

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119 For instance, the Solicitors Regulation Authority in the United Kingdom covers the terms of reference for the board relative to executive and committees and includes key policies and governance matters. See Solicitors Regulation Authority *SRA Governance Handbook* (26 October 2021).

120 See, for example, New Zealand Treasury *Owner's Expectations: Expectations for Crown companies and entities monitored by the Treasury* (17 July 2020) at 9.

121 See, for example, Institute of Directors New Zealand "What makes a good board?" <www.iod.org.nz>.

122 Cayton, above n 97, at [7.4.3].

A board of eight members

We recommend a board of eight members, which is consistent with international best practice for the size of the entity being established.

The OECD found that across jurisdictions it surveyed, the most common board size of regulators is 5-7 members with a range from 2 to 17.[123] The Institute of Directors' guidance is that the optimum number of directors depends on the size of the organisation; it recommends that medium to large companies should have 6-8 directors.

We are also mindful of discussions with those involved in similar reviews overseas and governance experts in New Zealand who emphasised the need for a small, skills-based board. Our discussions highlighted a view that four members or fewer was too small to manage absences or set up committees, while 10 or more can create coordination issues and reduced board effectiveness. The suggested optimum number was 7-9, which is consistent with literature for commercial boards.[124]

An allocation of roles to ensure diverse perspectives

We recommend:

- an equal split on the board between lawyers and public members
- at least two members with strong te ao Māori insights.

An equal proportion of lawyer and public board members

We consider it important that half of the new regulator's board be public members. We prefer the term 'public member', rather than lay or non-lawyer, since it focuses on what they are, rather than what they are not. Public members have not been socialised into the legal profession, and do not bring professional assumptions and values to their roles as board members.[125] They bring a public and user perspective and an understanding of community expectations and the ordinary norms and values of society.

Currently, individuals who have been or are enrolled as barristers and solicitors, even if they have never held a practising certificate, are ineligible for appointments as a lay member to a Standards Committee.[126] We envisage a slightly less restrictive definition of a public member, excluding anyone who has held an annual practising certificate. People who obtain a law degree, complete a professional legal studies course and are admitted as a barrister and solicitor, but who choose not to practise law, have not been socialised into the legal profession and should be eligible for appointment as a public member of the new regulator's board – a role in which their legal education could prove helpful.

Lawyer board members, with their understanding of professional norms, values and obligations, and their familiarity with the realities of everyday legal practice, also have a valuable role to play in governance – but they should not be in the majority, in order to signal clearly the independent oversight of the new regulator. We propose an even number of lawyer and public members on the board. This will enable an effective voice for the profession in governance and help ensure confidence that the regulator is not 'out of touch' with the practising lawyers whom it regulates.

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123 See *OECD Corporate Governance Factbook 2021* (30 June 2021) at ch 2.

124 See, for example, a literature summary in Dirk Jenter, Thomas Schmid and Daniel Uran *Does Board Size Matter?* (October 2019). This is also consistent with Carolina Azar and Andreas Grimminger *Achieving Effective Boards: A comparative study of corporate governance frameworks and board practices in Argentina, Brazil, Chile, Colombia, Mexico, Panama and Peru* (OECD, June 2011). The United Kingdom's Professional Standards Authority for Health and Social Care recommends 8-12 members as associated with greater effectiveness: see Jean Barry *Regulatory Board Governance Toolkit* (International Council of Nurses, 2014).

125 See Christine Hogg and Charlotte Williamson "Whose interests do lay people represent? Towards an understanding of the role of lay people as members of committees" (2001) 4 Health Expectations 2 at 3.

126 See the definition of "lay member" as "a member of a Standards Committee who is not on the roll": Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008, reg 3(1). An individual who has completed a law degree but never been admitted is eligible for appointment as a lay member.

We considered recommending that the new regulator have a majority of public members, as currently occurs in the Victorian Legal Services Board & Commissioner (Victoria), the Legal Services Regulatory Authority (Ireland), the Legal Services Board (England and Wales), and the Solicitors Regulation Authority (England and Wales). However, we noted that specifying a majority of public members would be unusual in a New Zealand context, as shown in Table 4. As discussed below, we instead recommend that the board chair of the new regulator should be a public member.

Table 4: Role of lay members in governance of occupational regulators

Occupational regulator	Governance members	Role specified for lay/ public members in legislation	Members appointed by
Medical Council	12	4 lay members 8 professional members	Minister (4/8 professional members elected)
Registered Architects Board	6-8	Up to 4 lay members Up to 4 professional members	Minister
Financial Markets Authority	5-9	n/a	Minister
Electrical Workers Registration Board	7	3 lay members (1 with electrical expertise) 4 professional members	Minister
Plumbers, Gasfitters and Drainlayers Board	10	4 lay members 6 professional members	Minister
Real Estate Authority	7	2 professional members	Minister
Pharmacy Council	8	2 lay members 6 professional members	Minister
Veterinary Council	7	2 lay members 3 professional members 1 academic	Minister (3 professional members elected)
Teaching Council	13	Up to 6 lay members 7 professional members	Minister (7 professional members elected)

Two governance members to bring strong te ao Māori insights

The rationale for specifying a minimum number of members with strong te ao Māori insights is to reflect the importance of understanding the needs of Māori as consumers of legal services, ongoing changes in the practice of law with the recognition of tikanga as first law and increasing use of te reo, the growing cohort of Māori lawyers in the profession, and the recommended commitment for the new regulator to give effect to Te Tiriti o Waitangi. These will be significant issues for the new board as well as the profession. Specifying in terms of strong insights is consistent with a competence-based approach.

We received submissions contesting the need for governance arrangements to better incorporate the views of Māori and te ao Māori. These views tended to note Te Tiriti is not a relevant factor in the governance or regulation of the legal profession, and that there is no principled basis for dedicated Māori seats at the board table. We also received submissions supporting forms of co-governance and 50/50 Māori/non-Māori seats.

In our view it is both principled and appropriate to require at least two board members to bring strong insights in te ao Māori, and that all members should have some competency in understanding Te Tiriti o Waitangi.

We also received a submission from Te Hunga Rōia Māori suggesting that there should be a Māori co-chair of the new regulator. While this could promote collaborative leadership, we do not consider it necessary to be prescriptive about this. We note that some regulators have moved in this direction[127] and legislation could allow for the board to opt for this approach.

Appointment terms of up to four years, capping reappointments to 10 years

A number of submitters raised concerns about current council and board tenure (two years) being too short and regular turnover causing too much disruption and loss of knowledge. We agree that terms should be longer. We recommend:

- appointments for up to four years, with flexibility and staggering of appointments
- allowance for reappointments up to a maximum of two further terms, subject to a 10-year limit.

Terms of three to five years are consistent with common practice, particularly in the New Zealand public sector. This allows sufficient time for members to get up to speed and be productive, avoids unnecessary turnover, permits the bringing on board of new perspectives, and ensures span across electoral cycles to support independence and political neutrality.

Reappointments would be allowed up to a maximum of two further terms. We are aware of literature showing that director terms beyond 10 years can result in governance risks.[128]

It is important that the expiry of board members' terms be staggered to ensure continuity in governance. This may require initial appointments to include a number with shorter (and longer) durations to support staggering of future appointments and succession planning.

The board chair should be a public member

Although we have not recommended that the majority of the board should be public members, we consider it important that the chair should not be a lawyer member. This is the approach adopted with the Legal Services Regulatory Authority (Ireland) and the Legal Services Board and the Solicitors Regulation Authority (England and Wales).

The Legal Services Board in England and Wales observed, four years after the shift to independent regulation, that the legacy of professional self-regulation meant that independent regulators were still too closely tied to the legal profession:[129]

> It is our view that lay chairs are a likely route to improved outcomes and greater independence not only from the representative bodies, but also from the profession as the regulated community ....
>
> It would ensure that the person leading each regulatory Board would start from a perspective of effective regulation aligned with the better regulation principles, rather than the history, culture and practice of self-regulation of different parts of the profession.

127 For example, the Midwifery Council has a Māori co-chair.

128 See for example, ASX Corporate Governance Council *Corporate Governance Principles and Recommendations* (4th ed, February 2019); and Ariel Fromer Babcock and others *The Long-term Habits of a Highly Effective Corporate Board* (FCLT Global, March 2019).

129 Legal Services Board *Chairs of regulatory bodies: Consultation on an amendment to the Internal Governance Rules to require that the Chairs of the Boards of the regulatory arms of each applicable approved regulator be a lay person* (2013) at 22, 27.

Board chairs play a critical role in leading their boards, facilitating discussions and influencing deliberations. Having a public member as chair, with a casting vote, will send an important signal that the regulator is independent from the profession and increase the likelihood that the regulator will be responsive to the needs of consumers. It will also help ensure the new regulator is perceived as a clean break from self-regulation.

The successful implementation of some elements of the reforms we are recommending, such as permitting new business structures and introducing new flexible ways of delivering legal services, will depend on the willingness of the regulator to challenge the status quo. While the board of the new regulator will undoubtedly make decisions with the best of intentions, the views of board members are shaped by their professional backgrounds. A public member chair is more likely to challenge the status quo and, in a closely balanced argument, may be less likely to come down on the side of the profession.

The board members will need to be able to work effectively as a team and bring a strategic perspective. To support this, we suggest a chair be chosen by the board, consistent with the approach taken in a number of overseas legal regulators, including the Solicitors Regulation Authority (England and Wales).

Recommended appointment process for the new Board

We propose an appointment process that will reinforce the independence of the regulator.

Minister of Justice to appoint the new regulator's board

We recommend that the board of the new independent regulator be appointed by the Minister of Justice on the recommendation of an advisory nominations panel. This is consistent with other independent professional regulators in New Zealand.[130] Ministerial appointment is also the norm for overseas legal service regulators, including the Victorian Legal Services Board & Commissioner, the Legal Services Regulatory Authority (Ireland) and Legal Services Board (England and Wales).[131]

During consultation, we heard concerns that Ministers could have undue influence, risking undermining the rule of law if they could appoint (or potentially dismiss) an entire board. Those concerns are legitimate. We are aware of examples of members being appointed to responsible authorities (the governing boards of health professional regulators under the Health Practitioners Competence Assurance Act 2003) by Ministers over many years on the basis of considerations other than the skills and competencies needed in the authority.

We accept that lawyers *are* different to other professionals, given their unique role in upholding the rule of law and needing to speak out strongly, at times in opposition to government policy and proposed legislation[132] or when questions arise concerning judicial independence.[133]

However, we doubt that fearless advocates will be restrained from speaking out by concerns about incurring the wrath of their regulatory body or Ministers. We do not think that rule of law

130 Including the nine regulators identified in Table 4.

131 In Ireland the Government appoints the 11-member board following nominations from 10 bodies. In Victoria the Government appoints the seven-member board, with the three lay members selected from a panel nominated by the Victorian Bar and the Law Institute of Victoria.

132 For example, in December 2022 the President of the Law Society wrote to the Minister of Local Government expressing concern about the constitutional implications of the inclusion of an entrenchment clause in the Water Services Entities Bill. The Government promptly announced it would remove the clause.

133 In October 2021 the Law Society's Rule of Law Committee published a report raising concerns about what it saw as inappropriate contact between a party to a proceeding and Heads of Bench and the subsequent discussion between the Heads of Bench and the presiding judge. The Wellington branch of the Law Society wrote to the Law Society President, noting that the Law Society "is an important guardian of the rule of law in this country and must not be afraid to speak out publicly when core values such as judicial independence are at stake": Letter from Christopher Griggs (Wellington Branch President) regarding the Rule of Law Committee's "Moana" Report (18 March 2022).

concerns warrant insulating appointments to a new legal regulator's board from the Minister of Justice. Instead, we support a convention that Ministers do not depart from recommendations for appointment made by an advisory nominations panel without good reason, to be provided in writing and publicly disclosed at the time of new appointments.

As outlined in chapter 5, the Minister of Justice already has significant powers under the current co-regulatory regime for lawyers. We do not consider that vesting the final power of appointment in the Minister would undermine the rule of law if the safeguards we propose are maintained.

Nominations panel rather than elections

We recommend that a nominations panel be established to advise the Minister of Justice on the appropriate skillsets and nominees to sit on the board of the new regulator. This panel should comprise an appropriate mix of governance and legal practitioners.

A nominations panel would enable a wide range of input into the appointment process

It is important the profession has input into the appointment of lawyer members on the board of the regulator. However, we consider a nominations panel to be a more effective means of engaging and consulting with the profession and avoiding potential conflicts. It would also make it clearer that board members are to act in a governance capacity rather than represent any particular interest.[134]

We recommend that the Ministry of Justice establish a nominations panel as part of the standard nomination process for Ministerial appointments. The panel would identify the appropriate skills required of directors (using a skills matrix and taking into account the overall composition of the board) and seek nominations from the public, legal profession representative bodies, relevant government agencies and consumer groups and make recommendations to the Minister. When making appointments, the Minister would be required to give reasons that set out the basis on which the members meet the criteria for appointment to the board, including reasons for rejecting nominations from the panel.[135]

The use of nominations panels is an approach used by other organisations in New Zealand[136] and regulators in the OECD,[137] and is similar to the approaches used by the Solicitors Regulation Authority in England and Wales.

The nominations panel could potentially comprise a small number of members, including:

- a nomination from the Law Society or other representative legal body
- a nomination from Te Hunga Rōia Māori
- an independent governance expert with appointments and board formation experience
- an independent expert in regulation in the public interest
- a consumer representative, for example through the Community Law Centres or Consumer NZ
- a current member of the Board (once established).

No elections for lawyer members on the board

We considered whether there should be a role for the legal profession to elect the lawyers who sit on the new regulator's board. Such an approach would be consistent with appointments to the Medical Council, the Nursing Council and the Veterinary Council, where some of the board

134 This is consistent with guidance on the membership of regulatory governance bodies by the OECD, above n 87.

135 In Victoria, in appointing the lawyer members, the Attorney-General is bound to select from nominees from the Victoria Bar and the Law Institute of Victoria: Legal Profession Uniform Law Application Act 2014 (Vic), s 35(3A).

136 Including the Climate Change Commission and the TAB.

137 For instance, the Australian Energy Regulator.

positions for the relevant profession are reserved for elected members.[138]

We do not think there should be a role for electing lawyers to sit on the board of the regulator. Elected members are likely to see themselves as having a 'constituency' to represent on the board and an election campaign could result in individuals making 'promises' to the electorate in a bid to be elected. This year Victoria abolished the previous role of elections to the board of the Victorian Legal Services Board & Commissioner, on the basis that appointments were needed to "strengthen the integrity" of the regulator.[139]

Using elections to select lawyers to sit on the board would make it less likely that the final board would have the required skillsets for governing the organisation and for effective regulatory decision-making. We also note that experience from medical, nursing and veterinary regulation in New Zealand indicates very low turnout of members of the profession in voting for board members.[140]

Allowing membership bodies to nominate lawyer members would replicate problems in the current Law Society model

We have decided against an alternative approach, which would follow the Victorian model of allowing representative bodies to nominate the lawyer members they think should be appointed to the board, with the Minister to make appointments from the nominated list.

This model would have the advantage of allowing the Minister to make appointments while considering the totality of the skillsets of the potential board, and would also allow for representative bodies to nominate members who will be familiar with the issues confronting the position. The obvious choices for membership bodies would be the Law Society and Te Hunga Rōia Māori, but both the Bar Association and ADLS could make the case they represent important constituent groups.

However, we do not support allowing lawyer groups to control the nomination of four of the eight proposed governance members, for many of the same reasons identified in our conclusion that a membership body should not regulate the legal profession.

The representative bodies would be able to exert too much control over the regulator, which could mean the regulator is too responsive to the interests of those representative groups. As we have observed with the status quo, if the regulator is too responsive to representative interests this influence can compromise its ability to regulate effectively (including setting appropriate funding levels), it is more reluctant to challenge the status quo, and there is a perception that the regulator is acting in the interests of consumers rather than lawyers.

The governance of the Law Society as a representative body

Our terms of reference require us to advise the Law Society on its optimal governance arrangements. We make the suggestions below in light of our decision that the Law Society will become a smaller organisation given its loss of regulatory functions. Ultimately the structure and governance of the Law Society will need to reflect what its members want and how the Law Society can best meet those needs.

138 The Teaching Council also elects professional members, but this is a body with fused regulatory/representative functions and is not typically classified as an 'independent regulator'.

139 Legal Profession Uniform Law Application Act 2014 (Vic), s 35(3A). See Parliament of Victoria *Parliamentary Debates (Hansard): Legislative Assembly, Fifty-ninth Parliament, First Session* (22 February 2022) at 330, 347, 361 and 366.

140 For example, only 15.5% of registered medical practitioners voted in the 2021 election for medical members of the Medical Council of New Zealand.

The Law Society will continue to have an important role

Establishing an independent regulator means the Law Society will no longer have statutory powers and will become solely a membership body. However, it will continue to play an important and valuable role for the profession, as the peak national body to represent the interests of New Zealand's lawyers, and for Aotearoa New Zealand, as a strong and independent voice speaking up for the rule of law.

By virtue of its history and reputation, the Law Society holds a special place as a representative body for lawyers. It is rightly seen as an important body by the profession and the public. Its voice will continue to carry weight in debates on significant issues of law and policy.

There is no need for both a Council and a Board

The consultation process highlighted that the current governance process, with a Council and a Board, is overly complex. Many submitters queried the value of having an additional layer.

We agree that the governance structure needs to be simplified. There only needs to be a single governance layer, with a board charter clarifying its role relative to management.

It should be clear that the governance body is to act collectively rather than members representing special interest groups or geographic regions. Any matters for which views of members are required should be consulted on with the profession rather than requiring the profession's representatives to advocate for special interests at the governance level.

The size of the governance body should be 8-10 members

Without statutory powers and with a narrower focus on representative services, a new-look Law Society would benefit from a smaller governance body. A smaller governance body would allow for the Law Society to be nimbler, more efficient and effective.

As an example, the New Zealand Bar Association has a Council made up of the President, President-Elect (if any), the Past President (if any), and an additional 12 members. The structure is quite complex as a result of trying to trade-off appropriate representation and diversity on the Council without inflating the size of the Council.[141] By contrast the ADLS Council has eight members, of whom four are elected and three appointed (including two non-lawyers).

Being mindful of our discussion around board size in relation to the independent regulator, in the context of the Law Society as a representative body we recommend a size of 8-10 may be appropriate.

The Law Society should include public members in its governance body

We recommend that the Law Society set aside positions for public members on its governance body, with full voting rights.

The most effective governance bodies have a broad range of skills that complement each other and provide for well-informed and appropriate decision-making. One way to capture and contribute to a broad range of skills is to have public members on the governance body of the Law Society.

Other pure membership bodies in New Zealand commonly have lay or public members on their governance bodies. For example:

- The New Zealand Institute of Architects has a Council of no more than 13 people, of whom up to three can be non-member lay persons.

141 The 12 members must include three members from Auckland, two from Waikato / Bay of Plenty, three from Wellington, two from Canterbury and one from Otago/Southland; two non-KC senior barristers; one junior barrister; two men; two women; two criminal barristers; and one associate member.

- The Royal New Zealand College of General Practitioners' Board has seven people, of whom up to two people need not be members of the College.
- Financial Advice New Zealand has a Board of eight people, with four practitioners and four independent directors.
- The Master Electricians Electrical Contractors Association of New Zealand (ECANZ) has a Board of between five and seven people, of whom at least one but not more than two must be Independent Directors who are not ECANZ members.
- The Real Estate Institute of New Zealand has a Board of nine members, of whom two must be independent.

A review in 2021 of Engineering New Zealand's governance structure recommended a board of eight people, of whom five are elected and the remaining three appointed by the Board based on a skills matrix (ie, three who do not have to be engineer practitioners).[142]

In 2022, the Law Institute of Victoria (the representative body for the Victorian legal profession) adopted a new constitution that provided for its Board to comprise of 12 directors, of whom three must not be members and, if legally qualified, must not have practised law in the previous five years.[143]

Elections have a continued role for a pure membership body

Recognising the difference in function between the independent regulator and the new representation-focused Law Society, we support the role of elections in voting for professional members to govern the Law Society.

We suggest that a portion of the governance members continue to be elected. Other members should be appointed by those elected members following independent governance advice that identifies skills gaps.

In keeping with the feedback obtained during consultation, we suggest that the Law Society move away from the electoral college system it uses to weight decision-making at the Council and to elect presidents. In our view, each member of the new Board/Council should have one vote.

142 Jo Cribb *Governance Review: October 2021* (Engineering New Zealand, 15 March 2022).
143 See Law Institute of Victoria "Board & Governance Home" <www.liv.asn.au>.

Part C
What needs to happen
Ngā mahi e tika ana kia mahia

7. New statutory objectives and obligations

This chapter focuses on the core components of the statutory framework relating to the purpose of regulation, regulatory objectives, and the fundamental obligations of lawyers. This chapter concludes:

- New legislation governing the regulation of lawyers should include a stand-alone Tiriti o Waitangi section.
- Legislation should specify regulatory objectives to guide the regulator.
- The fundamental obligations of lawyers should include a duty to maintain their competence and fitness to practise within their areas of practice.

A new purpose statement

The package of recommended reforms will require a new statute to replace the current Act and a new purpose clause.

The suggestion of a new purpose statement elicited a range of views from survey respondents: 37 per cent disagreed, 34 per cent expressed no view and 28 per cent agreed a new purpose statement was required.

In our view, it is important to state clearly why lawyers are regulated and the key aspects of the statutory framework. We think there should be an upfront statement that the regulatory system exists to uphold the rule of law by providing for a qualified, competent and independent legal profession. The consumer protection focus of the statute should be emphasised by articulating the purposes of promoting good-quality care and information, maintenance of lawyers' competence and a responsive and efficient complaints scheme.

Our proposed new purpose clause in Table 5 captures the essential elements of our reform package – recognising that the public and consumers should be at the heart of regulation and acknowledging the importance of having a qualified, competent and independent legal profession.

Table 5: A new purpose statement

A new purpose statement for a new Act

The purpose of this Act is to establish a new regulatory framework for lawyers in Aotearoa New Zealand, in order to:

- uphold the rule of law by providing for a qualified, competent and independent legal profession
- promote good quality care and information in the provision of legal services
- protect members of the public by providing for mechanisms to ensure that lawyers are qualified, competent and fit to practise
- provide for a responsive and efficient complaints scheme.

Te Tiriti o Waitangi and the statutory framework

Our terms of reference required us, as a review objective, to consider changes needed to promote "a commitment to honouring Te Tiriti o Waitangi and the bicultural foundations of New Zealand, including Te Ao Māori concepts".

The Act makes no mention of Te Tiriti o Waitangi or Māori and there is no requirement for the regulator to promote or have regard to the interests of Māori. We believe it is time for this to change.

We support a stand-alone Te Tiriti section in a new regulatory framework for lawyers. It would signal the importance of Te Tiriti to New Zealand's constitution and legal system, and would guide how the regulator engages with the profession and the public and fulfils its functions. It would also bring the regulatory framework into line with other Acts establishing statutory bodies performing public functions.

The views of submitters on Te Tiriti within the Act

35 per cent of survey respondents supported the incorporation of Te Tiriti in the regulatory framework. Support was also expressed in many email submissions, including from a wide range of representative bodies (eg, the New Zealand Bar Association, the Community Law Centres, Te Hunga Rōia Māori, the New Zealand Law Students' Association, the New Zealand Women's Law Journal, NZ Asian Lawyers, and the Asian Legal Network).

The submission from Te Hunga Rōia Māori explored in some detail the role of the law (and lawyers) in the marginalisation of Māori and Aotearoa New Zealand's first system of law. It pointed out that the Law Society, which was established in 1869, has failed in its duties over that period and there has been a loss of trust by Māori in the regulator. It submitted that the purpose statement of the Act should make reference to upholding Te Tiriti and that the Law Society (or regulator) should be bound by its text and governed accordingly.

A joint submission from five women lawyers' associations[144] highlighted the significant disparity that exists for Māori within the legal profession. Their submission also highlighted the recognition of tikanga as part of the common law and the expectation the regulator and profession will need

144 Auckland Women Lawyers' Association, Canterbury Women Lawyers' Association, Otago Women Lawyers' Association, Waikato Bay of Plenty Women in Law Association, and Wellington Women Lawyers' Association.

to adapt. It noted that all these factors call for a change in rethinking the regulatory framework and the adoption of a partnership approach with Māori:

> For these reasons, the Act should be amended to expressly incorporate Te Tiriti with an operative reference which requires those exercising functions or making decisions to give effect to Te Tiriti. Without this, we don't think there will be any meaningful change.

44 per cent of survey respondents opposed the incorporation of Te Tiriti in the Act. Their views spanned a broad spectrum, with the following submission summarising the position of a small but vocal minority:

> The Society should not promote the inclusion of upholding the Treaty in the purpose statement in the Act (s 3) … It would extend separatism, or the potential for separatism, to the way the profession is regulated and represented, and the way lawyers deal with individual members of society. The Society should take the exactly opposite tack. It should advocate for equality under the law.

Many submitters expressed concern about the risk of uncertainty being generated by a Treaty clause and what its practical effects would be.

Recommendation: incorporate Te Tiriti in the Act

In our view, a new statute should incorporate Te Tiriti o Waitangi into the framework for regulating lawyers.

Te Tiriti has a unique constitutional status within the legal system of Aotearoa New Zealand. Using Te Tiriti to guide the interpretation and administration of a statute is not a radical step. It replicates the approach used in over 60 other pieces of legislation. New Zealand's *Legislation Guidelines* require legislation to be consistent with the principles of the Treaty.[145] There is also increasing certainty about the expectations of organisations subject to such a requirement.

We recognise that a Treaty clause does not appear in the legislation for other professional regulators, although we expect that to change in coming years. In any event, there is a strong case for the regulatory framework for lawyers to contain an overarching Treaty clause, given the centrality of Te Tiriti to the legal system. We propose the following operative provision.

Table 6: A new Te Tiriti o Waitangi section

A Tiriti o Waitangi section in the new Act
All persons exercising powers and performing functions and duties under this Act must give effect to the principles of Te Tiriti o Waitangi.

When coupled with the new regulatory objectives we are proposing (discussed below), we would expect the Tiriti clause to result in a number of improvements to the status quo. We envisage the regulator (and other entities created by the new statute) being created and designed in co-operation with Māori. Working co-operatively with Māori, the entities will need to develop, for example, new governance, management and human resource policy and practices that give effect

145 Legislation Design and Advisory Committee *Legislation Guidelines: 2021 Edition* (September 2021) at [4.2].

to the principles of Te Tiriti. These policies and practices should reflect New Zealand's bicultural foundations, the recognition of te reo Māori as an official language (which parties and counsel are entitled to use in legal proceedings)[146] and tikanga Māori.

We envisage changes in regulatory practice and decision-making, including the regulator partnering with Māori, for example Te Hunga Rōia Māori, in the delivery of key functions, promoting the use of te reo Māori in its operations and reporting, and reflecting tikanga in areas such as admission (eg, making marae-based admission ceremonies commonplace for those who want them) and in the exercise of other regulatory functions (eg, complaints handling, for parties who prefer a tikanga approach).[147]

Setting out regulatory objectives in the Act

The Act prescribes the functions of the regulator but does not set out any objectives or overarching principles to inform its decision-making. As noted in the Clementi review, which led to the Legal Services Act 2007 (UK), "the first step in defining the regulatory regime should be to make clear what the objectives of the regime are".[148]

We consider that a new statute should include specific objectives for the new regulator. These objectives will provide clarity as to the regulator's role and how it should exercise its discretion, and enhance transparency around the trade-offs in decision-making and the priorities of the regulator, and will be consistent with statutory frameworks overseas that govern regulation of the legal profession.[149]

Submitters strongly supported having new regulatory objectives

Almost half of survey respondents (48 per cent) agreed there was a need for the Act to specify objectives for the regulator, compared to 25 per cent who saw no need to change the status quo. Many supporters of change endorsed as a useful starting point the regulatory objectives in the Legal Services Act 2007 (UK) as referred to in our discussion document.

A recurring theme was that regulatory objectives are needed to make clear that the overarching objective of regulating the legal profession is the protection of the public. We heard from regulators in England and Wales that one of the problems with the regulatory objectives in the Legal Services Act 2007 is that, in listing eight objectives, the statute fails to give primacy to an overriding objective of protecting and promoting the public interest.[150]

Many submitters recognised that the primary objective should be protecting the public. There was also support for a range of other objectives. Some submitters thought the regulator should promote a diverse profession, others that the regulator should be working to improve access to justice for consumers, while others thought it should be made clear the regulator needs to enter into mutual recognition agreements with regulators in other jurisdictions to make it easier for foreign lawyers to move to or provide services in New Zealand.

We also heard from many quarters, including the judiciary, that being a competent lawyer in contemporary New Zealand requires having the cultural competence to meet the needs of the community being served. A major shift is underway in the content of the law and the expectations of the public around tikanga and the use of te reo Māori, which has been an official language since

146 Te Ture mō Te Reo Māori 2016 Māori Language Act 2016, s 7.

147 Some submitters noted Māori felt excluded from the current admission ceremonies and would prefer marae and community-based ceremonies. See further discussion in chapter 11.

148 Clementi, above n 91, at 23.

149 See, for example, the Legal Services Act 2007 (UK), s 1; Legal Services Regulation Act 2015 (Ireland), s 13(4); Legal Services (Scotland) Act 2010, s 1; and Legal Profession Uniform Law Application Act 2014 (Vic), s 30.

150 Legal Services Act 2007 (UK), s 1(1).

1987 and is recognised in law as a taonga of iwi and Māori.[151] Tikanga principles are accepted as part of New Zealand law,[152] and the use and prominence given to te reo will continue to increase in the administration of justice. All law schools will incorporate tikanga Māori in compulsory papers from 2025, so future lawyers will be equipped with some knowledge in this area, but the majority of the current profession will need to upskill. We consider it likely that many lawyers will require support in these areas to be able to practise effectively.

The demographics of Aotearoa New Zealand have changed significantly since 2000. New migrants and refugees have contributed to a growing multicultural society that is striking in its ethnic and linguistic diversity. This has implications for a new regulatory regime. As noted in a submission from NZ Asian Lawyers:

> We would strongly support a statutory objective to encourage additional diversity (cultural/ethnic/linguistic as well as gender and sexuality) within the profession for the simple reason that the profession acts for the public and needs to reflect society at large. Other key objectives for the regulator, in our submission, is to reiterate that it acts in the interests of the public (as the profession does) but also that it will be independent, objective and sensitive to all relevant matters such as cultural and linguistic differences.

Recommendation: set out regulatory objectives in the Act

Regulatory objectives will signal clearly to the regulator, the profession and the wider public how the activity of the regulator will support the primary purpose of regulation – to protect and promote the public interest. They will guide the regulator in how it prioritises its activities and what it seeks to achieve, for the public and the profession. They will also help address some specific areas of concern identified in this review, and provide a framework for accountability of the regulator.

We recommend the five regulatory objectives below in Table 7.

Table 7: Our recommended regulatory objectives

New regulatory objectives for a new Act

The Regulator shall, in performing its functions under this Act, have regard to the objective of protecting and promoting the public interest by:

1. upholding the rule of law and facilitating the administration of justice
2. improving access to justice and legal services
3. promoting and protecting the interests of consumers
4. promoting ethical conduct and the maintenance of professional competence, including cultural competence, in the practice of law
5. encouraging an independent, strong, diverse and effective legal profession.

These objectives make clear that the primary rationale for regulating lawyers is to protect and promote the public interest, and are intended to guide the new, independent regulator in the exercise of its functions.

151 Te Ture mō Te Reo Māori Māori Language Act, s 4(1).
152 *Ellis v R* [2022] NZSC 114.

Below we briefly expand on the five subsidiary objectives.[153]

1. Upholding the principle of the rule of law and facilitating the administration of justice

Lawyers play an essential role in civil society in upholding the rule of law and supporting the operation of the courts and the legal system. We expect the regulator, in all its work, to uphold the rule of law and facilitate the administration of justice, mirroring the fundamental obligations of the lawyers it regulates. An integral part of this objective is that the regulator must remain independent from the government of the day.

2. Improving access to justice and legal services

The lack of access to justice and legal services, particularly for civil matters, is widely viewed as a crisis in New Zealand's justice and legal system.[154] A major concern for many people we spoke to is the high levels of unmet legal demand. The community would not accept half of its members being unable to access medical care – yet half of the population cannot afford legal services and may not even appreciate they have a legal problem.[155]

In our view the regulator should have a specific objective of improving access to justice. We note that the Legal Services Act 2007 (UK) specifies a regulatory objective of improving access to justice.[156]

In pursuance of this objective, the regulator should facilitate a market that improves access to justice. Providers of legal services should be encouraged to innovate to meet consumer demand, while consumers should be enabled to access services that meet their needs – recognising that consumers may choose to access legal service from non-lawyer providers, without the same regulatory protections.

As discussed at the end of this chapter, we do not consider that the regulator's objective to improve access to justice supports adding a new obligation on lawyers to provide pro bono services.

3. Promoting and protecting the interests of consumers

This objective would require the regulator to ensure that consumers have the opportunity to make informed choices about quality, access and value and that clients are well informed (including about fees), receive good-quality care and know how to raise concerns to make a complaint. We expect a focus on greater transparency in the legal marketplace, a more competitive market for legal services, more emphasis on effective communication in the client-lawyer relationship and informed (and ongoing) financial consent, monitoring of client experience and changing consumer expectations, and oversight of a fair, simple and efficient complaint resolution system.

4. Promoting ethical conduct and the maintenance of professional standards, including cultural competence, in the practice of law

In a recent public survey of trust in professions in New Zealand, only 43 per cent of respondents expressed trust in lawyers, well below doctors and nurses at 81 per cent.[157] As noted by Dare, "there is a widespread and ancient perception that [lawyers] are grasping, callous, self-serving, devious, indifferent to justice, truth and the public good".[158] Concern about ethical standards in the profession (following the Renshaw Edwards defalcations in the early 1990s) led to the Cotter and

153 The Legal Services Board of England and Wales has provided a useful summary of how they have interpreted their regulatory objectives, some of which are reflected below: Legal Services Board *The regulatory objectives* (June 2017).

154 Helen Winkelmann "Access to Justice – Who Needs Lawyers?" (2014) 13 Otago LR 229.

155 Submission from Community Law Centres at [2.1.b].

156 Legal Services Act 2007 (UK), s 1(1)(c).

157 Research New Zealand *Who do we trust? Who do we rate?* (July 2020). Journalists and politicians rated even lower, at 23% and 22% respectively.

158 Tim Dare "Legal Ethics and Legal Education" [1997] NZLJ 311 at 311.

Roper report[159] recommendations and the introduction of the compulsory Legal Ethics course in the law degree.

The disclosures in 2018 of sexual harassment, bullying and discrimination put a spotlight on ethics in the legal profession.[160] They raised serious concerns about the culture of the profession. Maintaining public confidence in the provision of legal services is expressed as the first purpose of the Act.[161] Public confidence in the legal profession and the ethics of practising lawyers is also important. We consider it timely for the regulator to have a specific objective of promoting ethical conduct by lawyers.

A core aspect of the regulator's role is maintaining professional competence. It is telling to compare the name of the statute creating the regulatory framework for health practitioners – the Health Practitioners Competence Assurance Act – with the Lawyers and Conveyancers Act.

The public expects the regulator of a profession to ensure that members of that profession, who are listed on a public register as holding a current practising certificate, are up to date in their knowledge and skills in their area of practice. We propose that the regulator have a specific objective to promote maintenance of professional competence, including cultural competence, in the practice of law.

From a consumer's perspective, a competent lawyer is one who understands their needs and is responsive to the client's culture. We also consider that the regulator has an important role in supporting the development of a basic level of cultural competence within the profession.

We envisage 'cultural competence' to mean being sensitive to the needs, values and beliefs of different cultural and ethnic groups.[162] This is underpinned by Te Tiriti and supports an expectation that individual lawyers will have competencies that enable effective and respective interaction with their clients[163] and be able to use te reo when appropriate.

We considered whether a lawyer's responsibilities to Māori, te reo and tikanga warranted specific reference as separate regulatory objectives, as recommended in the minority view later in this chapter. The majority of the Panel views the proposed reference to professional competence as encompassing being up to date with relevant law, including tikanga; and the reference to cultural competence as sufficient to cover a lawyer's responsibilities to Māori clients, including the use of te reo when appropriate.

Lawyers also need to be sensitive to the needs, values and beliefs of Pacific peoples, Asian consumers, people from the wide range of other cultures in Aotearoa New Zealand, and people with disabilities. Ensuring that lawyers are culturally competent in this broad sense is consistent with good-quality client care and service – serving the needs of diverse communities – and with promoting a culture of diversity and inclusion within the legal profession itself.

5. Encouraging an independent, strong, diverse and effective legal profession

This obligation mirrors a statutory objective of legal services regulators in England and Wales. We expect:

- an independent legal profession where lawyers are free from inappropriate influence to act in the best interests of their client. Lawyers must also be confident they can take action against the government of the day without any fear of consequences in how they are regulated.
- a strong legal profession that speaks out authoritatively on contemporary consumer needs

159 WB Cotter and C Roper *Report on a Project on Education and Training in Legal Ethics and Professional Responsibility for the Council of Legal Education and the New Zealand Law Society* (New Zealand Law Society, 1996).

160 See *Report of the New Zealand Law Society Working Group*, above n 41, at 20.

161 Lawyers and Conveyancers Act, s 3(1)(a).

162 Compare the Health and Disability Commissioner (Code of Health and Disability Services Consumers' Rights) Regulations 1996, rt 1(3).

163 Compare the Health Practitioners Competence Assurance Act 2003, s 118(1)(i).

when accessing legal services and on the needs of registrants in seeking to practise effectively in accordance with their fundamental obligations
- a diverse legal profession representative of the population it serves. A regulator with this objective could be expected to ensure there are no artificial barriers or discriminatory hurdles to legal careers caused by regulation, and would address specific issues through its regulatory framework.
- an effective legal profession that can meet the changing needs of consumers, including with respect to quality, access and value.

Additional regulatory objectives?

The minority view[164] proposes three additional objectives, relating to support for the use of te reo Māori and other first languages, preservation of tikanga, and promotion of climate change consciousness in the practice of law. The detailed proposals and reasoning are set out in the minority view later in this chapter.

The majority view[165] sees advantages in a less expansive list of regulatory objectives, on the basis that reference to cultural competence is sufficient to encompass use of te reo and other first languages; knowledge of tikanga is a dimension of professional competence in the law; and the profession's important responsibilities to take action on climate change lie with individual lawyers and their representative bodies,[166] rather than with the regulator.

The fundamental obligations of lawyers

Lawyers are currently 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". Through our consultation process we sought views on whether these four obligations remain appropriate.

We specifically asked for submissions on 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 those principles. We noted that 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 also highlighted in our discussion paper that in 2021 the Federation of Law Societies of Canada published its *Guiding Principles for Fostering Reconciliation*.[167] These principles are designed to inform all aspects of the Federation's work and state 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.

164 The minority view is provided by panellist Professor Jacinta Ruru.
165 The majority view is held by Professor Ron Paterson and Jane Meares.
166 For example, the Law Society of England and Wales adopted a *Climate change resolution* in 2021.
167 Federation of Law Societies of Canada *Report of the Truth and Reconciliation Calls to Action Advisory Committee* (June 2020) at Appendix C ("Guiding Principles for Fostering Reconciliation"). The principles do not create regulatory obligations on lawyers.

The views of submitters supporting a fundamental obligation of lawyers to uphold Te Tiriti

The submissions in favour of requiring lawyers to uphold Te Tiriti o Waitangi all noted the centrality of Te Tiriti to Aotearoa New Zealand's constitution. One representative group submission noted:

> In our view, a specific Tiriti obligation on lawyers: a. is arguably an inherent dimension of the obligation to uphold the rule of law in the Aotearoa context; b. should be made explicit, including to avoid doubt if there is a diversity of views on whether that obligation exists.

The Community Law Centres submitted that the "constitutional role of lawyers is unique from any other profession and the obligation to uphold the rule of law, including Te Tiriti and promotion of access to justice, needs to be clearly articulated". The Asian Legal Network emphasised that "Te Tiriti matters to tauiwi, particularly for migrant communities, as well as for lawyers and the legal profession" and submitted:

> As officers of the court, lawyers uphold a constitutional function and should be bound by the obligations of Te Tiriti, which is also the foundation of the legal system in which lawyers practise. These obligations extend to the provision of legal services.

The value in making a Tiriti obligation explicit in section 4 was highlighted by Te Hunga Rōia Māori, who submitted:

> Our view is that the existing obligation to "uphold the rule of law" encompasses the constitutional purposes of this country, including those contained in He Whakaputanga and Te Tiriti o Waitangi. It is disappointing that this view is not shared by all practitioners, and indeed seems to be opposed by some. As our history clearly shows, existing regulatory and representative arrangements have not adequately recognised that in having a basic obligation to "uphold the rule of law" lawyers must have due regard to these critical constitutional documents. Accordingly, [Te Hunga Rōia Māori] considers specific reference to those obligations is appropriate to remind practitioners that they are part of the law they are required to uphold.

Some submitters stated that such a change would be more than a tokenistic move. It would make clear to all lawyers that they have a personal responsibility to maintain basic levels of cultural competence and to act in a way that does not undermine the standing of Te Tiriti o Waitangi. It would also be seen as a defining moment for the legal profession in helping to account for past injustices suffered by Māori through sidelining of Te Tiriti. The New Zealand Law Students' Association, in support of this change, hoped that such an amendment would be backed with "generous resourcing and financial backing for CPD".

The views of submitters opposing a fundamental obligation of lawyers to uphold Te Tiriti

The scope of the fundamental obligations on lawyers generated the strongest debate in our consultation, with most focusing on the potential implications of any requirement for lawyers to uphold Te Tiriti o Waitangi.

Our discussion document raised the possibility of "a specific requirement to uphold the country's constitutional principles, including Te Tiriti". We heard from submitters concerned about the

unintended consequences of requiring lawyers to uphold constitutional principles, including Te Tiriti:

> It is one thing to affirm a commitment to the rule of law but another to be required to do so in regard to a particular conception of the constitutional order. Just what the country's constitutional principles are is often vague. That has been an advantage in some ways. There has been quite an evolution in terms of thinking about a lot of matters that are of constitutional significance in New Zealand. But at no time have we ever thought that lawyers ought to have to swear allegiance to some current conception of them. If we had, then it might have stalled that evolution. It would certainly have been controversial.

A breach of any section 4 obligation is 'unsatisfactory conduct' under the Act[168] and can be 'misconduct' if done wilfully or recklessly.[169] Submitters noted that the prospect of disciplinary sanctions attaching to a failure to uphold Te Tiriti would be chilling both for individuals' freedom of expression and political opinion, and for the ability of lawyers to advocate on behalf of clients.

Our discussions at branch events highlighted the concern that many lawyers felt about any new obligation that might undermine their duty to advocate for clients' positions, no matter how disagreeable some in the community might find them to be. Some members of the judiciary expressed concern that any restriction on the ability of lawyers to argue their client's case might undermine the rule of law and the important role that lawyers play in society. One submitter noted:

> This would have major constitutional implications for the rule of law and for the role of lawyers in upholding the rule of law. For example, it would have implications for the ability of lawyers to defend Treaty based arguments in litigation. Lawyers must be free to argue against Treaty claims in the same way as they defend NZBORA claims.

A number of lawyers supported the incorporation of Te Tiriti in the statute, but did not support making upholding of Te Tiriti a fundamental obligation. It was argued that Te Tiriti was between the Crown and Māori and conferred rights and responsibilities on both parties; while it was of the utmost constitutional importance, it could not be 'upheld' by private individuals.

Concern was also expressed about the likely uncertainty generated by imposing such a requirement on individual lawyers. The Solicitor-General made this point in relation to constitutional principles more generally:

> We note that the discussion document posits creating "a new obligation for lawyers to uphold the constitutional principles of Aotearoa New Zealand, including Te Tiriti o Waitangi".
>
> Difficulties arise in relation to imposing a new obligation on individual lawyers to uphold constitutional principles as what it means to uphold a particular constitutional principle in a given situation may be arguable. Lawyers appearing for clients who contest the application of, or interpretation of, a particular constitutional principle should be able to act for their clients in this regard without risking breaching their professional obligations.

168 Lawyers and Conveyancers Act, s 12(c).
169 Section 7(1)(a)(ii).

> Ultimately, constitutional principles, including in relation to the Treaty of Waitangi (Te Tiriti o Waitangi), are contestable matters for courts and tribunals to determine. In our view, any individual obligation on lawyers should be imposed by way of additional, and perhaps specific, CPD requirements, rather than through the creation of a new fundamental obligation.

Other submitters commented that the current obligation on lawyers to uphold the ‘rule of law’ has advantages, since the ‘rule of law’ can evolve over time and may be used by the courts to incorporate uniquely New Zealand characteristics, such as tikanga. These submitters noted such an evolutionary development was preferable to a new statutory obligation.

Majority view that fundamental obligation of lawyers to uphold rule of law should remain unchanged

A majority of the Panel[170] does not support reference to New Zealand’s constitution and Te Tiriti as part of a lawyer’s fundamental obligation to uphold the rule of law.

We see advantages in the simplicity of the current obligation “to uphold the rule of law and facilitate the administration of justice”. It neatly encapsulates the central premise that in a free and democratic society everyone (citizens and government) is subject to the law, and that lawyers play a crucial role in upholding the rule of law.

In our view, adding an explicit reference to New Zealand’s constitution and Te Tiriti – as part of upholding the rule of law – risks unintended consequences, given that the scope and content of our constitution remains an area of unsettled law and jurisprudence about Te Tiriti continues to evolve.

We also see conceptual difficulties in the proposed Tiriti obligation. The standard conception of the role of lawyer is one that takes on role-differentiated obligations: of neutrality, non-accountability and partisanship.[171] Lawyers, in their professional role, are neutral as to the morality and political views of their client – it is not their role to sit in judgement. It must not be assumed that a lawyer who represents a client with unpopular or extreme views endorses those views. If a client wishes a lawyer to argue that the Treaty does not apply to a given situation, or that it should be ‘read down’, the lawyer should not be barred by a statutory fundamental obligation from taking the case. However much an individual lawyer might personally decry their client’s views, they should not be entitled to deny the client access to legal services because of an imposed fundamental obligation of lawyers to uphold a different view.

Lawyers are also citizens, with rights to freedom of expression and political opinion affirmed by the New Zealand Bill of Rights Act 1990.[172] It seems probable that many lawyers in Aotearoa New Zealand hold progressive views consistent with recognising te Tiriti as fundamental in their personal and professional lives. However, such views are not universally held within the legal profession, as was clearly evident during consultation on the discussion document. Those lawyers who hold and express opinions that some may criticise as conservative or antiquated are entitled to hold and express those views. Indeed, under the Human Rights Act 1993, it would be unlawful for an employer to discriminate and not employ an otherwise qualified individual because they

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170 Professor Ron Paterson and Jane Meares.

171 “The effect of these three principles is supposed to be this: lawyers have a positive duty to promote the lawful interests of their clients zealously. A lawyer may not allow their own judgment of the moral status of the client, of the client’s lawful ends or of the lawful means to those ends, to effect the discharge of this duty. If a lawyer knows of a legal means to attain a client’s ends, they must use it though they think both the means and the ends are immoral. Furthermore a lawyer is not to be judged by the immorality of either the means or the ends.”: Tim Dare The Counsel of Rogues? A Defence of the Standard Conception of the Lawyer’s Role (Ashgate, Farnham (UK), 2016) at 12.

172 New Zealand Bill of Rights Act 1990, s 14.

hold such views.[173] It is notable that public sector job advertisements do not require any ideological commitments of applicants[174] (typically focusing instead on knowledge and capability), presumably on long-standing advice. The same approach seems even more apt for lawyer regulation.

It is salutary to note the experience of the Law Society of Ontario, which in 2017 introduced a requirement that licensees acknowledge an 'obligation to promote equality, diversity and inclusion'. The new duty was highly divisive, with opponents arguing it was an example of 'compelled speech':[175]

> Forcing lawyers to subscribe to a particular worldview for regulatory purposes is an unacceptable intrusion into a lawyer's liberty …

The Law Society of Ontario ultimately repealed the new requirement.[176]

In conclusion, a majority of the panel does not support including a reference to New Zealand's constitution and Te Tiriti as part of a lawyer's fundamental obligation to uphold the rule of law.

Recommendation: update the fundamental obligations of lawyers

The full panel recommends two material changes to the fundamental obligations on lawyers, as set out in section 4 of the Act:

1. In addition to their current obligation to 'protect' the interests of their clients, lawyers should be subject to an obligation to 'promote and protect' the interests of their clients – subject always to their overriding duties as an officer of the High Court and under statute.
2. Lawyers should be required to 'maintain their competence and fitness to practise in their areas of practice'.

Promoting and protecting the interests of clients

We consider that the current requirement for lawyers to 'protect' the interests of clients is too narrow. We recommend this obligation be broadened to require lawyers to also 'promote' their clients' interests, consistent with the similar objective of the regulator.

This change is not intended to undermine the independence of lawyers or the advice that they give. It will however emphasise the importance of lawyers working with clients to achieve their goals, rather than a narrower focus on protecting their interests.

Maintaining competence

We also consider it important to emphasise that lawyers have a fundamental obligation to maintain their competence and fitness to practise in their chosen areas of practice. The new regulatory regime will empower the regulator to take active steps to ensure the ongoing competence of practitioners. In keeping with professionalism, the statute should spell out that individual lawyers have a fundamental obligation to maintain their professional competence. As noted in our discussion of regulatory objectives, this will include developing and maintaining cultural competence, to meet the needs of Māori and clients from other cultures and ethnicities.

The majority of the panel does not support addition of a new fundamental obligation on lawyers relating to tikanga (as proposed in the minority view below), since we regard the new fundamental

173 Human Rights Act 1993, ss 21(1)(j) and 22–23.

174 Public Service Act 2020, s 22(1) affirms that public servants "have all the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990".

175 Arthur Cockfield "Why I'm ignoring the Law Society's Orwellian dictate" *The Globe and Mail* (Toronto, 17 October 2017).

176 Amanda Jerome "LSO repeals Statement of Principles, replaces it with an acknowledgement of human rights laws" *The Lawyer's Daily* (online ed, Canada, 11 September 2019).

obligation on lawyers to maintain their competence in their areas of law as sufficient to encompass being up-to-date with relevant law, including tikanga.

Table 8: Suggested edits to the fundamental obligations on lawyers (s 4)

Fundamental obligations of lawyers (s 4) (material changes underlined)

Every lawyer who provides regulated services must, in the course of their practice, comply with the following fundamental obligations:

a) to uphold the rule of law and to facilitate the administration of justice in Aotearoa New Zealand:

b) to be independent in providing regulated services to their clients:

c) to act in accordance with all fiduciary duties and duties of care owed by lawyers to their clients:

d) to promote and protect, subject to their overriding duties as an officer of the High Court and to their duties under any enactment, the interests of their clients:

e) to maintain their competence and fitness to practise in their areas of practice.

Minority view[177]

Additional regulatory objectives

In addition to the five subsidiary objectives stated above, there is a need for a further three subsidiary objectives to ensure: the new regulator is fit-for-purpose in the unique Aotearoa New Zealand context; there is integration and real meaning and substance that align with the new recommended Tiriti clause; and the responsibilities to Māori, te reo and tikanga are not limited to cultural competency or diversity.

1. *Fostering awareness, supporting and promoting te reo Māori, New Zealand sign language, the Pacific languages, and other first languages of New Zealanders in the administration of justice*

A central pillar of access to justice is being able to understand and communicate effectively in proceedings and the administration of justice. Language is key to this.

The Government has a plan for one million New Zealanders speaking te reo by 2040, with almost a quarter of Māori now speaking te reo Māori as one of their first languages.[178] Any member of the court, party or witness, or counsel has a right to speak Māori in legal proceedings.[179] The public, especially Māori, will have increasing expectations to be able to use te reo in accessing legal services (even if the consumer has fluency in English).

With the growing linguistically diverse demographics of New Zealanders, including increasing numbers of New Zealanders with English not as their first language, the regulator needs to specifically consider the language demands of consumers as an access to justice issue and in the administration of justice.

177 The minority view is provided by Professor Jacinta Ruru.
178 Stats NZ "Te reo Māori proficiency and support continues to grow" (press release, 5 July 2022).
179 Te Ture mō Te Reo Māori Māori Language Act 2016, s 7(1).

2. *Working in partnership with Māori to support the development and use of processes and practices to preserve the integrity of tikanga when tikanga is in dialogue with the practice of law*

Tikanga forms part of Aotearoa New Zealand's law because of legislation,[180] is recognised by the courts as New Zealand's first legal system[181] and, as the Supreme Court has held, tikanga "has been and will continue to be recognised in the development of the common law of Aotearoa/New Zealand in cases where it is relevant".[182] Care needs to be taken in navigating this dialogue and application to avoid the misinterpretation, misapplication and misappropriation of tikanga.[183] This objective would require the regulator to have a positive objective to work with Māori to encourage the use of processes in the practice of law that would allow for the dialogue to be traversed in a respectful and effective way. The Supreme Court has recognised the importance of this care and has provided some broad guidance of the types of processes that may be appropriate.[184] Given the historically violent manner in which the law has suppressed and sought to colonise and assimilate Māori and their legal traditions, such a positive obligation that speaks to avoiding further harm should be a core function of the regulator as tikanga is increasingly drawn upon in general legal practice.

3. *Promoting climate change consciousness in the practice of law*

This obligation would require the regulator to have an explicit responsibility to climate change consciousness. New Zealand has declared a climate change emergency, committing to urgent action on reducing emissions. Climate change is of central concern to many New Zealanders and an issue that all New Zealanders will need to grapple with in a personal and professional sense. We received a substantial group submission from Lawyers for Climate Action, who urged that the regulator should "fully and deliberately":

a. spearhead the discussion about what ethical obligations lawyers have, or should have, in relation to climate change

b. facilitate the education of lawyers about climate change concepts likely to be relevant to their practice so that they are well-positioned to identify and advise on climate-related risks and opportunities and to contribute to the just, inclusive and prompt transition to a zero-carbon economy

c. facilitate/encourage the profession to reflect on the climate implications of its work, so that the profession is able to understand and consider the ethical issues described above

d. adopt a climate change resolution similar to that adopted by the Law Society of England and Wales that provides its members with advice and guidelines on the many challenges climate change presents to the profession.

180 See, for example, Te Ture Whenua Māori Act 1993 Māori Land Act 1993.

181 See, for example, *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [94]; *Ngāti Whātua Ōrākei Trust v Attorney-General* [2018] NZSC 84, [2019] 1 NZLR 116 at [70]; *Re Edwards Whakatōhea* [2021] NZHC 1025, [2022] 2 NZLR 772 at [69]; and *Ngawaka v Ngāti Rehua-Ngātiwai ki Aotea Trust Board (No 2)* [2021] NZHC 291, [2021] 2 NZLR 1 at [2].

182 *Ellis v R*, above n 152, at [19].

183 See Natalie Coates "The Rise of Tikanga Māori and Te Tiriti o Waitangi Jurisprudence" in John Burrows and Jeremy Finn (eds) *Challenge and Change: Judging in Aotearoa New Zealand* (LexisNexis, Wellington, 2022) 65 at 84–85.

184 *Ellis v R*, above n 152, at [120]–[125] per Glazebrook J, [181] per Winkelmann CJ and [271]–[273] per Williams J.

Additional fundamental obligations of lawyers

In addition to the five fundamental obligations stated above, there is value in including specific reference to te Tiriti o Waitangi as part of the duty to uphold the rule of law, and adding a sixth fundamental obligation specific to tikanga.

The first five recommended fundamental obligations are important for any modern common law legal profession. More specific obligations are required to meet the unique legal circumstances of Aotearoa New Zealand where the Treaty of Waitangi "is of vital constitutional importance",[185] the Māori language is statutorily recognised as a taonga[186] and the common law recognises the Māori legal system is in a relevant dialogue with the common law of this country.[187]

These circumstances should not be ignored. The practice of law needs to better serve the interests of Māori. This general point has been made by many including Justice Baragwanath, writing extra-judicially in 2007:[188]

> *...we lawyers must play our part in lifting the hopes, aspiration and confidence of all members of our community. Until Māori feel that our laws and institutions value them, the deep-seated problems in our society cannot heal. Our approach to the Treaty and to the human dignity of Māori, within this country we claim to share with them, is a vital measure of what the future of our country and that of our children will be.*

With this in mind, these two additional recommendations are made:

1. Adding Te Tiriti explicitly as part of the reference to upholding the rule of law so this fundamental obligation reads: *to uphold the rule of law (including the law and our constitution that includes Te Tiriti o Waitangi) and to facilitate the administration of justice*

In considering the careful arguments in the submissions for and against the inclusion of Te Tiriti as part of a fundamental obligation, on balance Te Tiriti should be noted and the most logical place is alongside and explicitly referenced as being part of upholding the rule of law.

In 1990, Lord Cooke of Thorndon extra-judicially described Te Tiriti as "simply the most important document in New Zealand's history".[189] This view has strengthened to the point that it is now widely recognised throughout all branches of government that Te Tiriti is both a founding document and of constitutional significance to the modern Aotearoa New Zealand state.[190]

The rule of law is alive to the unique circumstances of Aotearoa New Zealand.[191] It requires that all people are bound to follow the law and whilst there is not a single written constitution, the constitution is an integral part of the legal framework and the practice of law. The rule of law should not be antagonistic to core constitutional principles. Te Tiriti should matter to lawyers in their *professional* practice because they are officers of the Court.

185 Legislation Design and Advisory Committee, above n 145, at 24.

186 Te Ture mō Te Reo Māori Māori Language Act, s 4(1).

187 *Ellis v R*, above n 152.

188 David Baragwanath "The Harkness Henry Lecture: The Evolution of Treaty Jurisprudence" (2007) 15 Wai L Rev 1 at 10–11 (footnote omitted).

189 Robin Cooke "Introduction" (1990) 14 NZULR 1 (Special Waitangi Issue).

190 See, for example, *Cabinet Office Cabinet Manual 2017* at [1] and [7.65(a)]; and *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801 at [151].

191 For a discussion about the rule of law in Aotearoa New Zealand, see Susan Glazebrook, Justice of the Supreme Court of New Zealand "The Rule of Law: Guiding Principle or Catchphrase?" (The University of Waikato & Mackenzie Elvin Law 2021 Annual Public Lecture, Tauranga, 26 May 2021).

Given this, an obligation to uphold the rule of law should mean that it is no longer acceptable for any member of the legal profession to advise clients, or to present an argument in the courts, that relegates Te Tiriti as a simple nullity and not part of the laws and constitution of Aotearoa New Zealand. We have moved on from this rejectionist period as a country and it is not a tenable position on the basis of legal precedent.[192]

This does not mean that Te Tiriti is always relevant or that the scope and bounds of how Te Tiriti might apply cannot be debated. That will be context-dependent and the importance of lawyers being free to advance arguments on behalf of clients is recognised. However, the bounds of legal argument are limited by the law and the legal and constitutional fabric of Aotearoa New Zealand now incontrovertibly includes Te Tiriti.

It is worthwhile making this professional obligation explicit. This is in part because of the negative and hostile manner in which the law throughout history has treated Māori in Aotearoa. The legal profession and New Zealand courts went to “extraordinary lengths”[193] to defend the *Wi Parata* precedent that declared Te Tiriti a nullity. Since the 1980s, Aotearoa New Zealand has been undergoing a reconciliation process as a nation. Recognition of Te Tiriti would accurately reflect how far we have come on that journey.

2. Adding a sixth fundamental obligation: *when in dialogue with tikanga, to use processes and practices to preserve the integrity of tikanga, in the practice of law*

This fundamental obligation is important for the legal profession. It should mean that when instructed by a client to advance an argument based in tikanga, the lawyer will have a fundamental obligation to use processes and practices to preserve the integrity of tikanga. The Supreme Court is already noting that it must take care: “Care must be taken not to impair the operation of tikanga as a system of law and custom in its own right.”[194] Lawyers must also be careful to avoid harm.

This obligation does not mean that every lawyer needs to be skilled in tikanga Māori.

The obligation arises *only* when in dialogue with tikanga in the practice of law. To be in dialogue will require a proactive trigger from a client or the court to consider tikanga. When triggered to do so, the lawyer needs to proceed with care. In many, if not most, situations this will require seeking expert tikanga assistance from Māori pūkenga (experts) because few lawyers are trained, or have expertise, in tikanga.

Access to justice and pro bono services

We recommend an objective for the regulator to improve “access to justice and legal services”. However, we do not consider it appropriate to impose an obligation on individual lawyers to improve access to justice and legal services – even though many lawyers voluntarily assume such an obligation. We recognise the different motivations of lawyers in practising law and choosing specialty areas of practice. A lawyer may opt to be a first class tax lawyer or commercial barrister and may view their work as contributing to an important public good although not, on a traditional view, contributing to access to justice.

192 See, for example, *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC); *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA); *Barton-Prescott v Director-General of Social Welfare* [1997] 3 NZLR 179 (HC); *Tukaki v Commonwealth of Australia* [2018] NZCA 324, [2018] NZAR 1597; *Ngaronoa v Attorney-General* [2017] NZCA 351, [2017] 3 NZLR 643; and *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board,* above n 190.

193 John William Tate “The Privy Council and Native Title: A Requiem for *Wi Parata*?” (2004) 12 Wai L Rev 101 at 103.

194 *Ellis v R*, above n 152, at [22], [122] and [180].

We also share the view of many submitters, including key groups such as the Community Law Centres, that pro bono services are not the answer to the major access to justice problems facing New Zealand society.[195] However, we believe the regulator can do more to encourage and recognise the pro bono work that lawyers do – both free and low-paid services. The proposed new regulatory objective "improve access to justice and legal services" should make the regulator more active in addressing barriers to pro bono services.

The launch in 2021 of the pro bono clearing house, *Te Ara Ture*, which matches lawyers wanting to do pro bono work with people who need legal services, may make pro bono services more accessible for both consumers and lawyers.[196] It is important that the regulator continues to support *Te Ara Ture* and other initiatives to promote pro bono services.

We do not support mandates in relation to pro bono

We do not think there is a case to require lawyers to undertake a minimum number of pro bono hours.[197] Not all lawyers can afford to provide free services, not all lawyers are 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 (including Māori, Asian and Pacific peoples) already provide free services to support whānau and volunteer within their community. For all these reasons, submitters strongly opposed any new obligations to do pro bono work.

We also examined whether there might be value in introducing new reporting requirements that either require lawyers to report their pro bono hours,[198] or enable voluntary reporting of pro bono hours to the regulator.[199] Such reporting requirements might help improve information on the level of pro bono activity across the profession and encourage lawyers to reflect on whether they could do more pro bono work.

We concluded that there is not a strong case to introduce new requirements on lawyers to report to the regulator on their pro bono activity. Such a reporting requirement would impose direct compliance costs on every lawyer in New Zealand. We are not satisfied that it would incentivise lawyers to materially increase their pro bono activity. Many lawyers are not in a position to provide pro bono services; any new requirement in this area would represent a disproportionate burden and understandably be resented. We are also conscious that many lawyers are already unhappy about the burden of reporting requirements, including anti-money-laundering requirements, and would see pro bono reporting as an unjustified additional burden.

There may be a role for aspirational targets

Alongside the proposed lifting of restrictions on who can provide pro bono services (discussed in chapter 8), we think some 'soft' measures could help encourage lawyers to reflect on whether they are in a position to undertake pro bono work. We believe more can be done within the legal profession to encourage the provision of pro bono services.

Representative groups overseas have taken the lead setting aspirational pro bono targets. Firms and lawyers are encouraged to sign up to meet the target and voluntarily report their pro bono activities. Subsequent public reporting on progress creates media coverage and encourages further participation. Examples include:

195 For a comprehensive review on this topic, see Kayla Stewart, Bridgette Toy-Cronin and Louisa Choe *New Zealand lawyers, pro bono, and access to justice* (University of Otago Legal Issues Centre, 9 March 2020).

196 Te Ara Ture takes referrals of individuals from Community Law Centres and only accepts applications for assistance from not-for-profit organisations which meet certain eligibility criteria.

197 Mandatory pro bono hours are required in Indonesia, the Philippines, South Africa, South Korea and Vietnam.

198 For example, 10 states in the United States require lawyers to report their pro bono hours, including Florida, Hawaii, Illinois, Indiana, Maryland, Minnesota, Mississippi, Nevada, New Mexico and New York.

199 For example, 13 states in the United States have voluntary pro bono reporting systems in place, including Arizona, Connecticut, Georgia, Kentucky, Louisiana, Montana, North Carolina, Ohio, Oregon, Tennessee, Texas, Virginia and Washington.

- 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. The target was set by the Australian Pro Bono Centre, which was formed to increase participation and excellence in pro bono services.
- The UK Collaborative Plan for Pro Bono sets an aspirational target of 25 pro bono hours a year. It covers 25,000 lawyers across its member firms.
- Pro Bono Pledge Ireland sets a target of 20 hours a year for signatories.
- In the United States, the American Bar Association sets a goal of 50 hours of annual pro bono activity.

There is an opportunity for similar collaboration within the New Zealand legal profession to establish a mechanism through which the provision of pro bono services could be encouraged and given a higher profile. A voluntary tool is a more appropriate and targeted means of encouraging those lawyers who are in a position to provide pro bono services to do so.

We also received submissions that it would be valuable to define what is meant by ‘pro bono’. Since we are not proposing any pro bono reporting requirements, we have not suggested a definition. A profession-led initiative to set aspirational targets would be a better way to generate consensus on a definition of ‘pro bono’.

8. The scope of regulation: who should provide legal services and be regulated?

This chapter focuses on who can provide legal services and who should be regulated. It concludes:

- There is no compelling reason for changing the scope of regulation as it applies to lawyers or extending it to cover currently unregulated legal services.
- A new 'freelance' model should be adopted, which would permit lawyers to provide non-reserved services to the public without requiring prior approval as a sole practitioner, provided they do not employ anyone, do not handle client funds, and are paid directly.
- Employed lawyers should be permitted to provide pro bono services in non-reserved areas (without any prior authorisation).
- New business structures should be permitted, which would allow non-lawyers to have an ownership interest in law firms and lawyers to enter into legal partnerships with non-lawyers.
- Law firms should be directly regulated and subject to new firm-level obligations.

Which providers of legal services should be regulated?

Any person in Aotearoa New Zealand may provide legal services to the public provided that those services are not within the 'reserved areas' for lawyers and the person does not engage in misleading conduct about their status under the Act – including by using protected terms such as 'lawyer', 'solicitor' and 'barrister'.[200] With some exceptions, such as appearing before the Employment Relations Authority, the areas reserved for lawyers prevent non-lawyers from providing litigation-related activities and property relationship services.

This title protection approach to regulating lawyers,[201] rather than the *activity* of providing legal services, means there are a wide variety of legal providers who compete with lawyers but are unregulated. This state of affairs creates two main issues:

- First, consumers may be disadvantaged by a lack of protection when they receive a service from an unregulated legal service provider.[202] Some consumers may also be unaware that their legal service provider is not a lawyer, as unregulated providers are free to describe themselves using terms such as 'legal expert' or 'law practitioner'.
- Secondly, lawyers may be disadvantaged and the market for legal services may be distorted

200 Lawyers and Conveyancers Act, s 21(1).
201 Being those who have been granted a practising certificate from the Law Society.
202 Consumers who are dissatisfied with the service provided or fees charged by an unregulated provider have limited options for redress except for utilising the Disputes Tribunal and courts.

by a statutory framework that treats lawyers and non-lawyers who are undertaking the same activity differently. Although only a narrow range of services are considered sufficiently 'high risk' to the public and are reserved for lawyers, the current rules regulate all legal services provided by lawyers. This approach imposes regulatory costs on lawyers in areas where the risks of public harm are small, where there may not be a compelling public policy interest for regulation, and where they will face competition from unregulated providers.

In the discussion document we identified three potential areas of heightened risk to consumers:

- 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 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.

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.

Options considered

Through our consultation document we sought feedback from submitters on four high-level options for addressing the scope of regulation of legal services:

1. **No change**
2. **Tailor the scope of the current regulatory framework** by either:
   a) extending the scope of reserved areas – 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

   b) limiting the regulation of lawyers – 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.

As occupational regulation is designed to protect the public from the risk of harm, we also sought views on whether the nature of regulatory obligations should more clearly vary depending on the degree of risk to the public interest or to consumers. We noted, for example, that in-house lawyers, as a category of lawyers, are considerably less likely to generate complaints to the Law Society.

Submitters' views on the scope of regulation

The views of submitters were generally mixed on the question whether the 'reserved areas' for lawyers are accurately defined: 39 per cent of survey respondents thought a change to reserved areas for lawyers is required (although views were split between those wanting the areas reserved for lawyers to be narrowed and those wanting them broadened), with 27 per cent submitting that no changes are required.

There was, however, a much clearer view that regulation should capture those who provide legal services more generally, rather than just lawyers. 58 per cent agreed there is a case to expand the scope of regulation, while only 21 per cent disagreed. It is worth noting here that most respondents were lawyers, so some respondents may be expressing a view that their competitors should be regulated, rather than that the status quo is causing consumer harm.

Submitters' views on the case for changing the scope of regulation

Many submitters calling for change in the scope of regulation did so by highlighting the poor consumer outcomes from unregulated legal services providers. They acknowledged that regulating non-lawyers would likely increase costs to clients, but considered this to be justified by the need to provide consumers with an effective remedy when something goes wrong.

The most common example of consumer harm from unregulated providers of legal services involved employment advocates. Under the Employment Relations Act 2000 employees and employers are able to choose any person to represent them before the Employment Relations Authority (the Authority) or the court.[203] Part of the rationale appears to have been for "the Authority to be an accessible forum for parties (of varying financial means, capabilities and resources) to bring their employment issues to it for speedy, non-technical, pragmatic resolution".[204]

We heard of cases where employment advocates were able to exploit or disadvantage vulnerable clients seeking representation. As highlighted in recent media stories, examples include inadequate service, overcharging, and creating delay within the Authority and the courts.[205] One submitter noted:

> Currently there are no professional obligations on advocates nor is there any avenue to complain about their conduct. I have had experience with an advocate on the other side of proceedings whose conduct would at least have been misconduct, if not serious misconduct, if they were a lawyer. They are performing what otherwise would be a reserved area of work and so should have the same professional obligations as lawyers.

The Employment Law Institute of New Zealand submitted that regulation is needed for all non-lawyer representatives, investigators, advocates and mediators operating a business within the employment jurisdiction. The Institute did not recommend bringing these employment professionals within the scope of regulation applying to lawyers, preferring that MBIE or the Ministry of Justice create a new regulatory framework based upon the tiered model that applies to Immigration Advisors.

Concerns were also raised about the lack of regulation for paid McKenzie Friends, insurance advocates, ACC advocates, environmental advisors, insolvency practitioners and education advisors.

203 Employment Relations Act 2000, s 236(1).

204 *Dollar King Ltd v Jun* [2020] NZEmpC 91, (2020) 17 NZELR 495 at [8].

205 See Diana Clement "Employment advocates: dangerously incompetent or access-to-justice warriors?" (2022) 13 LawNews 8; and Jean Bell "Legal profession groups push for employment advocate regulation" (26 April 2022) Newsroom <www.newsroom.co.nz>.

We also heard from submitters that regulation should focus on the activity being undertaken, rather than who is undertaking it. Some suggested we look at the health professions as an example of how those who provide health services are regulated, rather than just those with professional qualifications or a protected title.

Many noted that the development of technology and growth in artificial intelligence (so-called 'Legal Tech') will further expand the market for unregulated services. For example, lawyers are already being displaced as technology and automation provide low-cost and timely legal services in areas such as document drafting and review, with consumers in New Zealand able to complete online legal documents, such as wills, deeds and relationship property or separation agreements. Increased availability of legal information at low cost, growing use of AI, and digital analysis initiatives all have the potential to benefit consumers but may also increase their vulnerability. These technology trends may mean the current focus on regulating lawyers (rather than activities) becomes increasingly irrelevant from a consumer protection viewpoint.

The New Zealand Institute of Legal Executives highlighted that the Act regulates the activities of individuals who are employed by lawyers. By virtue of sections 11 and 14 of the Act, employees of lawyers are subject to the same minimum standards, regulatory oversight and complaints service as lawyers – but they do not have any recognition, representation or formal status under the Act. It was submitted the Act needs updating to provide for statutory recognition of these employees and enable more tailored regulation.

Submitters' views against changing the scope of regulation

Many of those who submitted against changing either the scope of reserved services, or the legal service providers that should be regulated, stated that there is no compelling evidence to justify wholesale changes to the status quo.

Citizens Advice Bureau submitted that, unlike when they were previously calling for the regulation of immigration advisors, their networks have not identified any evidence of widespread problems with unregulated providers of legal services. This mirrored information we received from the Commerce Commission. Over the past three years the Commission has received 25 complaints about legal service providers – only four have been consumers complaining about the activities of non-lawyer individuals, such as employment advocates.[206]

Both Citizens Advice Bureau and the Community Law Centres noted that, while extending regulation may be motivated by a desire to protect consumers, it could end up having a particularly detrimental impact for consumers by limiting access to legal services for those who need it most. Citizens Advice Bureau submitted:

> We are concerned about the potential to over-regulate and further reduce access to justice – something that is already out of the reach of most people. Regulation can protect people against potential harm from legal service providers, but it can also add costs, limit options, stifle innovation, and give rise to other unintended consequences.

We also heard from submitters who thought that many consumers are aware they are engaging a non-lawyer and freely choose to do so. Lawyer Chris Browne submitted:

> Consumers of legal services who choose to engage non-lawyers may commonly be aware of the increased risks but may have decided to prioritise something other than risk reduction in making their decisions, probably related to cost and accessibility

206 Information obtained under the Official Information Act 1982. An additional two complaints about advocates were made by lawyers.

> of services from a professional. On balance, I favour consumers being able to make that choice rather than forcing them either to use regulated practitioners or to go without legal services.

Those opposing any change to the current regulatory focus on lawyers also considered it to be impractical to create an overarching framework to regulate all providers of legal services. It was suggested that, rather than revising the regulatory framework for lawyers, a more effective response would be for the government to address any specific concerns by developing bespoke regulatory arrangements for those providers, as occurred with immigration advisors.

Overseas approaches to the regulation of legal services

New Zealand is within the mainstream internationally in regulating lawyers rather than all providers of legal services. The services that the Act exclusively reserves for lawyers, although narrower than in many countries, is also comfortably within the norm of approaches taken overseas.[207]

It is worth noting that in England and Wales there have recently been calls to move away from a regulatory focus on lawyers. Both the Competition and Markets Authority[208] and a recent independent review[209] have outlined concerns with the way legal services regulation focuses on professional titles and reserved activities, rather than the risk profile of the activities being undertaken. The Competition and Markets Authority 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.

However, we are not aware of any developed jurisdiction that has moved to regulate all providers of legal services.

Recommendation: maintain the current scope of regulation

On balance, we conclude that there is no compelling reason to change the scope of regulation as it currently applies to lawyers and legal services, both in terms of the areas reserved for lawyers and bringing non-lawyers within the existing regulatory framework.

We have some sympathy for the view that the rationale for the current approach to regulating lawyers is not entirely coherent. If one accepts that various professional rules can be justified for lawyers based on the public interest of protecting consumers, then shouldn't these same rules (and regulatory costs) apply to non-lawyers providing exactly the same service? Isn't the narrow regulatory focus on those who call themselves 'lawyers' becoming out of date in some areas where there is direct competition between lawyers and non-lawyers (such as employment advocacy) or between lawyers and legal technology services or overseas firms?

Insufficient evidence of harm to bring non-lawyers within the scope of regulation

Our consultation did not identify any examples of widespread consumer harm arising from unregulated legal service providers that might justify the costs of bringing non-lawyers within the same regulatory framework as lawyers. The one topic that generated the most concern was employment advocates. We are satisfied that, should government consider options for regulating these or other professions, there are likely to be more suitable (and lighter-touch) methods for

207 A summary of the different approaches taken internationally can be found in Sapere Research Group "International comparison of regulatory frameworks for solicitors: A working paper" (June 2022). The working papers are accessible via <www.legalframeworkreview.org.nz/independent-legal-review-resources/>.

208 United Kingdom Competition and Markets Authority *Review of the legal services market study in England and Wales: An assessment of the implementation and impact of the CMA's market study recommendations* (17 December 2020).

209 Mayson, above n 113.

doing so than extending the scope of regulation currently applied to lawyers.

We are also satisfied there are no strong policy reasons for revisiting the current scope of areas of legal work that are reserved solely for lawyers. The reserved work is minimal and is targeted at a specific area (litigation-related activity) where there is a clear public interest in maintaining high standards of competence in order to uphold the administration of justice and efficient operation of the courts. By reserving only a small area of work for lawyers, the Act strikes an appropriate balance by allowing other providers of legal services to compete with lawyers in non-reserved areas.

We are also conscious that one of the many reasons people choose alternative providers of legal services is because they are more affordable. Many consumers will happily prioritise these financial benefits over the higher levels of protection available when consulting a lawyer.

Lawyers face regulatory costs and responsibilities that non-lawyers do not, such as the need to adhere to the Conduct and Client Care Rules. However, receiving a practising certificate also confers significant commercial benefits that are not available to non-lawyers, including from clients seeking the protection that accompanies legal professional privilege, the commercial advantages and status of being able to use ‘exclusive’ professional titles, and the ability to provide services within reserved areas.

In light of these benefits and the lack of demonstrable harm from the current arrangements, there is no compelling case for revisiting the current scope of regulation for lawyers.

The regulatory framework can appropriately deal with Legal Tech issues

Technology will continue to disrupt the delivery of legal services. This includes by changing the way that lawyers work and provide services, improving consumers’ access to legal services and making it easier for non-lawyers to offer legal services.

We have not identified any issues resulting from changes in technology that require a wholesale reconsideration of how legal services are regulated in New Zealand.

The current framework is technology-agnostic and appropriately restricts the provision of services in areas where there is the greatest risk of harm to consumers and the public (the reserved areas). Non-lawyers are prohibited from providing services in the reserved areas, but are free to offer other legal services to consumers – and to utilise Legal Tech to do so. Similarly, a lawyer providing regulated services will be subject to regulatory oversight regardless of the technology they use.

It is important that regulation continues to protect consumers without placing artificial barriers to the adoption of new technology. The current framework is sufficiently flexible to achieve this goal.

No need to create ‘lighter touch’ regulation for in-house lawyers

It is also worth documenting that we initially considered, but ultimately discounted, the possibility that in-house lawyers should face ‘lighter touch’ regulation due to the lower risk of consumer harm.

We received several submissions that argued in-house lawyers should continue to be regulated in the same way as other lawyers. The Government Legal Network noted that creating different tiers of lawyers could undermine the perceived value of in-house lawyers to their employers. In-house lawyers are subject to the same fundamental obligations as all lawyers and the same requirement to provide independent advice, notwithstanding the duties owed to their employer through their employment. Their employers value the ability to seek frank advice knowing it is protected by legal professional privilege and in-house lawyers value the independence that comes from being subject to the fundamental obligations.

Although we do not consider there is a need to create lighter-touch regulatory obligations for lower-risk categories of lawyers, there may be a case to explore the use of differentiated practising

fees. This is something that the Victorian Legal Services Board & Commissioner has adopted, with nine different fee categories for lawyers.[210]

Statutory recognition for the regulation of Legal Executives and other employees

The Act indirectly regulates lawyers' employees by allowing Standards Committees to investigate complaints and impose sanctions where the conduct of those employees falls below that expected of lawyers in the same situation.[211] Over the past five years Standards Committees have considered over 200 complaints about non-lawyer employees.

There are quite possibly thousands of employees – ranging from Legal Executives / paralegals through to office support staff and administrators – who are oblivious to the fact they could be held accountable by the regulator of lawyers for their actions both within and outside the workplace. They would likely be surprised to know that the standard of behaviour expected of them is that of a qualified and practising lawyer.

The regulation of lawyers' employees could be done in a more proportionate and transparent manner. The Act should grant the regulator the power to tailor regulations governing the behaviour of employees. This would allow regulations to more appropriately reflect the different roles and levels of experience of employees within a workplace and would clarify regulatory expectations of those employees.

A more flexible, 'freelance lawyer' model

Under the current regulatory framework a lawyer can either be an employed lawyer (ie, within a law firm or as an in-house lawyer) or practise on their own account (typically as a partner in a firm, a sole practitioner or a barrister).

Lawyers must be qualified to practise on their own account if they wish to operate as a sole practitioner, become a barrister or partner in a law firm, become a director/shareholder of an incorporated law firm, operate as an in-house lawyer who wishes to enter into a contract for services with a non-lawyer, or as a consultant who wishes to contract with a party to provide regulated services.

The requirements to practise on your own account

The Act requires lawyers wanting to practise on their own account to meet the requirements set by the Law Society.[212] A lawyer seeking to practise without supervision requires the prior approval of the Law Society,[213] which is dependent on the applicant:

- completing the 'Stepping Up' course,[214] run by NZLS CLE Ltd five times a year at a cost of approximately $1,690. The course requires approximately 50 hours of self-directed distance learning and a two and a half day workshop.[215]
- having a minimum of 4,830 hours of relevant legal experience across at least three of the past five years. If this requirement is not met, an application can only be approved if the Law Society is satisfied that "special circumstances apply".[216]

210 The Law Society already differentiates lawyers practising on their own account with a trust account from lawyers practising on their own account without a trust account, requiring the former group to pay a contribution to the Fidelity Fund.

211 Lawyers and Conveyancers Act, ss 11 and 14.

212 Section 30(1); and Lawyers and Conveyancers Act (Lawyers: Practice Rules) Regulations 2008, reg 12.

213 The application fee is $275.

214 An approved course under Lawyers and Conveyancers Act (Lawyers: Practice Rules) Regulations, reg 12(4).

215 There are a limited number of workshops. In 2023 workshops will be held twice in Auckland, once in Christchurch, once in Wellington and once online.

216 Lawyers and Conveyancers Act (Lawyers: Practice Rules) Regulations, reg 12A(2A).

- having their name advertised on the Law Society website for a period of time requesting comments regarding the suitability of the individual in question to practise on their own account
- providing the Law Society with at least two employer references for each intended area of practice (references expire after three months)
- providing the Law Society with a business plan
- undergoing a panel interview with two senior legal practitioners appointed by the local branch of the Law Society (unless the applicant is in a firm with five or more partners).

Once a lawyer has completed the Stepping Up course, their submission to the Law Society takes approximately 6–8 weeks to be processed. If an application is referred to the Practice Approval Committee, more time is required.

Table 9: One example of a plausible timeframe for a lawyer wanting to practise on own account

In this stylised scenario, an employed lawyer offered an opportunity in late October 2022 to do a short-term contract for in-house services would face at least a six-month wait before they could start their new role:

- A lawyer offered a new role in October 2022 would miss the one-month cut-off date for applying to the November 2022 Stepping Up Course.
- To attend the next Stepping Up course they would need to travel to Auckland in March 2023.
- Following the completion of the course, the lawyer would submit an application to the Law Society and complete the interview. Based on Law Society guidance, the earliest they could expect to receive a decision would be between late April and early May 2023.
- If the lawyer has not met the required minimum amount of recent legal experience they need to go through the additional 'special circumstances' step, which could delay their application further.

The practising on own account requirements need to change

The current rules for lawyers to practise on their own account are overly prescriptive, limit innovation and competition in the delivery of legal services, and impose a 'one size fits all' approach in circumstances where the risk of consumer harm is minimal.

Practising on own account rules adversely affect those returning to the workforce

As discussed in chapter 4, the 'hours worked' threshold to be eligible to become a sole practitioner (or partner) sets too high a bar[217] for those who have been working part-time or have been on parental leave. The current rules unjustifiably equate hours worked to competence.

More equitable rules are required to better reflect modern working conditions. There should not be an expectation that competent lawyers have to work in full-time paid employment as a lawyer to be able to progress their career.

It is no answer to say that lawyers adversely affected by this rule can always apply to the Law Society for a 'special circumstances' exemption. Requiring highly competent lawyers to apply for

217 Requiring a lawyer to have worked the equivalent of over two and a half years full-time in the preceding five years. Those who can't meet this threshold have to convince the Law Society that 'special circumstances apply': Lawyers and Conveyancers Act (Lawyers: Practice Rules) Regulations 2008, reg 12A(2A).

a dispensation from the rules because they have stopped working for several years (or worked reduced hours) is paternalistic. The public interest in assuring the competence of lawyers returning to practise does not require such a prescriptive, inflexible 'hours worked' threshold. The current rules also generate considerable uncertainty and unnecessary stress for lawyers as to whether their application will be successful. Lawyers must first incur the not-insignificant financial and other costs of completing Stepping Up before seeking approval from the Law Society on 'special circumstances' grounds.

The rules prohibit contracting, limiting competition and innovation

The current requirement that lawyers must either be an employed lawyer or a sole practitioner effectively bars lawyers from doing flexible contract work. The impact of this is felt most acutely by those who are unwilling to make the commitment to become a sole practitioner, but who are highly competent in their fields and want the ability to work only a day or two a week or would be tempted to re-enter the workforce to help former clients with a small project.

We heard that the restriction on more flexible work arrangements disproportionately affects women and creates a barrier to participating effectively in the workforce. A joint submission from lawyers Sophie Gladwell, Julia Batchelor-Smith and Arla Kerr noted:

> For many women, [contracting] allows them a realistic pathway back to the profession following (multiple) stints of parental leave. Ultimately it allows them fulfilling flexible (and/or part-time) work that allows them to manage the demands of family life (school holidays etc).

It is not difficult to envisage how the current rules fail to meet the needs of lawyers and clients, and negatively impact diversity in the legal profession. For example, a former employed lawyer who has taken a career break or who is on parental leave and considering re-entering the workforce might be the perfect candidate to do a short-term project for a former client that only requires a few hours' work a day over a short period. Yet the client is barred from using that lawyer unless they choose to employ them directly (which many firms may not wish to do) or unless the lawyer goes through the rigorous process of becoming a sole practitioner or chooses to provide legal services without a practising certificate (with consequent restrictions).

Clients also want more flexibility. This is apparent from the growth of innovative 'NewLaw' firms that are setting themselves up solely to meet the demand from consumers and lawyers for new working arrangements. An increasing number of firms employ lawyers and then second them directly to companies, effectively offering on-demand in-house legal services. The lawyers in these roles are for all intents and purposes able to act without any direct legal supervision in their roles, which highlights the inadequacy and/or the inappropriateness of the current rules.

One submission highlighted the example of a business wanting to work with lawyers on a contract basis, rather than employ them. Due to the high requirements to become a sole practitioner, the individuals in question chose not to renew their practising certificates in order to do the contract work:

> [We] contracted three female lawyers, all have young families, all work part-time, flexibly (the hours that suit them) and remotely from around NZ. The firm undertakes project-based work, and our workload fluctuates – so it works for both the firm and contractors to have them contract. However, they cannot hold practising certificates. They are called "legal assistants" and have to limit the work they do for us. All of these women are skilled lawyers, and have 6+ years legal experience – so this is

> demeaning. This is their first role following parental leave. Several of them did not contemplate returning to the law.

Rather than encourage firms and lawyers to use intermediary firms or to forgo practising certificates in order to work flexibly, the rules need to be amended to reflect the reality that many highly competent lawyers are capable of providing legal services directly to clients without having to become a sole practitioner.

The rules do not take account of circumstances where there is minimal risk of consumer harm

The process of becoming a sole practitioner is lengthy, somewhat onerous and clearly targeted at training those who might be operating their own practice or have access to client funds. The rules are applied universally, regardless of the nature of the services that a lawyer may want to provide.

A lawyer does not necessarily pose risks to consumers simply because they are not directly supervised by an employer. It is the nature of the legal activities that creates the risks to consumers. The highest risk areas relate to the provision of reserved services (court-based work) and operating trust accounts. Requiring lawyers to seek prior authorisation before they provide unreserved services without supervision seems a disproportionate way to manage the risks lawyers pose to consumers – particularly when non-lawyers can already provide those same services without any regulatory requirements.

For example, a previously employed lawyer who wants to do a three-month contract with a government department is required to do the Stepping Up course, submit a business plan to the Law Society and face an interview panel where they will be questioned over their competence, business model and financial security. This lawyer faces the same regulatory hurdles as a lawyer who is setting up their own practice where they will employ staff, handle client funds and undertake court work.

It is an anomaly of the regulatory framework that all lawyers are permitted to provide in-house services, where they can act as a general counsel to the largest businesses in the country without supervision; but that lawyers are prohibited from doing a short-term (non-employed) contracting role for that same business without, effectively, seeking prior approval from the regulator.

Recommendation: permit a new 'freelance' practising model

Requiring lawyers to make a binary choice between being an employed lawyer or a sole practitioner is an outdated regulatory requirement that is failing both consumers and lawyers.

Lawyers should be permitted to provide legal services directly to the public without requiring prior approval as a sole practitioner, provided:

- their practice consists entirely of activities that are not in reserved areas of work
- they practise on their own and do not employ anyone else in connection with providing regulated services
- they practise in their own name (not through a firm or partnership)
- they are engaged by clients directly (no intermediary), and
- they do not handle client funds.

Lawyers operating under this 'freelance' model should not be required to seek prior authorisation from the regulator before providing services to the public. They would still be subject to the usual obligations of all practising lawyers, including the fundamental obligations and Rules of Conduct and Client Care.

The freelance model in England and Wales is a useful example

Such a development would mirror the 'freelance' lawyer model introduced in England and Wales in 2019.[218] The Solicitors Regulation Authority described this model to us as a valuable means of introducing flexibility into the market and encouraging diversity. Liberalising the rules on who can provide non-reserved services was seen as supportive of parents returning to the workforce, retirees wanting to provide services to former clients, and in-house lawyers who want to do short-term contract work or temporarily work on their own account.

A recent survey in England and Wales highlighted the degree to which this change has been welcomed by the legal profession.[219] Although only 1 per cent of the profession has adopted the model, 54 per cent of practising solicitors reported that the reform had provided them with more flexibility about how they work. Of particular relevance:

- Freelance solicitors were much less likely to be white (72 per cent) compared with the profession as a whole (83 per cent). Black solicitors comprised 3 per cent of solicitors in England and Wales, but comprised 8 per cent of freelancers.
- 58 per cent of freelance solicitors provided services to the public, with the remainder working directly for businesses, charities, and public bodies.
- The primary motivation of those becoming a freelance solicitor related to how they could operate: they wanted a better work-life balance, the ability to practise flexibly and more independence.
- The freelance model was perceived as directly benefiting clients. The benefits include providing easier access to a solicitor, clients having greater protections than if they had used a non-lawyer, and lower fees than using a law firm.

There is no evidence this new model has led to consumer harm in England and Wales. Freelance solicitors are exempt from a requirement to hold professional indemnity insurance, which reflects the lower risk to consumers from the provision of non-reserved legal services. From November 2019 to March 2021 the Solicitors Regulation Authority received only one complaint that was possibly connected to the freelance status of a solicitor.[220]

The Solicitors Regulation Authority also introduced a freelance model for reserved services, which had additional prerequisites, such as minimum post-qualification experience and a requirement for indemnity insurance. As New Zealand's reserved areas are already very narrow compared to England and Wales, we are not convinced that there is a need at this point in time to make such a change.

Such a change would be a significant and positive development

Non-reserved legal services (eg, legal advice, will drafting, contracts) can currently be provided by non-lawyers. It is a disproportionate burden to require all lawyers wanting to provide those services to get prior approval from the regulator simply because they wish to work by themselves and without supervision.

There is minimal risk to the public if a lawyer's practice consists entirely of providing non-reserved legal services, they do not employ staff, and they do not handle clients' funds. In such circumstances lawyers should be able to operate without needing a stamp of approval from the regulator.

Lawyers want more flexibility in the way they can provide legal services. This change would mean

218 Solicitors Regulation Authority *SRA Authorisation of Individuals Regulations* (30 May 2018), reg 10.2(a). See Solicitors Regulation Authority "Preparing to become a sole practitioner or an SRA-regulated freelance solicitor" (25 November 2019) <www.sra.org.uk>.

219 Centre for Strategy & Evaluation Services *Standards and Regulations – one year evaluation of SRA reforms: Final Report, A Report to the Solicitors Regulation Authority* (December 2021).

220 Centre for Strategy & Evaluation Services, above n 219.

that lawyers who want to work by themselves to provide low-risk legal services will no longer be compelled to attend a course, develop a business plan, be scrutinised through an interview, and seek approval from the regulator. It would also provide an alternative model for lawyers who do not want to work within a traditional legal firm. The experience in England and Wales shows that this new way of working is attracting lawyers from ethnic minority groups, who are more likely to experience discrimination within a law firm.

This change would also make it much easier for lawyers to do short-term contract work and lower the barriers for lawyers to re-enter the workforce.[221] There would no longer be any need for lawyers in New Zealand to have to 'circumvent' the practising rules by using intermediary firms to do the work that both they and their client want them to do. It would make the market for legal services more responsive to the needs of clients by removing the unnecessary delays of lawyers having to go through the sole practitioner approval process.

A more agile and adaptable profession would also benefit consumers. The pool of lawyers from whom consumers can seek advice would be enlarged, making it easier to access services at a lower cost. Businesses reluctant to employ a new in-house lawyer could benefit from being able to offer fixed-term contracts or retainers to lawyers who no longer need to go through the process to be approved as a sole practitioner. As observed in England and Wales, community groups and charities also benefit, particularly from lawyers re-entering the profession on a part-time or volunteer basis.

We accept that this would be a significant change to the current modes of practising law in Aotearoa. But we are confident it would be a positive change and would be welcomed by many in the profession and by consumers.[222]

Allowing employed lawyers to provide pro bono services

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 63 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.

The current restriction unduly restricts the activities of lawyers

As outlined in chapter 4, this restriction is a major issue for many lawyers. There is clearly enthusiasm from highly capable lawyers to do more to help people in their community facing legal challenges. 52 per cent of survey respondents to our consultation supported changes to encourage pro bono services, while 23 per cent disagreed. As one submitter commented:

> I have 20 years [post qualification experience], a General Counsel job title and an employer that would probably be supportive of me helping out charities that our business supports. However, under current pro bono rules I could not even review a basic contract off my own bat. It should be possible to put in place some sensible rule changes to permit more pro bono work being done.

We also heard that the current restrictions limit the willingness of some employed lawyers to become involved in governance or leadership of community groups, for fear that their views and

221 In chapter 11 we conclude there is also a case to remove the 'minimum hours worked' threshold for lawyers to practise on their own account more generally. This change will benefit those who do not want to adopt the proposed 'freelance' lawyer model – including those wanting to become partners or barristers, and those wanting to practise in reserved areas.

222 The issues relating to flexible working and the related untapped benefits, untapped talent and untapped market opportunities – and some of the solutions, including the 'freelance' model – are well traversed by Sarah Taylor *Valuing our lawyers: The untapped potential of flexible working in the New Zealand legal profession* (New Zealand Law Society, 2017).

advice might be construed as legal advice.

Most comparable jurisdictions allow employed lawyers to provide pro bono services and have put in place tailored and lighter-touch regulatory requirements to support this. For example, employed lawyers can provide pro bono services in Victoria, New South Wales, Queensland, Ireland and England and Wales.

Legislative change is required to remove the barrier to pro bono services

We recommend legislative changes to permit employed lawyers to provide free legal services outside the course of their employment.

The justification for the current restriction is that the risk of consumer harm is so substantial from lawyers providing unsupervised pro bono services, that all employed lawyers need to be prohibited from doing so. This blanket ban seems excessive. While there may be heightened risks to consumers in some situations, regulation can be used to mitigate those risks rather than having an outright prohibition.

The preceding section made the case that the risks to consumers from lawyers providing legal services in non-reserved areas are minimal, and certainly less than the risks to consumers from using unregulated legal service providers. We would support a similar approach to that articulated for the freelance lawyer model: all employed lawyers should be permitted to provide pro bono services to consumers provided the activities are in non-reserved areas, are provided at no cost, and the lawyer does not handle any client funds.

It is also important that this change does not require such lawyers to seek prior authorisation from the regulator or to satisfy the currently onerous requirements for lawyers to practise on their own account. It should be a permissive regime, with the regulator providing guidance to ensure professional standards are upheld.

It may be possible to expand this over time to permit employed lawyers to provide services in reserved areas subject to additional protections, such as requiring supervision by a lawyer approved to practise on their own account.

Permitting new business structures

The Act imposes two main restrictions on the business arrangements that can be used by lawyers:

1. The Act essentially prevents anyone other than actively involved lawyers from holding shares or being a director in an incorporated firm.[223]
2. The Act prohibits barristers and solicitors from entering into a partnership with a member of another profession, such as an accountant, while holding themselves out as a lawyer.[224]

These restrictions are given effect through the definition of misconduct, which makes it an offence for a lawyer to share income with non-lawyers from the provision of regulated services.[225]

Through our consultation document we sought views from submitters on whether the Act should permit non-lawyers to have an ownership and management interest in incorporated firms (a so-called 'Alternative Business Structure' or ABS) and whether lawyers should be able to enter into a partnership with non-lawyers (a 'Multi-Disciplinary Practice' or MDP).

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223 See the definition of 'incorporated law firm' in the Lawyers and Conveyancers Act, s 6. In narrow circumstances family members (as non-voting directors) and administrators of a deceased director's estate can have ownership rights.

224 The definition of 'misconduct' in the Act includes employed lawyers providing regulated services if they do so while employed by a partnership that is not comprised entirely of lawyers: s 9 (1)(b).

225 The definition of 'misconduct' in the Act includes any person (lawyer or incorporated law firm) sharing with any other person (not being a lawyer or incorporated law firm) the income from any business involving the provision of regulated services to the public: s 7(3).

The views of submitters on this topic were somewhat mixed. 42 per cent of survey respondents thought non-lawyers should be permitted to have an ownership interest in law firms (with 33 per cent opposing), while 42 per cent of respondents considered lawyers should be able to enter a partnership and share income with non-lawyers (with 43 per cent opposing).

The case for restricting the business form used by lawyers

These restrictions on business form are typically justified on the basis that lawyers' professional duties would otherwise risk being subordinated to the pursuit of profit or commercial considerations. The concern is that, in the absence of these restrictions, the profit-oriented motives of non-lawyer owners might undermine the professional responsibilities of lawyers within a firm – including their independence, their duty to the client, confidentiality obligations, and conflict-of-interest protections.

Submitters contended that liberalising ownership restrictions could give rise to situations where lawyers are pressured to divulge privileged material to non-lawyers within the firm or where lawyers are directed by non-lawyer employers to take steps that are not in a client's best interests. This was seen by many as a risk that could not be mitigated; consumers would ultimately suffer from any change in this area.

Those who favoured continuing these restrictions noted that relaxing these rules would introduce financial incentives for lawyers that would not necessarily align with their clients' interests:

> As lawyers, we are powerful already and to allow the above [change] will expose our clients to be persuaded towards non-lawyer businesses connected to their law firm such as real estate, accounting, investment, HR, marketing, insurance. Clients should have to go outside their law firm for these things. It helps ensure they are not conned into other ventures.

We also heard views that opening up the profession to outside investment would lead to the 'corporatisation' of the legal profession. Small law firms would be bought up by investors, while an increased focus on profit would result in lawyers competing with each other on price rather than professional standards and competence. As Sam Khalesi wrote, "We are a profession that holds ethics much higher than the need to make profits."[226]

Some submitters were concerned that changes in ownership rules would mean lawyers would no longer be central to the provision of legal services and have less control over the maintenance of standards within the profession. Lawyer Jonathan Gillard submitted:

> The practice of law and law firm ownership is an opportunity for persons from all walks of life to enter a profession and, if they choose, become an owner. The corporatisation of law firms with outside ownership is likely to result in the same outcome that has happened to optometrists, chemists, medical practices, with ownership being taken up by persons outside of the profession.

Submitters also outlined their concern that any change could enable disbarred lawyers to have an ownership interest in a law firm, where they could continue to work on legal matters and could direct junior lawyers to sign off on the advice.

226 Sam Khalesi "Lawyers urged to resist the corporatisation of their firms" (2022) 20 LawNews 3 at 4.

The case for broadening the permitted business structures

The arguments in favour of allowing non-lawyer ownership of law firms accept the potential for lawyers to face new conflicts of interests, but contend that these concerns can be managed through suitably targeted regulation rather than a complete prohibition on certain forms of corporate structure.

International literature supports the view that business restrictions are motivated less by a desire to protect clients than a desire to protect lawyers from competition. Such protectionism raises the cost of legal services while reducing their availability, stifles new start-ups and constrains competition. Constraints on corporate form also forgo the cost-reducing efficiencies of scale, technology, innovation and specialisation that could be expected were other business models available.

Submitters' views on the case for permitting Alternative Business Structures

A common theme of submissions in favour of liberalising the rules on alternative business structures was that the current rules result in poor outcomes for consumers.

A necessary corollary of preventing non-lawyers from investing in law firms is that law firms have limited means of accessing capital – they are effectively dependent on finding new lawyer-investors or they need to increase their debt. Lawyers submitted that the current options for raising capital are inefficient and that the ability to bring in investors would make it much easier to modernise a firm, expand operations (both in terms or staff and opening in new locations) or invest in new technology. These restrictions were identified by many as an impediment to firm growth and a 'hand-brake' on law firms' ability to make large-scale investments needed to better serve their clients.

We also heard that these restrictions were hindering the competitiveness of New Zealand law firms who look to offer cross-jurisdictional legal services for large clients. One law firm observed:

> Currently New Zealand law firms cannot become a fully and financially integrated part of any international law-firms which are outside the jurisdiction. The result is that New Zealand law firms are handicapped in meaningfully engaging with, and becoming part of, the modern global legal profession, despite clients frequently seeking services which touch on a range of jurisdictions.

Submitters observed that bringing in outside capital can, with its associated oversight, bring a new rigour to decision-making and culture. Several submitters noted that the restrictions on corporate form encourage the predominant law-firm partnership structure, which contributes to poor wellbeing and diversity outcomes.

We heard that providing firms with flexibility in structuring would enable innovation and provide opportunities, especially to women and Māori, to practise law differently and in a way that suits them. Lawyer Helen Mackay submitted:

> The reality is that a model that does not allow modern business practices drives focus on short-term profits and therefore creates toxic cultures where people are squeezed for longer working hours to deliver on budgets and create maximum return for owners.

Submitters' views on the case for Multi-Disciplinary Practices

An MDP is a subset of an ABS and most of the arguments for and against ABSs are also relevant here.

Many submitters commented that allowing lawyers and non-lawyers to enter into partnerships together would promote innovation and competition in the market for legal services and provide greater access and more effective solutions for clients. Our discussions with lawyers also highlighted that many clients have 'problems' they need help with, not just 'legal problems' – in addition to legal advice, they may need accounting advice, regulatory advice, tax advice, business management and so on. Allowing MDPs to operate in New Zealand would enable the creation of 'one-stop shops' that are designed to provide a more user-friendly consumer service. EY Law submitted:

> The reality of today's market is that consumers are increasingly attracted to firms that can offer multi-disciplinary services delivered by members of several different professions and increasingly includes the use of innovation of processes and technology.

There is a growing trend, particularly among larger firms, for non-lawyers and lawyers to create complex business structures, with restricted ownership of law firms, in order to keep up with the professional demands by clients for multi-disciplinary services. The 'Big Four' accounting firms are moving to provide legal services in New Zealand, but are doing so through highly convoluted corporate structures that are simply not practical for the traditional law firm.

The value that MDPs could provide to Māori was highlighted by Te Hunga Rōia Māori, who observed that MDPs could help address some access to justice issues while also being delivered through a single firm that could more easily meet the entire needs of consumers:

> For example, we note the success that iwi and urban Māori organisations have had in supporting the delivery of social services to a range of communities that might not otherwise have access to those. There may be a case for the involvement of similar organisations in the delivery of legal support … Multi-disciplinary practices also have the potential to better reflect the delivery of legal services in a holistic way by including the ability to access financial, cultural, or even social service support.

Internationally, new business forms have not led to poor outcomes

The current restrictions were included in the Act because of considerable uncertainty as to how non-lawyers might influence the delivery of legal services and whether lawyers would be able to continue to act in their clients' best interests. However, advice at the time made clear that was never meant to be a permanent state of affairs:[227]

> The government has decided to take a cautious approach to multi-disciplinary practices because they may pose risks to the independent delivery of services in accordance with professional standards… The government will monitor developments in overseas jurisdictions that have allowed such practices, such as New South Wales and evaluate these in the future.

There are sufficient insights from overseas in the nearly 20 years since that statement to assess whether there is a case for change in Aotearoa New Zealand.

The reforms in the regulation of legal services in Victoria, New South Wales, Western Australia and England and Wales are at the forefront of changes to the way that corporate form within the

227 Memorandum from the Ministry of Justice to the Minister of Justice "Lawyers and Conveyancers Bill: Explanatory Material" (June 2003).

legal profession is regulated worldwide.[228] The impacts of the reforms in those jurisdictions are described in detail in a separate published working paper undertaken on behalf of the Panel.[229]

Australia has been at the forefront of allowing ABSs, with New South Wales authorising MDPs since 1994 and permitting non-lawyer investment in law firms since 2001. With the adoption of the Uniform Law, both Victoria and Western Australia have also permitted ABSs and MDPs. As with England and Wales, under the Uniform Law in Australia, both individuals and entities are regulated. This means that the legal regulators must give prior authorisation to ABSs/MDPs before they can operate.

With the availability of MDPs over the past 30 years and subsequent uptake of the models in both Victoria and Western Australia, it is reasonable to assume that the changes are seen as beneficial. Our discussions with the regulators in those states did not identify any concerns.

One Australian review in 2010 observed that, despite concerns that lawyers would put profit before their clients, that has not eventuated:[230]

> The perceived clash between duty to shareholder and duty to client has not, at this stage, given rise to the problems that such a duality might be expected to present. In fact, it seems to me that the commercial pressure brought to bear upon practitioners in a traditionally structured firm by large corporate clients to provide potentially ethically bankrupt advice in fact exceeds the pressure exerted by shareholders in search of the almighty dollar upon solicitor directors.

England and Wales provides useful insights into developments since ABSs (including MDPs) were first established in 2012:

- It is estimated over 1,400 ABSs have been licensed in the past decade, with ABSs now accounting for 1 in 10 regulated firms.[231]
- The UK Legal Consumer Panel concluded that "the dire predictions about a collapse in ethics and reduction in access to justice as a result of ABS have not materialised".[232]
- A review by the Legal Services Board in 2020 concluded that ABSs provide more choice for consumers by offering a broader range of services, facilitate access to legal services, are more innovative than traditional law firms, and have had no worse a disciplinary record than other types of law firms.[233]
- A review by Boston Consulting Group in 2021 was more nuanced, noting that the new corporate structure was useful to a sizeable share of law firms (with 10 per cent opting to use the model), that there had been no observable impact on competition, and that it had increased the scale and concentration of legal providers.[234]

A research paper from Stanford University explored the impact of ABSs in **Utah and Arizona**.[235]

228 Legislation in Scotland requires lawyers or named regulated professionals to own at least 51% of law firms. This restriction and the Law Society of Scotland's lack of progress in implementing the new ABS model was criticised in Esther Roberton's review of legal services regulation in Scotland: see Roberton, above n 89.

229 Sapere Research Group *Alternative business structures and multidisciplinary practices: A working paper* (February 2023). The working papers are accessible via <www.legalframeworkreview.org.nz/independent-legal-review-resources/>.

230 Steve Mark "The Corporatisation of Law Firms – Conflicts of interests for Publicly Listed Law Firms" (paper presented to the Australian Lawyers Alliance National Conference 2007, Sydney, 13 October 2007) at 13. See also Christine Parker, Tahlia Gordon and Steve Mark "Regulating Law Firm Ethics Management: An Empirical Assessment of an Innovation in Regulation of the Legal Profession in New South Wales" (2010) 37 Journal of Law and Society 466.

231 Christopher Decker *Reform and 'modernisation' of legal services in England and Wales: motivations, impacts and insights for the OECD PMR Indicators* (paper presented to OECD Workshop on Regulatory Barriers to Competition in Professional Services, University of Oxford, 18 November 2021).

232 Legal Services Consumer Panel *Consumer Impact Report 2014* (5 December 2014) at 15 as cited in Maya Steinitz "The Partnership Mystique: Law Firm Finance and Governance for the 21st Century American Law Firm" (2022) 63 Wm & Mary L Rev 939 at 999.

233 Legal Services Board *The State of Legal Services 2020: A reflection on ten years of regulation* (25 November 2020).

234 Boston Consulting Group *The Effects of Deregulating Legal Services in England and Wales* (March 2021).

235 David Freeman Engstrom and others *Legal Innovation After Reform: Evidence from Regulatory Change* (27 September 2022).

It noted the significant interest in the new models from law firms and observed that "reform efforts to this point do not appear to pose a substantial risk of consumer harm". An analysis of complaints data showed no difference in complaint volumes lodged against these entities compared with other more traditional business models.

Recommendation: permit new business structures

The current prohibitions in the Act on business structure should be removed and both ABSs and MDPs should be permitted.

In short, consumers of legal services will be better off if lawyers have the flexibility to choose the corporate form through which they provide services. By delaying the implementation of these models, consumers in New Zealand are being deprived of more comprehensive forms of service that can be found overseas.

The current restrictions on corporate form do not promote consumers' interests. The prohibition on ABSs and MDPs constrains the ability of law firms to grow and inhibits the ability of firms to innovate and evolve. As noted above, the restrictions are creating material barriers for those firms looking to access the outside capital typically used to make large-scale investments, such as in technology and new staff, and to set up in new regions around the country. The rules prohibiting lawyers from sharing income with non-lawyers also impact consumers by curtailing the ability of professionals to come together to offer a 'one stop shop' that meets clients' needs across a range of services.

We have identified no compelling public policy grounds for the retention of these restrictions on corporate form. An analysis of those jurisdictions that have permitted lawyers to operate in ABSs and MDPs indicates no consumer harm that can be traced back to these new business structures. In the absence of any problem that the current restrictions might be trying to address, and in light of clear evidence that restrictions are having a detrimental impact on lawyers and consumers, we consider that legislative reform is necessary.

The lessons from overseas provide assurance to those with concerns about the impact the change might have on the professional ethics of those working within these new corporate structures.

The details of regulation vary across the jurisdictions that have liberalised the regulation of corporate form, but there are some common features that we consider could be adopted here:[236]

- individual lawyers will continue to be regulated
- entities wishing to act as ABSs and/or MDPs are directly regulated:
    - they must be licensed by the regulator
    - they must have adequate governance and management systems in place to ensure that all legal services are provided in accordance with the law and professional conduct obligations
    - they must have at least one lawyer responsible for ensuring that all legal practitioners in the firm comply with all professional obligations and that legal services are provided in accordance with the law and with professional obligations.

Regulating law firms as well as lawyers

Regulation of the legal profession in New Zealand has traditionally focused on individual

236 See, for example, William D Henderson *Legal Market Landscape Report* (State Bar of California, July 2018) at 5–32; and Judith A McMorrow UK *Alternative Business Structures for Legal Practice: Emerging Models and Lessons for the US* (2016) 47 GJIL 665.

practitioners. The move by the Law Society in 2021[237] to require law practices (including barristers' chambers) to nominate a designated lawyer to report on specified 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. In the case of a regulatory sanction, the legal firm or practice can be held liable. Entity regulation typically involves setting outcomes for practices to achieve, rather than prescriptive rules, with regulators often focusing on ensuring firms have appropriate 'ethical infrastructure' in place to avoid serious or systematic issues from arising.

Having already recommended that ABSs and MDPs should be permitted, entity regulation of those new firms is also required (as recommended above). At issue here is whether entity regulation extends further to capture all incorporated law firms and legal practices.

Direct regulation of legal practices occurs in Australia (NSW, Victoria), Canada (Nova Scotia) and England and Wales, and is permitted by legislation in Scotland but has not yet come into effect. Under the Uniform Law in Australia, both individuals and entities are regulated, and the entity is prohibited from engaging in legal practice unless it is qualified.

The views of submitters on entity regulation

There was very strong support for direct regulation of entities through which lawyers provide regulated legal services, with 61 per cent of survey respondents supporting the proposal and only 18 per cent seeing no need.

Submitters noted that the current individualistic approach to accountability fails to recognise that individual behaviours can be reflective of wider culture issues. Sometimes an individual's ability to properly fulfil their professional obligations depends on the extent to which they are allowed to fulfil those obligations. We heard that the regulator should be able to make decisions that apply beyond the individual, eg, mandating changes in policies/practices in problematic workplaces, or fining a firm for systematic patterns of poor behaviour by its partners or staff.

There was a strong theme in many submissions that entity regulation would provide the regulator with an important tool to address some of the poor conduct and cultural issues that affect many lawyers. Through entity regulation firms would be strongly incentivised to put in place appropriate practices and processes, ensure responsibility for individual lawyer compliance is systematised and protect staff wellbeing.

The New Zealand Women's Law Journal submitted:

> NZLS should be able to directly regulate firms and entities where they have fallen below the standard expected of them. That may include bullying and sexual harassment conduct, but also how entities respond to complaints of misconduct, as well as employment practices which exploit staff …

Those opposed to entity regulation considered that the best way to incentivise behaviour is through individual professional responsibility. Some were concerned that focusing regulation on the entity might dilute individual responsibility. The recent requirement for law practices to designate a lawyer to report conduct issues to the regulator was thought by many to be sufficient to address any concern about the systemic issues that might arise within a firm.

237 See Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules, sch r 11.4.

Recommendation: introduce entity regulation

The introduction of entity regulation is a logical next step in the regulation of the legal profession in Aotearoa New Zealand.[238]

The traditional focus on regulating the individual lawyer has its roots in self-regulation and a focus on professionalism – lawyers were seen as independent actors to be held to account by their peers, while law firms were "functionally invisible to regulation".[239] However, there has been a trend of reform overseas in recent years to transform the regulation and delivery of legal services through a focus on consumer interests and competition.[240] These reforms recognise that the hierarchical relationships of employment have become significant in the delivery of legal services and that regulation of legal practices can be a tool to help improve outcomes for consumers.

The standards that the Solicitors Regulation Authority (SRA) has put in place for firms (including sole practices) in England and Wales are described as aiming "to create and maintain the right culture and environment for the delivery of competent and ethical legal services to clients".[241] For example, the SRA now has powers to act against firms who take "unfair advantage of clients", do not keep the affairs of clients confidential, do not ensure the service provided to clients is competent, do not safeguard the assets entrusted to them by clients, or unfairly discriminate in the way they provide their service.

Victoria, New South Wales and Western Australia have adopted entity regulation under the Legal Profession Uniform Law (the Uniform Law) and it has provided a valuable addition to their regulatory scope. Provided there are reasonable grounds to do so (based on the conduct of, or a complaint against, the law practice or one of its associates) regulators in these jurisdictions are able to use specific investigative powers to audit the law practice's compliance with any aspect of the Uniform Law, Uniform Rules made under that law or other professional obligations. The entity may then be given a 'management system direction' – with which it must comply – to ensure that it implements and maintains appropriate systems to enable it to provide legal services in accordance with the Uniform Law, Uniform Rules and other professional obligations. Combined, these compliance audit and management system direction powers give Uniform Law regulators a powerful tool to look into an entity's operations, and assist it to implement changes that may lead to a better consumer or employee experience.

We accept that entity regulation will impose compliance costs on practices to meet any new requirements and that these costs may affect smaller firms more. We consider that there will be an overall benefit from introducing entity regulation in New Zealand, since it will help entrench an ethical infrastructure within firms, bringing material benefits for clients, the public, and the legal profession. However, it will be important for the regulator to tread lightly in introducing entity regulation, so that costs are minimised and any new rules are clear, proportionate and not burdensome.

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238 Entity regulation would not capture firms where legal advice is provided in-house.

239 See, for example, Andrew Boon (ed) *International Perspectives on the Regulation of Lawyers and Legal Services* (Bloomsbury, London, 2017) at 20, 96 and 108.

240 Particularly in England & Wales, Scotland, Ireland and Australia.

241 Solicitors Regulation Authority *SRA Code of Conduct for Firms* (30 May 2018).

9. Quality care, information and competence assurance in a new regulatory model

This chapter examines how a new regulator should prioritise the interests of consumers, protect them from harm, support at-risk practitioners and have new powers to assure the competence of practitioners. It concludes:

- Changes are needed to promote consumers' interests and shift the current balance in the client-lawyer relationship, with an emphasis on consumers' rights to good-quality care and information, including about fees.
- The regulator should track client experience and consumer expectations, and prioritise consumers' interests in its regulatory strategy, informed by advice from a consumer panel.
- There should be a new focus on competence assurance in the regulatory framework for lawyers.
- The regulator needs to shift from reactively addressing competence issues through a disciplinary lens, to proactively identifying 'at-risk' lawyers and targeting support and resources to intervene before consumers are harmed.
- The regulator requires a broader set of tools to respond to risks of consumer harm in a timely manner and address competence and health concerns outside a fault-based disciplinary framework.
- A wholesale review of the CPD framework should examine whether to move away from a minimum annual hours requirement. In the interim:
  - self-paced learning (non-interactive and non-verifiable) CPD should be permitted
  - CPD should include a core of mandatory non-technical subject areas (not courses).

Prioritising the interest of consumers

More needs to be done to place consumers at the heart of the regulatory framework for legal services. We need to shift the current model away from its focus on reactively addressing individual breaches of professional standards, to a model where the regulator is empowered to promote and protect the interests of the public and consumers. As noted in chapter 7, a specific purpose of the new statute should be to promote good-quality care and information in the provision of legal services. The new regulator will have a specific objective of promoting and protecting the interests of consumers.

Why are these changes necessary? We take it as axiomatic that consumers are entitled to receive good-quality legal services delivered in a manner that meets their individual needs. Most clients probably do receive good service. Yet many clients feel in the dark about what their lawyer is doing and what fees are being incurred, despite the focus on client care and service information in the

Rules of Conduct and Client Care. The client-lawyer relationship stands in contrast to the changes that have occurred in the patient-doctor relationship in Aotearoa New Zealand in recent decades. There is no Code of Clients' Rights in this country, in contrast to the legally enforceable, highly visible Code of Patients' Rights,[242] in place since 1996.

Clients often find it difficult to assess the quality of services being provided, and may be reluctant to question their provider. Clients are all too aware that the clock is ticking and fees are mounting – though they seldom know how much until they receive an invoice. Clients often rely on advice from family and friends in choosing a lawyer, without any objective evidence of a lawyer's expertise and track record.

Revised rules, under a new regulatory framework, should support a consumer's right to be well informed at the start of an engagement, including about options, time frames and cost, and to be regularly updated on progress, fees and any unexpected issues. For many lawyers, this is already how they work, but the rules should ensure that a client's reasonable expectations are matched by professional duties. They need to go further than the current formulaic provision of standard information at the start of an engagement.[243]

Consumers want to able to access comparative information about legal services, practitioner experience and price. The regulator should encourage greater transparency on the part of lawyers and firms, to make it easier for consumers to choose a lawyer, and seek to remove market barriers to innovation and competition.

The regulator should track client experience and trends in what consumers want and how their needs are being met in the marketplace for legal services. A consumer panel or advisory group and an annual consumer survey would help the regulator understand and promote consumers' interests, in the way it regulates lawyers and firms. We note successful examples of this in England and Wales, where the Legal Services Consumer Panel provides independent advice to the Legal Services Board about the interests of legal services consumers and publishes annual Tracker Surveys on how consumers choose and use legal services; and Victoria, where the Legal Services Board & Commissioner is advised by a Consumer Panel, charged with finding out what consumers think, expect and need, and bringing consumer voices and experience to the Board and Commissioner.

A key job of any professional regulator is competence assurance: ensuring that licensed professionals remain competent and fit to practise. Public confidence in the regulatory framework will be bolstered by knowledge that the regulator is monitoring its data for warning signs, taking steps to prevent harm and checking that practitioners are up-to-date in their practice areas.

Clients need to know how to raise concerns and queries directly with their lawyer or firm and should be encouraged to do so. The lawyer and firm should be required to facilitate the fair and speedy resolution of the matter, using an independent mediator if necessary. For clients who remain dissatisfied, the regulatory scheme should also enable access to a fair, simple and efficient complaints resolution scheme.

The regulator should be able to demonstrate how it is pursuing its regulatory objectives. It should model openness and transparency in its regulatory decision-making. This will help build trust and confidence in the public and the profession.

The market for legal services in Aotearoa New Zealand is broad and diverse. It includes small rural practices through to large multi-national firms, lawyers working in-house, doing criminal legal aid work and those doing corporate and commercial law. The regulatory framework needs to be proportionate. Given a relatively small economy and legal services market, it is essential that

242 Health and Disability Commissioner (Code of Health and Disability Services Consumers' Rights) Regulations 1996.

243 As required by the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules, sch rr 3.4 and 3.5.

lawyers do not face unnecessary regulatory costs, which will ultimately be passed on to consumers.

The regulatory framework should give the regulator the full suite of tools it needs to target its interventions at the root causes of problems, taking a remedial approach, while responding firmly and promptly to conduct and disciplinary matters.

A reformed complaints system will be essential to the protection of consumers, to ensure that they can voice concerns (in the first instance with their provider) if they have questions or concerns about the services they have received, and to give them access to a responsive and efficient complaints scheme (which is not part of a combined regulator / representative body). We propose reform to the current complaints model in chapter 10.

A modern regulatory framework will build trust and confidence in the regulator, promote consumers' interests and help lawyers maintain high standards in their work. It will enable innovation, for example through the use of new technologies, and support the market for legal services to grow, while ensuring the interests of consumers remain to the fore.

Competence assurance

We see a need for a much stronger focus on competence assurance in the regulation of lawyers. This area is receiving significant attention internationally,[244] but the focus of regulation in New Zealand continues to be on CPD.

New Zealand does not have a process to ensure the competence of lawyers through the equivalent of a bar exam or solicitor's qualification exam that is a feature of many overseas jurisdictions.[245] We are not proposing such a change. However, we are concerned that once an individual has been admitted as a lawyer, the regulator's interest in professional competence is narrow and reactive: verifying whether lawyers have done their CPD, approving changes to practice status (such as practising on own account) and investigating complaints.

Consistent with international survey evidence,[246] most consumers assume that lawyers face regular checks on their competence throughout their careers, and believe that lawyers should have to demonstrate they remain competent to do their jobs. The public expects that holders of an annual practising certificate are competent.

Consumers may be surprised to know there is nothing preventing a lawyer from providing services in an area of the law they have never worked in before. For example, that a criminal defence lawyer might decide to hold themselves out as able to advise on Māori land law. It is only if something goes wrong that the regulator will examine whether the lawyer breached the Rules of Conduct and Client Care.

A comparison with the health professions in New Zealand is instructive. The title of the Health Practitioners *Competence Assurance* Act 2003 sends a clear signal of what the public has the right to expect from regulators. Health professional regulators may not register a health professional unless they are "competent to practise" within specified scopes of practice, nor issue an annual practising certificate "unless it is satisfied that the applicant meets the required standard of competence".[247]

The vast majority of the legal profession is highly competent and unlikely to have more than a minimal interaction with the regulator. To impose new competence obligations on the entire profession would be an undue burden.

244 Hook Tangaza *International Approaches to Ongoing Competence: A report for the LSB* (Legal Services Board, March 2021).

245 Lawyers in New Zealand must complete a professionals course.

246 Community Research *Ongoing Competence in Legal Services: Research into public attitudes* (Legal Services Board, July 2021).

247 Health Practitioners Competence Assurance Act, ss 15(1)(c) and 29(1).

However, there is a small minority of lawyers where the regulator could make a difference in protecting consumers. For example, fewer than 2 per cent of lawyers in New Zealand are responsible for generating 50 per cent of complaints to the regulator.[248] The current regulatory framework treats instances of poor conduct as if they are random events. They are not. Empirical research indicates there are common risk characteristics and population groups that represent the greatest risk to consumers.[249] Modern regulatory practice is increasingly looking to identify those groups so that regulators can target their scarce resources to have the biggest impact in protecting the public.[250]

A modern, risk-based regulator gathers and analyses relevant data and is able to identify potential issues of concern and develop risk profiles, to help target its resources. This might include using empirical research to identify the characteristics that may predispose a lawyer to misconduct, developing predictive tools to identify lawyers who would benefit from assistance, or even simply asking lawyers as part of CPD compliance to identify any heightened risk factors such as shifting their practice into new areas of the law. As outlined below, new regulatory powers will support the regulator to be more proactive in addressing consumer harm and building public confidence in the profession.

The regulator's powers

A modern professional regulator typically has broad powers to intervene in the public interest when it becomes aware of problems in a practitioner's practice, which may pose a risk of harm to consumers. The Act confers a number of powers on the Law Society, but it does not have the power to respond quickly when concerns arise with a practising lawyer.

At present the power to compel a lawyer to do something (eg, to undertake further training) sits with the 22 autonomous Standards Committees rather than the Law Society Executive. This decentralised authority can only be used if a Standards Committee first determines there has been unsatisfactory conduct or if the circumstances justify intervention in a legal practice to protect clients' funds.[251] The power to suspend or cancel a practising certificate lies with the Lawyers and Conveyancers Disciplinary Tribunal. There is no power for the regulator to require a lawyer to undergo a health assessment or competence review, or to undertake rehabilitative or remedial measures, as a means of addressing problems that do not merit a disciplinary response.

We sought feedback through our discussion document on whether the regulator required a broader set of regulatory tools outside of the disciplinary framework. In particular, we asked for views on whether the regulator should be able to address lower-level concerns (eg, mental health concerns, concerns about competence, inadequate supervision arrangements) before they give rise to concerns about fitness to practise and require a reactive disciplinary response.

Views of submitters on new regulatory powers

There was considerable support among submitters for giving the regulator additional regulatory tools. 45 per cent of survey respondents agreed new tools were required, with 18 per cent disagreeing.

Submitters observed that, outside of the disciplinary framework, the Law Society's ability to

248 Furthermore, 38 individuals have been the subject of more than five complaints within the past two years. Data provided by the Law Society. Not all complaint subjects are lawyers.

249 Tara Sklar and others "Vulnerability to legal misconduct: a profile of problem lawyers in Victoria, Australia" (2020) 27 International Journal of the Legal Profession 269; and Sklar and others, above n 77.

250 We acknowledge that the Law Society is moving in this direction, seeking to be a risk-based and responsive regulator: see New Zealand Law Society *Navigating Into The Future: Regulatory Strategy 2022-2025* (8 December 2022).

251 Lawyers and Conveyancers Act, ss 162, 163, 164 and 169..

address competence or behavioural concerns arises only during the narrow window each year when lawyers renew their practising certificate. The Law Society has power to refuse a practising certificate by taking into account whether, because of a mental or physical condition, the person is unable to perform the functions required to practise law.[252] However, concerns were raised about the Law Society's ability to respond in a timely fashion when issues such as cognitive impairment are raised.

> The Law Society became aware of a lawyer showing obvious signs of cognitive decline.
>
> The Law Society was not able to promptly restrict the lawyer's ability to practise law. In this case there was clear evidence of potentially serious harm to clients, which was sufficient to commence disciplinary inquiries. These took some time to work through, and in the meantime the lawyer was able to continue in practice.

Our discussions with Law Society staff highlighted that, even in instances where a lawyer has been convicted of fraud or become bankrupt, the Law Society has no power to act promptly to protect the public. As with all cases the Law Society must either initiate disciplinary proceedings and apply for a suspension or wait until the lawyer seeks to renew their practising certificate.

The Aotearoa Legal Workers' Union provided a detailed submission on the need for additional regulatory powers, as well as arguing for the Law Society to use its current powers more effectively – for example, through the Practice Approval Committee declining to renew a practising certificate where an applicant lawyer is awaiting a penalty decision from the LCDT following a finding of professional misconduct.[253]

We also received dozens of suggestions from submitters about additional powers the regulator should have. They are too numerous to list here, but the most common suggestions have been captured in the accompanying submissions analysis paper.

Recommendation: give the regulator new tools

The current regulatory tools are extremely limited and restrict the ability of the Law Society to effectively regulate the legal profession and protect consumers. Our specific concerns are that:

1. The Law Society Executive has limited power to deal with acute matters in a timely fashion, such as where there is a high likelihood of consumer harm occurring. Instead, a disciplinary process is required, which can take a considerable period of time as the complaint progresses through a Standards Committee and potentially the LCRO and/or the LCDT.
2. The powers available to Standards Committees exist within an adversarial disciplinary environment, which focuses on establishing whether there have been specific breaches of the Rules of Conduct and Client Care. Some matters, such as relating to age and health, would be better dealt with outside of a disciplinary/sanctions framework.

To support a more responsive regulatory framework we have identified a number of additional tools that the new regulator should be granted. They are summarised in Table 10 below:

252 Sections 41(2)(a) and 55(1)(l). See further discussion in chapter 11.

253 There are complexities around this. This would require the Practice Approval Committee and the LCDT to run parallel processes, with both seeking and reviewing similar evidence. It could also lead to situations where both bodies reach different conclusions on the same evidence.

Table 10: Recommended new regulatory tools

Recommended new tools for the regulator

1. The power to suspend a practising certificate (which is currently only a power of the LCDT) in cases where, pending the outcome of disciplinary process, the lawyer may pose a risk of serious harm to the public or to public confidence in the legal profession.
2. The power to require lawyers to take action without the need for a disciplinary or fault-based finding, in cases where concerns about an individual's fitness to practise arise:
   a) requiring a lawyer to undergo a health or competence review and comply with remedial measures (eg, rehabilitation, supervision, further training) in cases where concerns about a lawyer's fitness to practice arise (eg, if there are reasonable grounds for believing that a lawyer has a drug or alcohol problem, inadequate supervision, or exhibits a pattern of concerning behaviour)
   b) requiring a lawyer to undertake further training, even in a case where a complaint may not be upheld (if for example specific concerns are identified through a complaint).
3. The ability to undertake practice reviews to monitor lawyer and firm compliance with professional and ethical standards, in addition to the existing trust account powers.
4. The ability to impose bespoke conditions on a practising certificate (eg, to limit scopes of practice of a lawyer, to require a lawyer's work to be supervised).

A modern regulatory framework requires that the regulator has the tools to be able to regulate effectively in the public interest.

1. The power to suspend a practising certificate

While the LCDT remains the most appropriate forum to decide whether a lawyer is guilty of misconduct and should be suspended, it is an oddity of the current regime that the regulator has no ability to temporarily suspend a lawyer, even in the most compelling instances of ongoing consumer harm.[254]

An intrinsic part of a regulator's duty to protect the public is being able to respond promptly to address serious risks of harm. The regulator also needs to maintain public confidence in the regulatory framework and the regulated profession. In our view the new regulator should have the power to suspend a lawyer's practising certificate on narrow grounds – where, pending the outcome of a disciplinary process, the lawyer may pose a risk of serious harm to the public or to public confidence in the legal profession.

2. Directive powers to address competence and health concerns

As discussed further in chapter 10 the current disciplinary framework is not suitable for addressing many concerns about lawyers. It forces the regulator into a role where it can only react to complaints and has no power to proactively address low-level concerns before they become more significant.

Other New Zealand regulators, including health practitioner regulators such as the Medical Council,

254 A Standards Committee, not the Law Society Executive, can request an interim suspension pending the hearing of a case before the LCDT. Even then an interim suspension first requires the Standards Committee to make a determination the case should go to the LCDT, to formally lay a charge with the LCDT and to apply for an order of interim suspension.

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 a disciplinary focus and are both protective of consumers and supportive of practitioners. The Victorian Legal Services Board & Commissioner is another example of a regulator that can require further training without the lawyer necessarily being cautioned or reprimanded.[255]

We are satisfied that, in instances where the regulator has sufficient grounds to be concerned about the conduct or competence of a lawyer, it should be able to direct that lawyer to take certain steps. These powers should include rehabilitative measures (eg, alcohol addiction programmes), competence reviews and specific training requirements.

This should entail both proactive checks at the time of annual recertification of lawyers and reactive interventions when the regulator is alerted to concerns about material deficiencies in a lawyer's practice, or identifies a pattern of low-level shortcomings. Examples might include a lawyer being subject to several different complaints, even relatively minor ones; or information that a lawyer has moved into a new area of practice but has not provided evidence of upskilling or having suitable supervision arrangements. A risk-based regulator would review all relevant information as part of the process of recertifying a registrant as fit to practise. Subject to having reasonable grounds for the belief that concerns exist, the regulator should be able to require the lawyer to co-operate in enquiries as to their competence to perform the functions required to practise law.

3. Practice reviews

The Law Society has powers to inspect and intervene in a practice to ensure suitable arrangements are in place around the operation of trust funds. While an important function, this very narrow power appears to presuppose that it is only important to mitigate the potential financial harm that lawyers can cause clients through the loss of client funds.

We are satisfied that the regulator should have powers to undertake a review of how a lawyer and law firm practise, and to require the co-operation of lawyers in that review. This would likely be an infrequently used power, but is important to enable the regulator to address potential systemic failings within a law firm. It is also a complementary power that can be used to support the new focus on entity regulation.

4. A power to impose bespoke practising certificate conditions

The Law Society does not have any statutory authority to impose conditions on practising certificates.[256] To work around this restriction the Law Society (through the Practice Approval Committee) will sometimes ask lawyers to voluntarily agree to make undertakings as to how they will practise.

This undertakings power permits the Law Society to protect the public by influencing a lawyer's scope of practice. However, it is not appropriate that the process is dependent on the lawyer's prior consent or that the conditions can only be imposed through an application approval process.

The new regulator should have the power to impose bespoke conditions on a lawyer's practising certificate. This would enable it to address any concerns about a lawyer practising in areas where they have no knowledge or experience, or to address material concerns that remain as a result of a complaint or disciplinary finding. For example, a lawyer returning from suspension might be required to be under active supervision/mentoring for a period of time, or the regulator could limit the scope of a lawyer's practice if multiple complaints raise issues of concern.

255 See Victorian Legal Services Board & Commissioner *Policy – VLSBC – Compliance and Enforcement – LPUL Update* (22 June 2021).
256 The LCDT can impose conditions following a disciplinary hearing: Lawyers and Conveyancers Act, ss 41(2)(d) and 42(2).

The role of Continuing Professional Development

Lawyers appreciate the need to maintain and develop their skills, to meet their clients' needs and fulfil their professional obligations. Most lawyers are conscientious in keeping up to date with developments in the law. Regular education and training can help individuals maintain their competence and develop new skills.

A key means by which a regulator can check that a professional remains competent to practise is through a Continuing Professional Development (CPD) framework.

CPD encompasses a broad range of activities that enhance modern legal practice. As well as its traditional use to keep up to date with statutory and case law developments in one's areas of practice, CPD helps lawyers develop new skills in areas such as negotiation, communication, mediation, legal technology and practice management. Cultural competence is also an increasing area of focus. Many lawyers are keen to learn more about Te Tiriti, tikanga and te reo Māori. For lawyers serving in multicultural communities, learning about other cultures enhances their practice.

CPD cannot guarantee that lawyers will remain competent in their areas of practice. It is, however, an essential tool for supporting the profession to refresh their skills and knowledge, as well as maintaining public confidence in the legal profession. Some new CPD offerings are also helpful in supporting a more diverse and inclusive culture in the profession.

Current CPD requirements

Lawyers are subject to an ongoing obligation to "undertake the continuing education and professional development necessary to ensure an adequate level of knowledge and competence in his or her fields of practice".[257]

In addition, CPD rules prescribe that lawyers must have 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 linked to learning needs as contained in their CPD plan, provide an opportunity for interaction and feedback, attendance must be verifiable, and the activities cannot be part of a lawyer's usual day-to-day work.[258]

The current model of CPD was introduced after a careful consultative process in 2012. In its 2012 discussion paper, *A Proposed Scheme of Mandatory Continuing Professional Development*, the Law Society stated that the CPD scheme should:

- promote a culture of lifelong learning
- encourage lawyers to take responsibility for their own continuing professional development
- be flexible enough to allow all lawyers to complete their requirements regardless of their areas of practice, location and experience, and to take account of their preferred learning styles
- be cost-effective to administer and be affordable for both the regulator and individual lawyers
- provide a transparent accountability mechanism
- be reasonable and equitable in terms of the demands it places on lawyers.

These are worthy goals. The model adopted sought to achieve a balance between so-called 'input-based' CPD, and 'outcomes-based' reflective learning, which educational research indicates is better for learning.

257 Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules, sch r 3.9.
258 Schedule rule 3.1(b).

In July 2021 the CPD rules were amended to give the Law Society the power to specify mandatory components of CPD.[259] This power has yet to be used.

In our discussion document we noted that the CPD obligations on lawyers in New Zealand are typically less onerous than in most comparable jurisdictions, both in terms of the minimum 10-hour commitment and leaving the content of CPD entirely up to the discretion of the individual lawyer.[260] However, some international legal regulators are even less prescriptive than New Zealand. The SRA has moved away from prescriptive CPD requirements and now simply requires lawyers in England and Wales to maintain the competence needed to carry out their roles.

Is the 10-hour CPD requirement still appropriate?

There were mixed views from submitters on the suitability of the current 10-hour framework

We received mixed views on whether changes are needed to the current framework for CPD. 40 per cent of survey respondents considered there was a case for change, while 34 per cent disagreed.

The most common argument for changing the current CPD arrangements was that they do not ensure lawyers remain competent to serve the public. Many submitters observed that CPD is a compliance activity, with lawyers looking to meet the 10-hour obligation in the 'least painful way'. One submitter commented:

> CPD is an obligation. When CPD first became mandatory we were told that it was to be relevant to our areas of practice, now they have 'catch up' days which seem to be designed for participants to do any CPD at all, whether or not it is relevant. It would be far better to concentrate on assisting lawyers to develop their practice in their chosen field …

Those in favour of changing the current arrangements were split on whether the solution was to strengthen the hourly requirement or to move away from having a minimum number of CPD hours. There was recognition that the current 10-hour requirement is somewhat arbitrary and is unlikely to be sufficient for ensuring that lawyers remain competent:

> I'm not aware of evidence that links hours of CPD to the outcomes CPD usually seeks to achieve (eg, improved or continuing competence). I believe that hours (and other input focused systems) result in goal displacement and a CPD system would be better focused on an appropriate process – planning and reflecting. Even better, an evidence-based system focusing on peer input and review would be great.

Specific suggestions made by submitters for improving CPD, while retaining a minimum hours requirement, included:

- The development of a clearly defined competency framework by the regulator, that describes the core skills for practising lawyers, broken down by levels and expertise. This would allow lawyers to better target their learning activities.
- Allow for self-paced, non-interactive learning to count towards CPD. Many submitters noted that individual study and reflection (through recorded webinars, reading publications, online

259 Lawyers and Conveyancers Act (Lawyers: Ongoing Legal Education – Continuing Professional Development) Rules 2013, rule 4.1(b) (amended by Amendment Rules on 1 July 2021).

260 See Sapere Research Group Continuing professional development in the legal profession: a summary of international approaches – A working paper (June 2022). The working papers are accessible via <www.legalframeworkreview.org.nz/independent-legal-review-resources/>.

learning) can be just as effective, if not more effective, for lawyers wanting to improve their skills.

- CPD should be highly structured with mandatory components for junior lawyers in their first five years, with a focus on ethics, client communication, complaints handling, and practical workshops in their areas of practice.
- Important training should be made free or discounted to incentivise members to participate.
- Pro-rating hours for those working part-time (currently hours are only pro-rated for those who work part of a year).

We also heard from submitters who thought the current approach to CPD works well and is generally consistent with requirements imposed in other professions. Submitters noted a particular strength of the current CPD model to be the self-reflective component, which requires all lawyers to take some time each year to reflect on where they should target their learning. While 10 hours is seen as relatively light, many submitters noted that it is appropriate for busy lawyers who tend to improve their skills and learning through their day-to-day work.

Recommendation: review the 10-hour CPD requirement

Over time, lawyers will not adequately meet their clients' needs and fulfil their professional obligations without regularly assessing their personal learning and development needs and taking steps to address those needs. CPD, however it evolves, will always be a vital means for lawyers to remain competent and fit to practise. However, we are not convinced that a universal 10-hour annual CPD requirement is the most appropriate means of ensuring ongoing competence.

The requirement of 10 hours' CPD each year is a blunt instrument that is unlikely to be materially lifting competence within the profession. An individual lawyer's learning requirements will vary significantly throughout their career. It seems overly prescriptive to dictate that, regardless of their individual circumstances and skill levels, there is public benefit in compelling them to spend 10 hours on interactive and verifiable learning.

We observed a fair level of consensus that CPD has become a 'tick-box' exercise. There is no focus in the regulatory framework on whether the activities done by a lawyer are appropriate or of a high quality. We therefore have concerns that the current model for CPD imposes costs on the profession without any commensurate benefit.

We are attracted to the model introduced in England and Wales, which replaced similar minimum hours requirements. The Solicitors Regulation Authority has shifted its regulatory focus from verifying that CPD training has been undertaken to examining whether individuals are doing what is required to stay competent in their areas of practice.

Nevertheless, we do not propose removal of the requirement of 10 hours' CPD each year. Instead, we recommend that the regulator undertake a review of the CPD framework and examine in detail the impact of the changes in England and Wales, to consider whether there would be benefit in adopting a similar model here. We note that, internationally, the place of CPD in assuring ongoing competence, and the need to supplement it with other measures, is under review.[261]

We are also conscious that the minimum annual CPD requirement, while untargeted, does at least provide a focal point for ongoing learning. As a regulatory requirement it is also seen by employers as a reason for encouraging staff to attend training courses – and staff benefit from employer subsidies for such training.

Pending a full review of CPD, changes that could be made within the current framework include:

- Part of the 10-hour CPD requirement should be capable of being met through non-interactive

261 Hook Tangaza, above n 244, at pt 4 ("So what else is being done to try to improve Lawyer Competence?").

and non-verifiable learning, such as research, video training and peer review discussions with colleagues. Lawyers should be trusted to do self-paced learning. We do not consider that requiring all CPD to be interactive necessarily adds any value (given the test of being 'interactive' can be met by signing up for Zoom webinars and having the camera and sound off for the entire session).

- The regulator should explore developing a competency framework to help lawyers identify the skills and training they might require, as has been recommended in Victoria.[262]

Core mandatory components of CPD

Regardless of whether the 10-hour CPD requirement stays in place, we think the regulator could be more prescriptive in the areas that the profession should focus on. We do not think this should go as far as requiring all lawyers to do the same accredited training courses.

The Cartwright Report, the Bazley Report and Purea Nei all recognised the importance of education in changing the culture of the legal profession. The Cartwright Report recommended that CPD include a compulsory training component related to safe workplace culture, diversity and equality. We sought views from stakeholders on whether it should be mandatory for lawyers to undergo cultural competency training, anti-bullying and discrimination training, and/or training in any other areas.

Views on mandatory CPD components

There was some support from submitters for requiring mandatory training as part of CPD. 46 per cent of survey respondents supported the idea of mandatory training, while 35 per cent disagreed.

Submitters highlighted a number of areas where they considered the profession would benefit from mandatory training, including anti-bullying and discrimination, mental health and wellbeing, business guidance, management skills, technology, intersectionality and ethics. Requiring lawyers to upskill their cultural competence was one topic that generated particularly strong support. Te Hunga Rōia Māori submitted:

> Put simply, tikanga and te reo Māori are part of the law of Aotearoa New Zealand today. If a practitioner today does not have some knowledge of these they are failing to meet even their existing obligations to uphold the rule of law and to facilitate the administration of justice in New Zealand.

We heard from submitters that any mandatory courses would need to be widely available in different formats, at different times, and available to professionals at no, or very low, cost. Others favoured the Victorian approach whereby lawyers remain free to choose the individual courses they want, but that their CPD activities must cover specific mandated subject-matter areas.

Others expressed scepticism about the desirability of mandating CPD activities. Those opposing any mandatory CPD highlighted that a one-hour course on a subject such as unconscious bias, anti-bullying or cultural competence is unlikely to result in any behavioural changes or provide a meaningful understanding of a topic. Compelling people to take courses that seek to change their behaviour might have the opposite effect.

We also heard from those who thought that training is more effective when it is ongoing and that, rather than focusing on potential new one-off CPD activities, there should be an integrated and practical approach to topics such as cultural competence. If training is highly relevant, accessible, and supported by employers, lawyers are likely to enrol for the training that they need. Many lawyers are voluntarily upskilling in areas such as tikanga and learning te reo Māori, out of genuine

262 Chris Humphreys *Getting the Point? Review of Continuing Professional Development for Victorian Lawyers* (November 2020).

interest, to better serve Māori clients, and because they are keen to develop skills that give them an edge in a competitive market and enhance their CV.

Recommendation: include some mandatory components in CPD

CPD can play a role in changing the culture of a profession, as well as helping lawyers to reflect on gaps in their skills and knowledge. We are satisfied there is a case for the regulator to specify several core categories that lawyers need to do training in every three to five years.

Mandatory categories could be introduced on a rolling basis and include topics such as ethics, tikanga, te reo, mental health and wellbeing, unconscious bias, anti-bullying and harassment, practice management and cyber-security and technology.

These mandatory components would need to be introduced in a way that works for the profession, while still being meaningful in supporting lawyers. We are conscious that mandating lawyers to attend specific courses would be very costly (particularly as it would likely need to be made freely available and would increase the regulatory costs of monitoring and compliance) and that such an approach would not take into account the varying levels of existing knowledge of lawyers doing such a course.[263]

On this topic we agree with a recent review undertaken in Victoria, Australia:[264]

> Suggestions to the review for mandatory CPD activities have been treated cautiously, as the logistics of delivering programs for all of Victoria's 24,000 lawyers would be so large that there would be a significant risk that they would be poorly designed and targeted. They would be an inadequate substitute for a more comprehensive, integrated program of reform. There is much that can be achieved by active support for new and innovative approaches that provide better resources in problem areas and lift the bar of practice and expectations.

We see merit in the Victorian approach where the regulator specifies the core 'problem areas' for CPD, but lawyers are given flexibility as to the courses they choose to take. The regulator, representative bodies and legal education bodies can then tailor the development of courses to reflect the requirements on lawyers.

Admission to the legal profession

Finally, we observe that many of the powers through which a regulator influences competence within the profession are currently exercised by the independent Council of Legal Education. Our terms of reference exclude us from examining changes to the Act in relation to the Council of Legal Education.

The powers exercised by the Council of Legal Education are typically part of the core functions of independent legal services regulators overseas, rather than being given to a separate body. A review commissioned by the Law Society in 1997 observed:[265]

> Entry standards are the single most important element in regulating the legal profession. If the regulator is to be effective it must have control over standards.

263 For example, our discussions with the legal profession in Canada highlighted that many indigenous lawyers found little value in attending a mandated cultural competency course given their base level of knowledge.

264 Humphreys, above n 262, at 4.

265 E-DEC Ltd, above n 18, at [3.13].

In most overseas jurisdictions, the regulator sets the terms for admission into the profession, which includes setting standards for university courses, approving the content of legal professionals courses, and assessing the suitability of lawyers' overseas qualifications and experience. It would be sensible for any legislative reform to examine whether the current separation of functions should continue, or whether there is a case for the education-related functions to be exercised by the new independent regulator.

10. A reformed complaints system

This chapter concludes that the current complaints system is not meeting the needs of consumers or the profession and that wholesale reform is required. It recommends a new complaints system, with the following features:

- Complaints to the regulator would be investigated and determined by a specialist in-house complaints team. There would no longer be Standards Committees, although the regulator could seek external expert advice when necessary.
- A new complaints pathway needs to be established for client service / consumer matters (eg, fees, delay, poor communication). The pathway should not focus on whether a lawyer should be disciplined, but be designed to support dispute resolution through a fast, flexible and informal resolution service provided by the regulator. Consumer complaints should in the first instance be made to the relevant law firm or lawyer.
- The LCRO would be replaced by a small (three person) review committee convened by the new regulator and staffed by external members, or by an external adjudicator.
- Lawyers would have new duties to promote their complaint procedures and to ensure that complaints are dealt with promptly, fairly, and free of charge.

Complaints system: the current state

The Act requires the Law Society to deal with complaints in a "fair, efficient and effective manner".[266] All complaints must be made in writing[267] and must be referred to a Standards Committee.[268]

The role of Standards Committees

Standards Committees make their decisions independently from the Law Society. There are 22 Standards Committees, made up of volunteer lawyers and lay members who typically meet monthly to examine complaints against lawyers.[269] The Act requires a Standards Committee to have at least two lawyers and one lay person, and regulations state they may comprise up to seven lawyers and two lay people.[270]

A Standards Committee may determine that no further action is required on a complaint, that there has been 'unsatisfactory conduct' on the part of the lawyer (and issue associated orders) or prosecute the matter before the Lawyers and Conveyancers Disciplinary Tribunal (LCDT). All decisions must be given in writing with reasons.[271]

The Law Society has established two National Standards Committees to handle more sensitive and potentially high-profile and public-interest cases, which include cases of bullying and sexual

266 Lawyers and Conveyancers Act, s 122(2).
267 Section 134.
268 Section 135(1).
269 Convenors and lay members on a Standards Committee currently receive a nominal payment.
270 Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations, reg 13.
271 Lawyers and Conveyancers Act, ss 139(2)(a) and 158(2)(a).

harassment. Early Resolution Standards Committees have also been created to hear cases where a speedier resolution/decision may be possible. A dedicated Costs Committee also operates, reflecting the more specialised knowledge required to make decisions on such cases.

Each Standards Committee is supported by a Professional Standards Officer (PSO) from the Law Society, who provides administrative, investigative, legal research support and guidance. The PSO is responsible for correspondence with the parties, providing briefing papers to Committee members on complaints, and drafting decisions that reflect the judgment and reasoning of Committee members.

The Legal Complaints Review Officer

The LCRO can review decisions made by a Standards Committee following an application, usually from a party to the complaint. The LCRO is an independent office under the administration of the Ministry of Justice. The officer and deputies cannot be a practising lawyer or conveyancing practitioner. This review function currently costs $1.85 million annually, which is recovered through a levy on practising lawyers and conveyancers.

In reviewing a decision the LCRO may seek further information from either party or from the Standards Committee, and may make its own investigations into any aspect of the complaint or how it was handled.[272] The LCRO has the power to confirm, modify or reverse any decision of a Standards Committee and can lay charges against a practitioner before the LCDT or direct a Standards Committee to do so.[273]

The Lawyers and Conveyancers Disciplinary Tribunal

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.

The LCDT hears cases as a panel of five members, comprising a Chair, two lay members and two professional members selected from a pool of LCDT members (the professional members will be lawyers or conveyancers depending on the case). The Chair, Deputy Chair,[274] and lay members are appointed by the Minister of Justice, while professional members of the LCDT are appointed by the Law Society and the Society of Conveyancers.

The LCDT is the only entity in the regulatory framework with the power to strike a lawyer off the roll, suspend a lawyer, or prohibit a person from practising on their own account.[275]

The complaints system requires wholesale reform

Our consultation process confirmed that the current complaints system is flawed. It is slow, adversarial, produces inconsistent outcomes, is perceived as biased towards lawyers, and is not consumer-centred or restorative. We also heard that the complaints model is not working for Māori and Pacific peoples.

The problems with the current system are largely outside the control of the Law Society and are due to the highly prescriptive procedures in the Act that spell out in detail how complaints must be handled.

272 Section 204.
273 Sections 211(1) and 212(1).
274 Both the Chair and Deputy Chair cannot be practising lawyers, but must have had at least seven years' experience practising as a lawyer: Lawyers and Conveyancers Act, s 230(1).
275 However, the High Court retains its inherent jurisdiction to do so.

The complaints system is not meeting the needs of consumers or lawyers

Our consultation exposed widespread issues with the complaints system

Of all the aspects of the regulatory framework on which we sought feedback, the most consistent message we heard was widespread dissatisfaction with the complaints model. 61 per cent of survey respondents thought that changes were needed to the complaints model, with 16 per cent content with the current state. Support for change increased to 66 per cent among those who had been through the complaints process.

Submitters were largely satisfied with the current role of the LCDT in adjudicating matters of misconduct, but we heard very clearly that there is a case to reform the current Lawyers Complaints Service (which is based around Standards Committees) and the LCRO.

The Lawyers Complaints Service

- 1,395 complaints are received on average by the Law Society each year (five-year average).
- 88 per cent of complaints are not upheld (five-year average).
- Complaints currently take an average of 246 days to be resolved.
- Complaints where there is eventually an adverse finding against a lawyer took an average of 463 days to be resolved (2021/22).
- Of the orders made against a lawyer in 2021/22, 69 per cent were to pay a fine/costs, 15 per cent required compensation, 10 per cent were for further training and 7 per cent were to apologise to the complainant.

The LCRO service

- 19 per cent of complaints proceed to the LCRO for an independent review (five-year average).
- It takes on average over a year for a complaint to be considered by the LCRO.
- 12 per cent of decisions are reversed or partially reversed and 4 per cent are sent back to the Standards Committee for further consideration (five-year average).

The concerns we heard about the complaints system were consistent:

- **Delays:** it takes too long to make decisions, even for low-level and clear-cut complaints. The average time to close a complaint has consistently increased over time, from 143 days in 2014/15 to 246 days in 2021/22.
- **Lacking independence:** with lawyers on Standards Committees as the primary decision-makers, many consumers see the system as ‘run by lawyers for lawyers’.
- **Too adversarial:** the process has become quasi-judicial, with parties making lengthy submissions and cross-submissions on every possible point in dispute and lawyers often instructing counsel to argue their case. It is seen as a disciplinary process, not a complaint resolution process.
- **Formal complaint resolution:** most complaints are resolved through a formal decision, with very few complaints resolved through efforts to negotiate or mediate outcomes.
- **Inconsistency:** the decentralised complaints model leads to inconsistent outcomes across the country. For example, the proportion of complaints that were considered by a Standards Committee and then dismissed with a finding of ‘no further action’ ranged from 71 per cent (Hawke’s Bay) to 87 per cent (Nelson) over the five years to 30 June 2022.

- **Inaccessibility:** the current complaints service is highly adversarial and largely undertaken by exchanging written submissions, and is seen as inaccessible by some Māori and Pacific peoples (both as clients and lawyers).
- **Ill-suited for resolving fee disputes:** Standards Committees are asked to consider complaints about whether a lawyer's fees are reasonable, but can only order a fee to be reduced if they are satisfied the fee meets the standard of 'unsatisfactory conduct'. We heard that this is a high bar and the work to assess a fee is highly technical and resource-intensive.
- **Improper use:** we heard that many of the complaints from an opposing side in a case (particularly in family law matters) are without cause and are motivated by desire to 'get back' at the lawyer in question. There is currently no way to promptly dismiss such complaints.

We also heard from submitters that the Lawyers Complaints Service should be used as an option of last resort. Submitters noted that many lawyers have ineffective processes for handling complaints and that lawyers and law firms need to do more to endeavour to resolve client complaints.

It was noted by many that the Act currently provides a mechanism for complaints to be resolved by negotiation, conciliation and mediation,[276] but it is infrequently used. Several submitters noted that these alternative means of resolving disputes can often be more restorative, more satisfactory for both parties, faster and lower-cost than formal investigations. However, such approaches should not be mandatory as clients may be in a vulnerable situation or need their complaint dealt with at an arm's length.

We also heard that the complaints process can be highly stressful for many lawyers, who fear the professional and personal repercussions that can follow an adverse finding. The mental health implications for those facing a complaint are compounded by an attenuated process.

Case study 1:
a nine-month process to resolve a complaint from a colleague about rudeness

A lawyer complained to the Law Society that another lawyer's correspondence to them was rude.

The lawyer in question was informed of the complaint within two days (August), after which both parties provided responses over a four-month period. At one point the complainant's cross-submission sat with the PSO for six weeks before being forwarded to the lawyer.

The matter was considered by the Standards Committee in February the following year where it concluded 'no further action' was needed on the complaint. It then took the Law Society three months to write the decision and send it to the parties advising them of the outcome. This complaint took nine months to resolve.

276 Lawyers and Conveyancers Act, s 143(1)(a).

Case study 2:
an 18-month process to mediate a complaint about competence

A client complained to the Law Society that their lawyer failed to give competent advice, including sufficient information to make informed decisions, and to act in a timely manner and follow instructions.

The complaint was received in early November and the lawyer was notified in mid-December. The lawyer and the complainant both had an opportunity to make a submission and cross-submission, with all papers received by April. A Standards Committee first considered the complaint in July and sent an inquiry to the parties seeking information on specific points. This information was received by the Law Society in August, but the matter wasn't considered again by the Standards Committee until December, at which point it concluded the matter was likely appropriate for mediation.

The mediation concluded in June the following year. At the third Standards Committee meeting the Committee was advised of the successful mediation and the Committee concluded 'no further action' was required on the complaint. The complaint process in this case took 18 months.

Case study 3:
a 28-month process to resolve a complaint about fees

A client complained to the Law Society that their lawyer had overcharged them and had failed to respond in a timely manner to requests for a breakdown of fees charge.

The Law Society received the complaint in April and took over a month to notify the lawyer that a complaint had been made against them. Submissions and cross-submissions followed, with the first Standards Committee hearing held in August. The Standards Committee considered the complaint twice more at its September and October meetings.

A delay followed as the Standards Committee sought to engage a cost-assessor, who was appointed in March and provided advice in June. Both parties had the opportunity to comment on the cost assessment. The Standards Committee met again in June to consider the matter, where it concluded there was case to have a hearing on the papers. Both parties were given another opportunity to make submissions and further cross-submissions.

The Standards Committee met in September, but adjourned the hearing to give the lawyer an opportunity to voluntarily reduce their fees. The lawyer declined and the Standards Committee met again in February. At that hearing the lawyer was found to have met the standard for unsatisfactory conduct. It took over eight months for the decision to be drafted and for the parties to be notified. The complaint process in this case took over 28 months and was discussed at six separate Standards Committee meetings.

The lawyer subsequently sought a review by the LCRO, in a process that took a further seven months. The LCRO upheld the decision of the Standards Committee.

There is a high level of consumer dissatisfaction with the complaints system

The Law Society provided the Panel with the results from its unpublished surveys of users of its complaints service.[277] In Table 11 we compare the levels of consumer satisfaction with the Lawyers Complaints Service with the most recently publicly available survey data from nine other complaints schemes in New Zealand (comparing satisfaction levels with the ‘process’ or ‘service’).

This table speaks for itself. Consumers are highly dissatisfied with the service they are receiving from the Law Society compared to users of other complaints schemes.

Table 11: Complainant satisfaction levels with other complaint schemes

	Complainant satisfaction with ‘process’ / ‘service’
Financial Services Complaints Ltd	91%
Banking Ombudsman Scheme	82%
Telecommunications Dispute Resolution	81%
Real Estate Authority	77%
Insurance and Financial Services Ombudsman Scheme	70%
Privacy Commissioner	52%
Ombudsman New Zealand	42%
Broadcasting Standards Authority	35%
Law Society’s Lawyers Complaints Service	33%

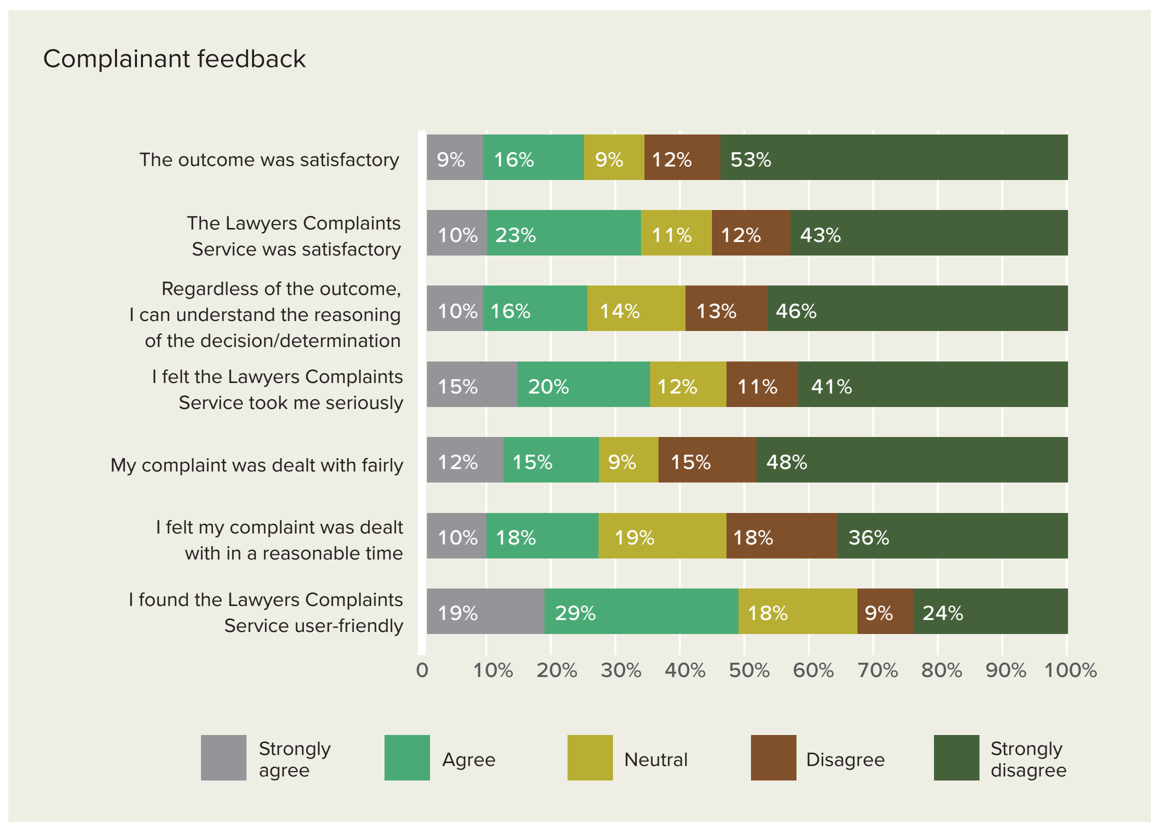
The Law Society’s survey data shows wholesale consumer dissatisfaction with the process, as depicted below in Figure 3. The lowest levels of satisfaction were with the final outcome (25 per cent satisfied), but there were also low levels of satisfaction with being able to understand the final decision (26 per cent), the fairness of the process (27 per cent) and the timeframe to deal with the complaint (28 per cent).

Case study 4:
a complainant unable to access the Lawyers Complaints Service

A client received a bill from a lawyer. The charge was $1,500+GST. The client felt that the charge was too much and asked the lawyer to send a detailed bill. This time the lawyer sent a bill for more than $2,000+GST. The lawyers mentioned that the original bill was discounted and the new bill reflected the actual cost. The client thought the bill should have been half of $1,500. The lawyers were not happy to negotiate on this. The client called the Law Society to lodge a dispute against the lawyer but was told that complaints about bills for less than $2,000 cannot be accepted.

277 The survey was completed by 188 consumers and 141 lawyers who had used the Lawyers Complaints Service between 2019/20 and 2021/22; representing 7.3% of complainants. While those consumers who completed the survey may not be representative of the users of the service, this is also true of the other complaints schemes that we are making comparisons against.

Figure 3: Lawyers Complaints Service consumer survey



Focus groups insights into issues with the current model

We held separate focus groups with the lay and lawyer members of the Standards Committees to explore their views on the current model. Both sets of representatives considered that the Standards Committee process produces fair outcomes with high-quality decisions. However, there was a degree of acceptance that the model is too cumbersome and does not meet consumer or lawyer expectations of timeliness.

One lawyer member commented:

> If a matter is dragging out for years it is risible and we need to accept the system is fundamentally broken. It's not a good scheme that is just slow.

There was a consensus that the current process is too adversarial and this contributes to delays. Many lawyers naturally take a complaint against them extremely personally and, with the prospect of being publicly identified for 'unsatisfactory conduct', they will endeavour to refute every point made by a complainant, while in other cases insurers will step in on behalf of a lawyer and instruct counsel.

Some Standards Committee members recounted receiving 10,000 pages in submissions to read in advance of their monthly meeting. The average reading requirement is between 1,200-2,000 pages for each meeting.[278] This was considered impractical for unpaid volunteers. Many Standards Committees now nominate different members to take the lead on a specific complaint, to avoid all members having to read the material prior to their meeting.

278 One member said the average submission pack for their monthly meeting was around 6,000 pages.

A commonly shared view is that many of the complaints considered by Standards Committees do not require the collective expertise of a group of 3-9 people to make a decision. The very high proportion of complaints that are designated 'no further action' should be able to be filtered out early on, or a decision made without having to be referred to a full committee. However, the current model does not permit triaging or delegation of decision-making, which contributes to clogging up the process.

The oversight provided by the LCRO and the prospect of having decisions overturned on procedural grounds was a key concern for Standards Committees. On the other hand, we heard some lawyers who said it took an LCRO review to reach a fair decision dismissing a complaint against them.

Both lay and lawyer members commented that to meet natural justice standards,[279] their processes have become quasi-judicial. Not only do they need to seek submissions on all relevant points from both parties, but their written decisions need to set out their reasoning and decision on all points. The LCRO itself has confirmed this expectation, advising Standards Committee members:[280]

> If we had to identify one area where Standards Committees could perhaps be more helpful to the parties and to review officers looking at decisions or determinations it would be to ensure that decisions are absolutely plump and bursting with reasons.

Finally, we tested with Standards Committee members whether lawyers should continue to be responsible for making decisions on consumer complaints. Lay members all stated that their lack of legal training is no hindrance to understanding the issues and the submissions of parties and that there is no good reason why lawyers have to make decisions on complaints. The lay members noted there may be occasions when they need advice to clarify the law on certain points, but this can be (and is) easily provided. There is no evidence lawyers are 'soft' on their peers – many committee members observed that lawyer members are often tougher on their peers than lay members.

We heard mixed views from the lawyer members of Standards Committees on the importance of lawyers judging their peers. Most felt that the value of the current model was that it brought together a range of lawyers with diverse backgrounds, a depth of knowledge as to professional duties and expectations, and technical knowledge on specific areas of the law. Several members stated that there was nothing unique about the lawyers on a Standards Committee that meant the task couldn't be done by lay people.

Underlying causes of problems with the complaints system

The current Lawyers Complaints Service may be producing the 'right' outcomes on individual cases, but the model is clearly not working effectively and is failing both consumers and lawyers in how it reaches those outcomes.

When the Minister of Justice advised his cabinet colleagues in 2000 on the pressing need to reform the system for handling complaints about lawyers, he chose words that could unfortunately be repeated today, 23 years on:[281]

> I have formed the view that the current complaints and disciplinary systems are inadequate: processes should allow redress for service complaints (including

279 As required by the Lawyers and Conveyancers Act, s 142(1).

280 Webinar by Deputy Legal Complaints Review Officer Robert Hesketh (5 September 2022).

281 Memorandum to the Cabinet Policy Committee "Regulation of Lawyers & Conveyancers: Consequential Policy Issues" (October 2000) (obtained under Official Information Act 1982 request to the Cabinet Policy Committee).

> mediation and conciliation where appropriate) and prompt referral to more formal procedures in appropriate cases .... The New Zealand Law Society view is also that the current procedures are long, adversarial, technical and costly, and that the constraints of the current statutory procedures significantly damage public trust and confidence in the profession.

We have identified several key causes of the problems with the current model, which need to be addressed as part of any reform.

1. A disciplinary system masquerading as a complaints system

> It's not a complaints system. It's a disciplinary system for lawyers.[282]

The current statutory framework was intended to be "one within which complaints ... may be processed and resolved expeditiously and, in appropriate cases, by negotiation, conciliation, or mediation".[283] In operation, it has failed to achieve that objective. The model is poorly designed to support the resolution of consumer complaints, determine what a fair outcome might be, or provide restoration to consumers.

The disconnect between what consumers expect from a professional complaints scheme and what they are receiving is likely the primary cause for the high levels of consumer dissatisfaction. Many consumers feel they are incidental to the process. This a fair conclusion, particularly given that:

- over the past five years the Lawyers Complaints Service has 'resolved' only 5 per cent of all complaints through negotiation, mediation or conciliation, and
- in only 6 per cent of all complaints that were upheld against a lawyer was the lawyer in question required to apologise to the complainant.

This disconnect is also highlighted by fees complaints, where many consumers are disadvantaged by the rule that complaints about fees cannot be considered if the total invoice is less than $2,000 (exclusive of GST).[284] We heard an example where a Standards Committee investigated a disputed $500 charge as part of a large legal fee on a $4 million property transaction, but could not investigate a complaint from a low-income consumer who wanted to dispute half of their $2,000 legal fee. This arbitrary threshold suggests that the complaints scheme is not designed to identify and provide redress for consumer harm.

One Law Society staff member described the current model as being "quite an unsatisfactory process for a complainant". The willingness of staff to pick up the telephone and talk to a complainant is variable. The process is not consumer-centred.

2. There needs to be a pathway that prioritises complaint resolution rather than sanctions

One of the fundamental problems with the current model is that it has become quasi-judicial and adversarial. As we heard from one long-time convenor of a Standards Committee, "the system is at the level of a civil jurisdiction of a court in terms of workload, complexity and lawyering-up that goes on".

A primary cause of the entrenchment of positions is that, once a complaint has been made about a lawyer then, regardless of how minor the complaint may be, there is the potential for disciplinary sanctions to apply. Lawyers are aware a finding of 'unsatisfactory conduct' could impact their

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282 A former Standards Committee convenor.
283 Lawyers and Conveyancers Act, s 120(2)(b).
284 Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations, reg 29.

careers and have public and personal consequences. They are therefore incentivised to dispute every point.

In our view there is considerable scope to reorientate the complaints model to focus on complaint resolution and service complaints, while reserving the possibility of disciplinary sanctions for more serious conduct matters.[285]

This would require a system that provided the regulator with sufficient flexibility to develop different pathways for different types of complaints. A more responsive complaints framework would emphasise low-level complaint resolution outside of a disciplinary framework and would include:[286]

- where practical, utilising informal alternative dispute resolution methods in the first instance
- where both parties agree, a tikanga-based resolution process that would facilitate face-to-face interaction, restoration and preservation of the mana of the parties involved.

Many complainants do not want their lawyer sanctioned; they simply want an explanation, their problem resolved and an apology if appropriate. As the Community Law Centres submitted:

> Entering into another adversarial process adds stress when people are also dealing with a difficult legal situation. It also distracts from the original legal issue that the client is wanting to resolve. A restorative process, including mediation or other facilitated discussions, would be preferable in many cases, particularly for lower-level complaints, e.g. lack of responsiveness, unclear communications, lack of clarity around fees.

In our view the presence of the LCRO oversight, while no doubt improving the quality of the decisions, has also contributed to the adversarial nature of the current complaints model and the significant delays that are occurring. The Law Society's Professional Standards Officers can take several months to draft a written decision following a Standards Committee decision on a complaint. Part of this results from inadequate resourcing, but our interviews highlighted that it also reflects a concern about writing a decision that will not be overturned by the LCRO.

3. The Standards Committee model has significant flaws

We do not consider it necessary or appropriate for the regulator to rely on Standards Committees to make determinations on complaints. Although Standards Committees are staffed by highly skilled lawyer and lay members who volunteer a considerable amount of time, the model has inherent deficiencies.

Our concerns with the current Standards Committee model include:

- Standards Committees, which are comprised mostly of lawyers, are not perceived as independent by consumers. In our view this is a fundamental flaw and cannot be addressed by making minor changes such as changing the composition of a committee. This perception of a lack of independence is clear from the dissatisfaction in consumer surveys as well as submissions from Consumer New Zealand, Citizens Advice Bureau and the Community Law Centres.
- Standards Committees do not attract volunteers who are representative of the community or

285 The Victorian Legal Services Board & Commissioner operates a complaints model that encourages complaint resolution. It regulates approximately 25,000 lawyers and in 2021 it made a determination of unsatisfactory professional conduct on 14 occasions. The Law Society regulates approximately 16,000 lawyers in New Zealand and its Standards Committees make determinations of unsatisfactory conduct, on average, on 138 occasions each year.

286 We note the recent work that the Law Society has undertaken to improve the Lawyers Complaints Service. This includes improving the front-line complaints service, investing more to support low-level complaint resolution (including training staff), setting up an internal investigations team, putting in place screening processes for sensitive matters, drafting penalty guidelines for Standards Committees and looking at consistency issues across Standards Committees. Nevertheless the Lawyers Complaints Service remains constrained by the requirements in the Act that every complaint be referred to a Standards Committee.

the profession. For example, 91 per cent of lawyer members[287] identify as either NZ European or Other European (compared to 70 per cent of the New Zealand population), 2 per cent are Asian (15 per cent of the population), 1 per cent are Māori (17 per cent of the population), and 1 per cent are Pacific (8 per cent of the population). The striking lack of ethnic diversity calls into question the suitability of these committees as the sole arbiters of consumer complaints and professional standards.[288]

- As each Standards Committee is independent, there is inevitably inconsistent decision-making associated with such a highly decentralised model. Although the decisions reflect the collective judgment of those in the room, Standards Committees effectively operate in a silo and have no visibility of decisions made by other committees on similar matters.[289] As noted below, the sharing of decisions between Standards Committees is hindered by the strict provisions on confidentiality.
- The Standards Committee structure is a contributing factor to delayed decisions on complaints. Having Standards Committees meet only once a month inevitably delays decisions. For example, a delayed submission from a lawyer might mean a complaint misses a Standards Committee agenda by one day and the matter is then deferred to the following month's meeting for consideration. There is no good reason why decisions on complaints need to follow a monthly timetable, except that the Law Society recognises it cannot require the unpaid volunteers on those Standards Committees to meet more frequently.
- The regulator has limited control over a core regulatory function – maintaining professional standards through complaint resolution and disciplinary investigations.

The Standards Committees have been described to us as a 'compromise' in the interests of the profession that was made by policy-makers when the Act was passed. At the time there was considerable unease at the loss of the District Law Societies and moving to a fully centralised model run from Wellington. It was in this context that the Standards Committees were established to replicate a previous branch regulatory function.[290]

Lawyers play a valuable role in advising on complaints that require technical legal insight or a nuanced understanding of professional standards. However, an effective complaints model would draw on that expertise as and when required, rather than assuming every complaint can only be considered and adjudicated by lawyers.

While many submitters highlighted the cost advantage of using volunteers to resolve complaints, as noted earlier, the current model is costly. Each Standards Committee is supported by a paid Professional Standards Officer, who has responsibility for managing the complaints before the Committee. They are required to provide written briefs to Committee members, which set out the facts and issues at dispute for each complaint (along with all submissions from parties), capture minutes of deliberation and draft written decisions on the complaint, for review and sign-off by Committee members. While the profession undoubtedly saves costs by not paying Committee members, these costs are outweighed by the costs incurred in having to support the Committees.

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287 Sourced from the Law Society registry for practising lawyers. The Law Society does not hold ethnicity information for lay members of Standards Committees.

288 Research indicates that there are barriers to volunteering for many, with influencing characteristics that include age, gender, ethnicity, socio-economic factors, disabilities, religion and sexual identity. See Kris Southby and Jane South Volunteering, inequalities and barriers to volunteering: a rapid evidence review (Leeds Beckett University, November 2016).

289 The LCRO has observed that "A real impediment to consistency with SC decisions and determinations is that each Committee operates as a silo and is completely sealed off from colleague committees": Hesketh, above n 280.

290 The Lawyers and Conveyancers Act empowers the Law Society to establish Standards Committees. The geographic distribution of Standards Committees to mirror the former District Law Societies is prescribed by the Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008.

4. The legislation is too prescriptive

The main problem with the current complaints system is that the Act is too prescriptive.[291] By specifying in detail how all complaints must be managed, the Act has created significant inefficiencies and costs in the complaints service and has restricted the ability of the Law Society to adjust its procedures and make improvements.

All complaints must be in writing

We received compelling submissions from Citizens Advice Bureau and the Community Law Centres that the legislative requirement for complaints to be made in writing[292] represents a barrier for many consumers. Their submissions highlighted examples of consumers who found it difficult to make a written complaint to the Law Society, including for literacy reasons, English being a second language, and an inability to articulate a complex problem in writing.

All complaints must be referred to a Standards Committee

Law Society staff cannot triage or filter complaints.[293] Unlike other regulatory regimes, staff cannot summarily dismiss vexatious[294] or inconsequential complaints, complaints that are made too long after the event in dispute, complaints that have already been resolved, or complaints that are properly directed to another agency. No matter the complaint, it must be accepted for processing and eventually submitted to a Standards Committee.

Table 12 below shows that the current complaints system in New Zealand, with its inability to summarily dismiss or redirect complaints, is examining a considerably higher proportion of complaints about lawyers than other jurisdictions. The requirement to accept all complaints is a major factor contributing to the current cost and delay problems.

Table 12: Comparison of lawyer complaint volumes accepted by the regulator for investigation/decision

	Lawyer complaints accepted by regulator (annual average, 2017/18 - 2020/21)	Complaints accepted per 1,000 lawyers
New Zealand	1,449	93.1
Scotland	916	72.6
England and Wales	9,797	57.3
Victoria	1,338	52.5
Ireland	748	50.6

Another implication of referring all complaints to a Standards Committee is that Law Society staff cannot resolve or determine even straightforward cases. The complaints service is purely administrative in supporting the work of the Standards Committees, even though staff and Standards Committee members acknowledge there are many cases where in-house staff could promptly make a decision. For many complaints, considerable effort appears to be unnecessarily expended by the Law Society's Professional Standards Officers engaging with parties, briefing Standards Committees and writing decisions.

291 As strictly interpreted in *Deliu v The Lawyers Complaints Service of the New Zealand Law* [2012] NZHC 2582.

292 Lawyers and Conveyancers Act, s 134.

293 Section 135. The Law Society requested legislative amendments to allow for triaging of complaints in early 2022. We understand that for resourcing reasons this proposed amendment will not proceed in the near future.

294 There are six complainants who have lodged at least 10 separate complaints about lawyers over the past two years, three of whom have made over 20 complaints.

A highly formal process

By the time a standard track complaint gets to a Standards Committee, a Professional Standards Officer from the Lawyers Complaints Service will have contacted both parties and provided the complaint to the lawyer or law firm who is the subject of the complaint for a response. The process from that point is laid out in the Act:

1. Initial consideration: at its monthly meeting the Standards Committee will consider a complaint for the first time. The Committee is provided with a briefing from the Professional Standards Officer and all material regarding the complaint (including the complaint and any submissions). Under section 137(1), the Committee has to decide whether to inquire, direct the case to mediation, or conclude 'no action' is required.
2. If a Committee decides to 'inquire' into the complaint, it must advise both parties of that decision (section 137(2)). The person who is the subject of the complaint must then be invited to provide a written explanation (section 141), and parties can respond to submissions made by the other party.
3. The Committee must decide whether to determine a complaint under section 137 or set the complaint down for a hearing.
4. If the Committee decides to conduct a hearing on the complaint, the relevant parties are invited to make submissions and cross submissions on the notice of hearing before the complaint is determined (section 152), which is a hearing on the papers unless the Standards Committee otherwise directs (section 153).
5. The Committee must provide a written notice of its determination, including the reasoning for it (section 158).

There is no discretion to depart from this process. Although a Standards Committee may possess all the information it requires to make a finding of unsatisfactory conduct against a lawyer, it is required by the Act to hold a hearing before making an unsatisfactory conduct finding (section 152). We are also aware that Committees often decide they need to request further information from a party, so rather than this being a two-step deliberation model, a Committee can end up discussing the same complaint at many different monthly meetings.

Very limited ability for the regulator to disclose complaint information[295]

The Law Society is bound by strict confidentiality requirements about the complaints it receives or any investigation it is undertaking. It cannot confirm the existence of a complaint, nor disclose any information to interested parties unless they are a party to the complaint (eg, if a Standards Committee launches an own-motion investigation[296] there is no ability to provide updates to alleged victims of a lawyer accused of harassment).

As a result, the Law Society is hamstrung and can appear unresponsive to matters of deep concern to the profession and the community. We support the Law Society's request for a minor amendment to allow it to disclose the existence of a complaint or investigation and procedural information, where it is in the public interest to do so.

We are also aware that the strict confidentiality requirements mean that Standards Committee members do not see the decisions made by other Committees.[297] This has obvious implications for the consistency of decision-making around the country.

295 Lawyers and Conveyancers Act, s 188.
296 Lawyers and Conveyancers Act, s 130(c).
297 It is possible for anonymised decisions and headnotes to be shared between Committees.

5. The model was not designed for complaints about sexual harassment, bullying and racism

The model was designed for dealing with complaints about client service, rather than dealing with allegations of harassment. In response to the Cartwright Report the Law Society established a second National Standards Committee to handle sensitive complaints. The members of that committee have some experience in handling highly sensitive complaints.

The Law Society has also adapted its front-end complaints system to better support those who report behavioural concerns but do not want to have the status of being a 'complainant'. This also provides increased confidentiality protections. These matters are considered for referral to a Standards Committee by Law Society staff. If this occurs then the Standards Committee needs to consider whether to initiate an own-motion investigation at its discretion.

However, submitters argue that the changes are not sufficient and the entire model needs to be redesigned, particularly to support victims who may be traumatised. The New Zealand Women's Law Journal submitted:

> The complaints process needs to have a complainant-centred focus and provide support to victims throughout the whole process. Many people who have made formal complaints of sexual harassment and assault have reported the legalistic, lengthy, opaque and often adversarial complaints process that they endured caused more harm than the original conduct.

Some submitters also queried whether a Lawyers Complaints Service, even with dedicated national committees, is an appropriate mechanism for handling complaints about lawyers bullying or harassing other lawyers. As noted by one experienced lawyer member of a Standards Committee, "the subject of bullying and harassment is too important to be left to Standards Committees".

6. Fees complaints should rarely be a disciplinary matter

Unless there are allegations and supporting factors that a fee charged by a lawyer is grossly excessive (which can be referred to the Disciplinary Tribunal), we do not think complaints about fees should be assessed within a disciplinary framework.

We heard repeatedly how ill-suited the current disciplinary regime is to investigate and determine the appropriateness of a fee. Complaints about fees consistently account for 9-11 per cent of complaints to the Lawyers Complaints Service but take up a disproportionate amount of time and resources to investigate and reach a determination (and account for 25 per cent of orders issued by Standards Committees).

Case study 5:
a lawyer's experience of fees complaints

We heard from one lawyer whose firm had a complaint about a $5,000 invoice go to a Standards Committee. The firm made the decision to waive the entire bill as it would have cost them more in time and money to deny the complaint over the 1-2 year period the Standards Committee would have taken to investigate the appropriateness of the fee.

The lawyer also noted that, once a fee was subject to a complaint to the Law Society, they were prevented by regulations from trying to collect the outstanding amount until the Standards Committee had made a decision.

At present a fee that a Standards Committee considers to be too high can only be adjusted if a determination is made that the lawyer has engaged in 'unsatisfactory conduct'. Members on Standards Committees say they regularly see cases where a consumer has received an invoice that is too high, but are wary of compelling the lawyer to adjust their fee because the precondition of an 'unsatisfactory conduct' finding is not warranted.

It is also apparent, particularly for complaints disputing large fees, that the Standards Committees are largely dependent on advice from an external cost assessor. Cost assessors are also volunteers, not readily available, and the difficulty in engaging a cost assessor also results in significant delays.

Part of the problem with fees complaints is that, unlike in some other jurisdictions,[298] current rules do not require lawyers to provide up-front cost-estimates at the start of any engagement. As noted earlier, consumers should give informed financial consent at the start of an engagement. If properly informed, consumers will be less likely to complain about a fee consistent with the original or revised estimate. This should, in turn, reduce the volume of fees complaints to the regulator.

7. Lawyers need to improve their internal complaints handling processes

The lengthy delays experienced within the Lawyers Complaints Service are exacerbated by the invisibility and ineffective nature of many law firms' internal complaints procedures. Our focus group sessions highlighted that an underlying driver for many relatively minor complaints to the Law Society is consumer dissatisfaction with poor communication from a lawyer. Many of these complaints could potentially be resolved if consumers had a readily accessible means of making a complaint to their lawyer or law firm.

At present lawyers practising on their own account must have "appropriate procedures" for handling complaints with a view to ensuring they are dealt with "promptly and fairly".[299] There are no requirements for law firms to make their complaints process visible and accessible,[300] to deal with complaints at an arm's-length basis from the subject of the complaint, or to endeavour to resolve the complaint within a certain timeframe.

Improving the internal complaints procedures of law firms would benefit lawyers and consumers (by reducing the prospect of a protracted complaint to the regulator), and would likely contribute to reducing the high volume of complaints currently received by the Lawyers Complaints Service.

Assessing the system against a best-practice framework

The Government Centre for Dispute Resolution's (GCDR) best-practice principles provide a framework for assessing whether a complaints scheme is fit for purpose. Table 13 summarises our assessment.

298 For example, the Solicitors Regulation Authority requires authorised law firms and lawyers to provide detailed cost information on their websites (including total/average cost, hourly rates, qualifications, likely disbursements) for any of the following services they provide: conveyancing, uncontested probate, motoring offences (summary offences), preparing immigration applications (excluding asylum), claims before the Employment Tribunal for unfair/wrongful dismissal, debt recovery, licensing applications for business premises: Solicitors Regulation Authority *SRA Transparency Rules* (30 May 2018), regs 1.3–1.4.

299 Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules, sch r 11.5.

300 Compare the requirements for banks that are part of the Banking Ombudsman Scheme, to have "a clearly documented internal complaints process that refers to the scheme", and to make complaints-related information widely available: Banking Ombudsman Scheme "Reference documents: Participation criteria" (1 January 2021) <www.bankomb.org.nz>.

Table 13: Assessment of the current legal complaints model against GCDR's best-practice principles

Key principle	Key requirements	Our assessment
User focused and accessible	Users of dispute resolution services are at the centre of all aspects of the dispute resolution system. Dispute resolution is easy for potential users to find, enter and use regardless of their capabilities and resources.	**Unsatisfactory** The model is designed to assess professional competence, not facilitate complaint resolution. There are barriers to entry, a lack of support for users, and minimal use of alternative resolution procedures. Consumers report widespread dissatisfaction.
Independent and fair	Disputes are managed and resolved in accordance with applicable law and natural justice. All dispute resolution functions are, and are seen to be, carried out in an objective and unbiased way.	**Mixed** Decisions are of a high standard and processes adhere to natural justice principles. The LCRO provides an important review function. But Standards Committees are not perceived by consumers as independent and their make-up does not reflect New Zealand's diversity.
Efficient	Dispute resolution provides value for money through appropriate, proportionate and timely responses to issues. It evolves and improves over time and makes good use of information to identify systemic issues.	**Unsatisfactory** It is a high-cost model that is not providing a timely service. This is exacerbated by an inability to triage out unmeritorious complaints. There is no evidence of root-cause analysis to identify and address systemic issues.
Effective	Dispute resolution delivers sustainable results and meets intended objectives. It fulfils its role in the wider government system by helping to minimise conflict and supporting a more productive and harmonious New Zealand.	**Mixed** While the model may eventually deliver the 'right' result, it does so in a manner that is unsatisfactory. It is adversarial, slow, and does not facilitate informal resolution of low-level consumer complaints.
Accountable	There is public confidence in dispute resolution. Those involved in its design and delivery are held to account for the quality of their performance. Regular monitoring and assessment and public reporting encourage ongoing improvement and better outcomes across the system.	**Unsatisfactory** The Standards Committees are not producing consistent outcomes due to their independence and an inability to share files and decisions. The Law Society as the regulator has no input into decisions and cannot publicly acknowledge a complaint has been received. Very few decisions are publicly available.

For all the reasons discussed above, we conclude that the current complaints model is not fit-for-purpose, even if it ultimately reaches appropriate decisions on most complaints. The Standards Committee structure is not seen as providing a fair and independent means of resolving complaints. Consumers perceive their interests to be treated as secondary to those of the profession and that lawyers 'look after their own'.

There is no compelling reason why complaints about lawyers should be considered by lawyers. As Duncan Webb stated at the time the Act was passed, many saw the new regime as a means by which lawyers would be judged against the expectations of the public, rather than solely against the 'inappropriate' means of using professional standards as an anchor for assessing conduct:[301]

> Unsatisfactory conduct will exist (and remedies under the Lawyers and Conveyancers Act will follow) where the lawyer fails to live up to the expectations not of fellow practitioners (the tort test) but the expectations of a reasonable member of the public .... In doing so it legislates that the appropriate perception for the purposes of professional regulation is the standpoint of the client and not the lawyer.

Despite the client-centred definition of unsatisfactory conduct in section 12(a) of the Act, the adjudication of complaints falls to lawyer-dominated Standards Committees to determine. The new regulator should incorporate a new complaint resolution system, independent of the profession.

Putting in place a more effective complaints system

> The system suffers serious structural and systemic faults that can't be rectified. Tinkering won't fix it.[302]

What should the complaints system be trying to achieve?

A starting point for designing a new complaint-handling system is to clarify its purpose.

One view is that an occupational regulator should have a very narrow role with respect to consumer complaints. Under this approach the regulator should be solely concerned with identifying those complaints where a lawyer may have fallen short of the expected standards of the profession and should prioritise investigating whether the lawyer should face disciplinary measures.

The way the Lawyers Complaints Service model has evolved is not consistent with the original intentions of the legislation, which anticipated a broader focus on complaint resolution. The Minister of Justice when advising his Cabinet colleagues in 2000, stated:[303]

> I propose a new complaints and discipline regime that focuses on providing clients with remedies, as well as disciplinary action where appropriate, and adheres to the principles of independence, transparency, fairness, accessibility, accountability, efficiency and effectiveness.

We agree with the original intent of the 2006 reforms, that there needs to be a broader role for the legal complaints scheme beyond focusing on whether lawyers have breached regulatory standards and should be subject to sanctions. In our view the model must have two complementary functions:

1. A complaint resolution function: other than complaints that may warrant discipline, the scheme should assist the parties to resolve the matter (including through informal processes) and, in cases where it is appropriate, issue determinations to resolve the complaint.

301 Webb, above n 19, at 14.
302 A lawyer member of a Standards Committee.
303 Cabinet Policy Committee, above n 281.

2. A disciplinary function: it should identify those complaints where there appears to have been a breach of the standards that may warrant disciplinary measures and prioritise resources to investigate and make determinations on those cases, including applying sanctions as appropriate.

The current model has placed too much emphasis on the second function (discipline) to the detriment of the first (complaint resolution). The original intent when the Act was passed was that it would provide a fast and efficient low-level complaints service, where for many complaints an adverse finding against a lawyer would be akin to a "slap on the wrist with a wet bus ticket".[304] Duncan Webb observed about the Act:[305]

> An important shift is the conceptual division of complaints and discipline. While the disciplinary procedure may have its genesis in a complaint, the Act clearly distinguishes between the complaint resolution function and the discipline function .... In New Zealand the idea of a complaints service having a stated function of resolving complaints by negotiation, conciliation, or mediation is novel to say the least.

While consumers will always be able to seek redress against their lawyer through the courts, it is important to provide consumers with an accessible dispute scheme that can resolve their concerns promptly and fairly.

The approach adopted in Victoria shows one model of how a legal services regulator provides a complaints service that has both complaint resolution and disciplinary functions. Its model is summarised in Figure 4.

Figure 4: A summary of the Victorian legal services complaints model

<table>
<tr><th colspan="2">Key elements of the Victorian complaints model</th></tr>
<tr><td colspan="2">Victoria has over 60 per cent more lawyers, yet its regulator handles fewer than half the complaints compared with the NZ Law Society
Facilitates resolution of low-level disputes; focuses regulatory resources on significant disciplinary matters (5 per cent of complaints)</td></tr>
<tr><td>Key characteristics
• all complaints can be determined by in-house staff, with external expert advice when necessary
• discretion to take no action on a complaint, filtering inconsequential complaints, delayed complaints, resolved complaints and complaints better suited elsewhere
• in rare cases, can make a determination of what is 'fair and reasonable in the circumstances' on consumer matters
• no external review mechanism for consumer matters (internal review only)</td><td>Two separate pathways for complaints
1. 'consumer matters': staff use ADR and mediation to attempt to resolve (very rare to make a determination but can do so ~1 per cent)
2. 'disciplinary matters': staff investigations, which may lead to:
- a determination of unsatisfactory professional conduct
- a prosecution of cases of misconduct before a tribunal</td></tr>
</table>

304 A quote widely attributed to the first LCRO, Duncan Webb.
305 Webb, above n 19, at 16.

Recommendation: reform the complaints system

Effectively handling consumer complaints requires a system that places consumers at the heart of its processes.

In our view, the highly formal and adversarial disciplinary processes should be reserved for the small subset of complaints that truly require a disciplinary response from the regulator. This requires establishing a new complaint pathway for the vast majority of consumer complaints – one that is characterised by a focus on complaint resolution, where consumers will feel they have been listened to and, if necessary, where they can receive assistance as they seek to have a problem with a lawyer resolved in a fair and speedy manner.

We have closely examined alternative complaints models in forming a view on the core components of an effective complaints model for the new legal services regulator. We have drawn heavily on the mechanisms in place in Victoria and Ireland, where an independent regulator is responsible for resolving all complaints (service and conduct).[306] We propose separate pathways for ‘consumer matters’ (regarding how legal services were provided, such as complaints about communication, delay, fees, etc) and ‘disciplinary matters’ (where, if established, the conduct complained about would amount to unsatisfactory conduct or misconduct).[307]

In proposing a reformed complaints and disciplinary system, we have taken into account Sapere’s cost-benefit analysis, which indicates that the proposed model will be more efficient and lower cost than the current model.[308]

The major changes we are recommending are outlined below in Table 14:

Table 14: A new complaints system

Key elements of new complaints system

1. Rather than prescribing every step the regulator should take, legislation should set an outcome for the regulator (such as “to facilitate the fair, simple and efficient resolution of complaints and to uphold professional standards”) and provide it with the tools to do the job.
2. The regulator will have a discretion, after preliminary assessment, to take no action on a complaint if, having regard to all the circumstances, any action is unnecessary or inappropriate.
3. Complaints will be assessed and determined by a specialist in-house complaints team. There will no longer be Standards Committees, although the regulator will be able to seek external expert advice where appropriate.
4. There will be separate pathways for ‘consumer matters’ (regarding how legal services were provided, such as complaints about communication, fees, delay etc) and ‘disciplinary matters’ (where, if established, the conduct complained about would amount to unsatisfactory conduct or professional misconduct).
5. A pathway for ‘consumer matters’ will not have an investigative or disciplinary focus and is designed to be faster and more flexible, with a focus on dispute resolution.

306 The delineation between complaints about consumer matters and those about unsatisfactory professional conduct or misconduct is common overseas and is also a feature of the complaints regimes in New South Wales, England and Wales and Scotland.

307 While there will inevitably be some overlap between consumer and disciplinary matters, having separate pathways is clearly international best practice so that the focus of consumer matters can be on complaint resolution within a satisfactory timeframe. This separate pathway is a feature of complaints models in Victoria and Ireland (within the same regulator) and England & Wales and Scotland (which have separate entities for two pathways). We note in particular the Legal Profession Uniform Law Application Act 2014 (Vic), sch 1 cl 269–271.

308 Sapere’s cost-benefit analysis compared three complaints systems: the status quo, the status quo with the ability to triage complaints, and a new model with the ability to triage complaints and resolve the majority of service complaints in-house through less formal means.

a. With the consent of both parties the regulator will in the first instance invite the parties to resolve the matter in an informal manner and will attempt to facilitate resolution though either negotiation and mediation, or a tikanga-based process.

b. If informal resolution is unsuccessful, the regulator may choose to exercise a new power to issue a determination as to what is "fair and reasonable in all the circumstances".[309]

6. Complaints about lawyers (or a practice) that would, if proven, meet the standard of 'unsatisfactory conduct' or 'misconduct' will continue to be considered a 'disciplinary matter'. Resources will be prioritised to investigate the allegations.

   a. The regulator will have the power to determine whether a lawyer's (or a practice's) conduct reached the standard of unsatisfactory conduct and issue binding orders.

   b. More serious matters of misconduct will be prosecuted before the LCDT by the regulator.

7. The identity of a lawyer will not be publicly disclosed if the regulator determines they have met the standard of 'unsatisfactory conduct', other than in accordance with the regulator's Naming Policy for exceptional cases.

8. The LCRO will be replaced by a small (three person) review committee convened by the regulator and able to be staffed by external members, or by an external adjudicator. With a new independent regulator it will no longer be necessary or cost-effective to have a separate independent entity to review complaint decisions.

9. Lawyers should be subject to a new duty to "ensure complaints are dealt with promptly, fairly and free of charge".

10. There should be a time limit for complaints to be made to the regulator.

Our proposed new complaints system is shown in Figure 5 (over).

We set out further details of the proposed model below.

Granting the regulator discretion to take no action on a complaint

The effective operation of a complaints service requires the regulator to have the discretion, after a preliminary assessment, to take no action on a complaint. We propose that the regulator be empowered to take no action if, having regard to all the circumstances of the case, any action is unnecessary or inappropriate. The statute should specify relevant factors for the regulator to take into account, including the time that has elapsed since the complainant knew about the matter complained about, whether the subject matter of the complaint is trivial, frivolous, misconceived or lacking in substance, the complaint is vexatious or not made in good faith, or there is another more appropriate avenue for addressing the complaint, which it would be reasonable for the complainant to exercise.[310]

We heard accounts of the Lawyers Complaints Service being 'weaponised' by both clients and lawyers from an opposing side of a case.[311] The discretion to take no action on a complaint, after preliminary assessment, would enable the regulator to quickly dismiss complaints that are

309 This is consistent with the power of the regulators in Ireland and Victoria, as well as specialist legal complaints bodies in England and Wales and Scotland. We explore this issue in more depth below.

310 Compare, in New Zealand, the Ombudsmen Act 1975, s 17, and the Health and Disability Commissioner Act 1994, s 38; and in Victoria, the Legal Profession Uniform Law Application Act 2014, s 277(1).

311 For example, complaints from a client on an opposing side of case rarely result in a finding of unsatisfactory conduct (only 1% of the time) but take up a considerable proportion of the work of the Lawyers Complaints Service (comprising 17% of all complaints that are assessed).

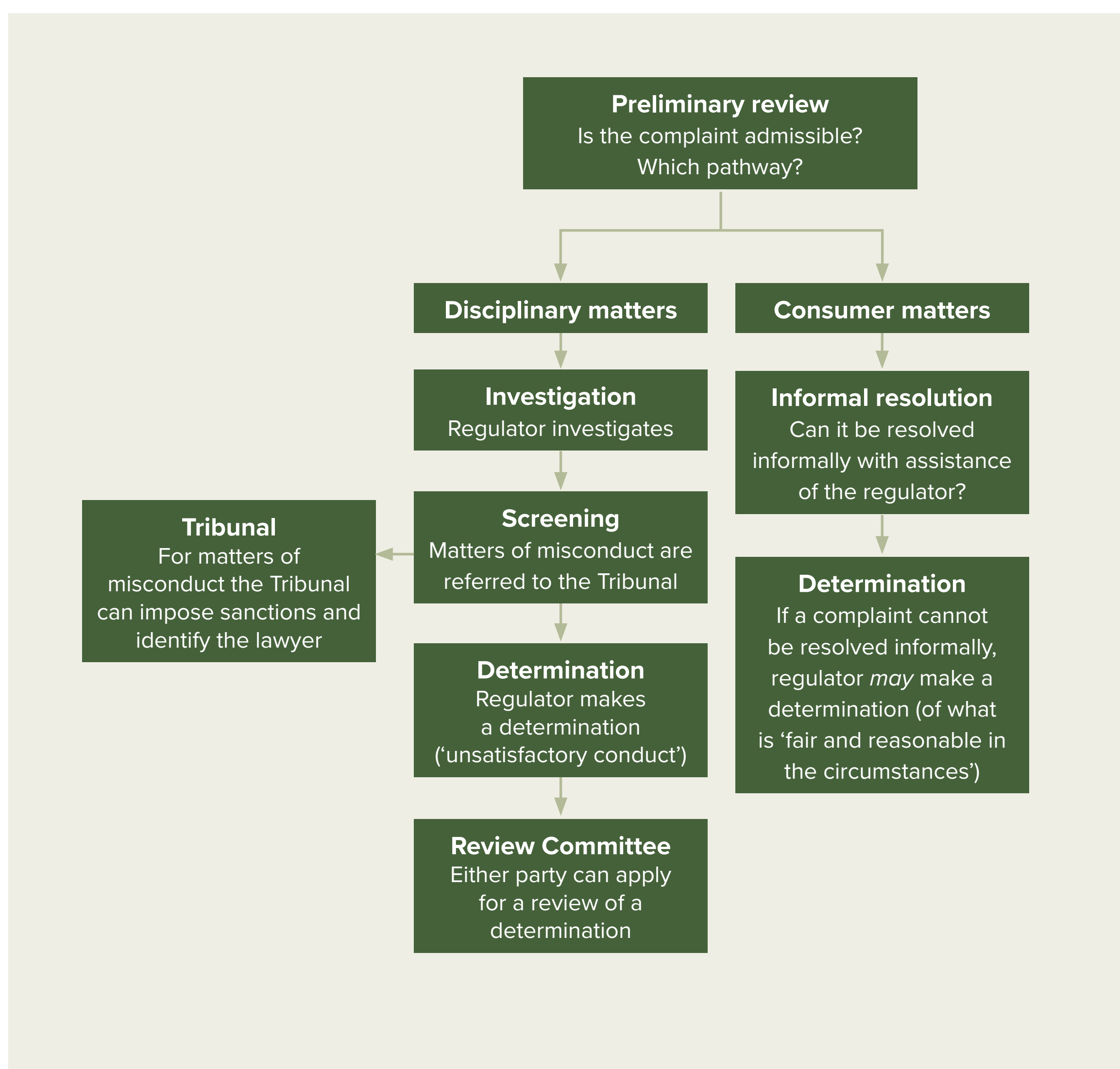
clearly without merit. We note that the Victorian Legal Services Board & Commissioner has issued guidance on the limited circumstances in which it will take action on complaints by lawyers about the behaviour of other lawyers.[312]

For consumer matters: a new power for the regulator to facilitate resolution and make determinations

Our proposal to differentiate consumer matters and disciplinary matters[313] will help address our concern that the current model does not place enough emphasis on complaint resolution. It will reduce system costs (including for the regulator, consumer and lawyer) as there will no longer be an expectation of complaint adjudication and formal written decisions for every decision.

We would expect the regulator to build in-house capability in alternative dispute resolution skills, including mediation.[314] We heard from many submitters that they would value the opportunity

Figure 5: Our recommended complaints model



312 "Victorian Legal Services Board & Commissioner Operational Guidance: Complaints by lawyers about lawyers" (February 2022).

313 We acknowledge that some complaints will raise a mix of consumer and disciplinary matters and will require in-house decisions about how best to proceed.

314 We are aware the Law Society is now providing mediation training to staff in its early resolution team.

to opt into utilising a tikanga approach to complaint resolution, which would be non-adversarial and kanohi ki te kanohi (face-to-face).[315] This could be especially useful as an option for Māori consumers and Māori lawyers. For those service complaints that have not yet been considered by a law firm's own complaints process, we would expect the regulator to refer the matter back to the firm, with a directive that it take all reasonable endeavours to resolve the complaint and report back.[316]

A key element of the new model is that the principal focus for consumer matters will shift to facilitating informal complaint resolution. However, the regulator will have a new power, to be exercised if necessary, to determine what is "fair and reasonable in the circumstances". This would not be a disciplinary finding.

This new power mirrors the powers of legal services regulators and legal complaints bodies overseas. For example:

- The Victorian Legal Services Board & Commissioner can, after efforts to facilitate resolution have failed, determine what is "fair and reasonable in all the circumstances".[317]
- The Legal Services Regulatory Authority in Ireland can, after efforts to facilitate resolution have failed, make determinations and orders where the "legal services provided by the legal practitioner were of an inadequate standard".[318]

International experience shows this power to make a determination on what is "fair and reasonable in the circumstances" is used sparingly, in approximately 1 per cent of consumer matters. For example, in the year to 30 June 2021 the Victorian Legal Services Board & Commissioner closed 447 'consumer matter complaints' of which only four required it to issue a determination.[319] However, it is an important power to have and the prospect of its use incentivises parties to commit to efforts at informal resolution.

Fee complaints will no longer necessarily be a disciplinary matter

Complaints about fees would now become 'consumer matters' rather than prompting disciplinary investigations and sanctions (unless the fees were grossly excessive). This move would bring the treatment of fee complaints closer to how they were handled under the previous regime of the Law Practitioners Act 1982.

As with other consumer complaints, it is our expectation that staff at the regulator would initially encourage informal resolution of fees complaints. If necessary they could make a determination as to what was "fair and reasonable". In our view this should be done by the regulator contracting a costs assessor, rather than using volunteers.

It will be important to avoid a situation where the regulator is involved in making minor adjustments to fees that are within the margin of differences of opinion about value. We agree with the submission made by Fraser Goldsmith that a fee could be adjusted if it was at least 15-20 per cent higher than what a cost assessor considered to be fair and reasonable.

At present there is a lower limit on the size of fee complaints that the Law Society will consider ($2,000 or more). We have not consulted whether this bar should be removed (since for many consumers a bill up to $2,000 is still a lot of money) or a cap placed on the size of a disputed fee

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315 See Carwyn Jones "Māori Dispute Resolution: Traditional Conceptual Regulators and Contemporary Processes" in Morgan Brigg and Roland Bleiker (eds) *Mediating across difference: Oceanic and Asian approaches to conflict resolution* (University of Hawai'i Press, Honolulu, 2011) 115.

316 Most industry ombudsmen schemes in Australia refer complaints back to a member to provide the member with a second opportunity to resolve the complaint: Gavin McBurnie and Jane Williams *Five-year Independent Review of the Telecommunications Industry Ombudsman* (Queen Margaret University Consumer Dispute Resolution Centre, 24 August 2022) at ii. Compare the power to refer a complaint to the provider, under the Health and Disability Commissioner Act, s 34(1)(d).

317 Legal Profession Uniform Law Application Act 2014 (Vic), sch 1, cl 290.

318 Legal Services Regulation Act 2015 (Ireland), s 60.

319 Victorian Legal Services Board & Commissioner *Annual Report 2021* (28 October 2021).

the regulator can look at. In Victoria the threshold for considering a fee complaint is $750, the level at which a lawyer must disclose estimated legal costs.[320] There is also a cap on the size of a fee dispute the regulator can examine, beyond which complainants are encouraged to bring a civil claim. There may be value in having the regulator focus on resolving smaller fee complaints typical of the average consumer rather than being used as a form of arbitration in lieu of utilising the courts. Lower and upper limits could be examined as part of any legislative reform.

For disciplinary matters: in-house investigation and determination of 'unsatisfactory conduct' (by regulator) and prosecution of 'misconduct' cases before the LCDT

There will continue to be a need to investigate 'disciplinary matters' – where, if established, the conduct complained about would amount to unsatisfactory conduct or misconduct. This will include matters where there is evidence of serious professional failings in the services provided by the lawyer to the client (or, for example, to beneficiaries of an estate) or serious misconduct in dealings with another lawyer, or in notifications raising serious allegations of bullying, sexual harassment, discrimination or racism.

The regulator, through its complaints staff, will be able to make determinations of unsatisfactory conduct, and will investigate cases that appear to reach the threshold of misconduct and require prosecution before the LCDT. Some disciplinary matters – in particular those being prosecuted before the LCDT – may need external legal advice on complicated professional standards issues.

Reserving the power to name lawyers for most serious matters

Many lawyers commented to us that the current complaints model invites an adversarial response as any complaint could result in disciplinary sanctions, with the risk of being publicly identified as falling short of professional standards.

Although a Standards Committee can decide to publicly identify a lawyer who has been found to have engaged in 'unsatisfactory conduct', this power has been used in less than 2 per cent of occasions when there has been an adverse finding against a lawyer in the past five years. Despite the infrequency of its use, this little-used power is clearly driving the behaviour of lawyers who are the subject of a complaint and contributing to the lengthy delays that are a feature of the current model.

'Unsatisfactory conduct' determinations are intended to cover more minor lapses of professional standards. Removing the prospect of name publication for such determinations would de-escalate the entire complaints model and support our objective of the fair, simple and efficient resolution of complaints. While lawyers would still want to avoid a finding of 'unsatisfactory conduct', they are likely to adopt a less confrontational approach to their engagement with the complaints system (with shorter submissions and less of a tendency to challenge all points). It would also be a key step in facilitating compromise and resolution.

In the current system, the overwhelming majority of complaints against a lawyer are dismissed, but it is not a 'painless' process. It can often take well over a year to be concluded. Many lawyers describe their mental health as being harmed by having a complaint 'hanging over their heads'. Removing the prospect of publicity would help remove some of the unnecessary stress the current model places on lawyers.

We appreciate the countervailing argument in favour of transparency, to give consumers access to information that could influence their choice of lawyer and to promote public confidence in the legal profession. We recommend that the new statute require the legal services regulator

320 Legal Profession Uniform Law Application Act 2014 (Vic), sch 1 cl 18(3) and sch 4 cl 174(4). The Victorian Legal Services Board & Commissioner can only handle disputes about legal costs if the total bill for legal costs is less than $100,000, or the total bill for legal costs is more than $100,000 but the amount in dispute is less than $10,000. For disputes exceeding these amounts, complainants must utilise the courts.

to adopt a 'naming policy' (after consultation with the public and the profession) setting out the circumstances when lawyers whose conduct has not met expected standards may be named if it is in the public interest to do so. A similar regulatory requirement for health practitioner regulators in New Zealand was introduced in 2019[321] and has resulted in naming policies that carefully balance relevant factors, including the practitioner's privacy and the public interest.[322]

It is anticipated that the power would be used very rarely – for example where there have been multiple adverse determinations against the same lawyer.[323] Routine, single determinations of 'unsatisfactory conduct' would not lead to the lawyer being publicly identified.

In order to ensure that the lessons of 'unsatisfactory conduct' cases are learnt by the profession and shared with the public, the regulator should provide regular educational updates and guidance on its website.

In practice, public naming of a lawyer who has been found guilty of a breach of professional standards would be reserved for only for the most serious matters, where the LCDT has found the lawyer guilty of misconduct.[324]

A new 'light touch' review mechanism

We recognise that an important element of fairness and confidence in the regulator's decision-making is to allow parties to the complaint to seek a review of the final decision.

The LCRO currently fulfils this review function. While a key purpose in establishing the LCRO was to provide for the review of the regulator's complaint decisions, it was only established as an independent entity because there was a need to provide a check on what would otherwise be an entirely self-regulatory complaints model, as documented at the time:[325]

> In the eyes of consumers the office must have independence from the [legal and conveyancing] professions so that they perceive reviews are dealt with in a non-partisan way.

We acknowledge the hard work and quality of decisions of the LCRO. The current LCRO, Rex Maidment, and his deputies have maintained a high standard of decision-making, providing an under-appreciated service with limited resources. However, if our recommendation to establish a new independent regulator is implemented, it will no longer be necessary to maintain the LCRO as a separate entity. The new regulator will be independent from the profession and should be viewed by both sides as a neutral arbiter on complaints.

In our view, the fair, simple and efficient resolution of consumer matters would be undermined by allowing either party (complainant or lawyer) to seek a review of the resolution of a *consumer matter*, where the regulator has determined what it considers to be "fair and reasonable in the circumstances". The lack of a statutory right of review or appeal is consistent with the approach of the Victorian legal complaints model and with low level complaint resolution schemes in New

321 Health Practitioners Competence Assurance Act, s 157B.

322 See, for example, Medical Council of New Zealand *Publication of notices about orders and directions* (April 2020).

323 The Health and Disability Commissioner (HDC) has a policy that there may be public interest in naming an individual if they have been found in breach of the Code in relation to three separate episodes of care within the past five years and all breaches involved at least a moderate departure from appropriate standards. Fewer than five practitioners have been publicly identified by the HDC in the past five years.

324 We note that disciplined teachers can only be publicly identified following a hearing in the Teachers Disciplinary Tribunal with lower level breaches upheld by the Teaching Council required to be anonymised: Teaching Council Rules 2016, r 64. The Teaching Council may advise that a person is the subject of a complaint or an investigation, although we are advised that as a matter of practice this power is not normally used.

325 Memorandum from the Ministry of Justice to the Minister of Justice "Lawyers and Conveyancers Complaints and Discipline Regime: Legal Complaints Review Office – Administrative Form" (21 August 2001) (obtained under Official Information Act 1982 request to the Ministry of Justice).

Zealand.[326] Unhappy complainants will still be able to pursue usual consumer protection remedies, including through the Disputes Tribunal.

For those parties who seek a review of a determination on a *disciplinary matter*, we propose a new review function that can be carried out for less than the current $1.8 million per annum cost. Instead of a stand-alone entity such as the LCRO, we propose that the regulator convene a small Review Committee of external members, or contract an external adjudicator,[327] to adjudicate on review applications. We would expect the Review Committee to comprise paid members (lawyer and lay members, with appropriate skills and experience) who would meet as frequently as necessary to ensure timely review.

This would not be a de novo hearing of the merits of the complaint. Parties would be able to make a statement in writing as to why the regulator's determination was, or was not, incorrect. The Review Committee would typically either confirm the decision, send the decision back to the regulator with directions for it to be reconsidered or, if appropriate, issue directions to the lawyer involved (eg, to refund fees, undertake education).

A similar approach has been adopted by the Legal Services Regulatory Authority in Ireland. The LSRA's Review Committee sits in groups of three members (from a pool of 20+ members) and must be composed of two lay persons and one legal practitioner.

Improved procedures for handling sensitive complaints

Complaints or notifications about sexual violence, harassment, bullying, discrimination and racism are particularly sensitive for individuals to report.

These sensitive matters need to be handled by specialist, trained staff. The need for the staff of regulators to be trained to handle sensitive notifications is increasingly recognised. In the United States, the Federation of State Medical Boards recommends that all staff who work with complainants in cases involving sexual misconduct should undergo training in the areas of sexual misconduct, victim trauma and implicit bias.[328] A similar approach has been adopted by Ahpra, the Australian Health Practitioner Regulation Agency, in training specialist staff to handle sexual boundary notifications.[329]

The Law Society has created a *Specialist Complaints Unit* (National Standards Committee and investigation team) following the recommendations in the Cartwright Report[330] and undertakes specialist training for staff handling sensitive matters.[331] It will be important that this work is progressed by a similar unit in the new regulator, with the handling of cases effectively quarantined from the complaints service. Initiatives introduced by the Legal Services Board & Commissioner in Victoria to reduce barriers to reporting of sexual harassment merit close examination.[332]

Strengthened obligations for lawyers to deal with complaints fairly

The current requirement for lawyers to have "appropriate procedures" for ensuring "that each complaint is dealt with promptly and fairly"[333] does not go far enough. Law firms and sole practitioners should be required to actually ensure complaints are dealt with fairly and effectively.

326 See the statutory schemes for the Victorian legal complaints system and the Health and Disability Commissioner consumer complaints system in New Zealand.

327 An example is the Independent Service Complaints Adjudicator for the Legal Ombudsman in England and Wales.

328 Federation of State Medical Boards Working Group *Physician Sexual Misconduct: Report and Recommendations of the FSMB Workgroup on Physician Sexual Misconduct* (May 2020), recommendation 21.

329 Ron Paterson *Three years on: changes in regulatory practice since Independent review of the use of chaperones to protect patients in Australia* (Australian Health Practitioner Regulation Agency and Medical Board of Australia, May 2020) at 9.

330 *Report of the New Zealand Law Society Working Group*, above n 41, at 77–82.

331 New Zealand Law Society *Transforming for the future: Annual Report 2021/2022* at 16.

332 The Victorian Legal Services Board & Commissioner has developed an online reporting tool to enable targets and witnesses of sexual harassment to make anonymous reports, in an attempt to reduce barriers to reporting of sexual harassment: Victorian Legal Services Board & Commissioner "New tool for reporting lawyer sexual harassment" (press release, 16 September 2021). Specialist training is provided for staff handling sensitive matters.

333 Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules, sch r 11.5.

Our consultation highlighted that many of the complaints going to the Law Society did not require the active involvement of the regulator and could have been addressed if the consumer felt they had been fairly treated when they complained to their lawyer.

Health providers in New Zealand "must facilitate the fair, simple, speedy, and efficient resolution of complaints".[334] Under the Code of Practice of Banking, banks undertake to make information about their free complaints process easily available and to deal effectively and fairly with customer concerns and complaints – and signpost the ability to contact the independent Banking Ombudsman about unresolved problems.[335]

We recommend a new duty, that mirrors the duty in England and Wales, for lawyers to "ensure that complaints are dealt with promptly, fairly, and free of charge".[336]

There should be a time limit for complaints to be made to the regulator

The Act does not set a time limit for complaints to be made to the Law Society. Standards Committees have discretion to take no action on a complaint if the time elapsed between the subject matter of the complaint and the date when the complaint was made is such that an investigation is "no longer practicable or desirable".[337]

The regulatory framework should recognise that many complainants, for valid reasons, may not be in a position to make a complaint shortly after the conduct in question occurred.[338] But in most cases, a client should be expected to air their concerns within a reasonable time from learning of the alleged deficiency. It is inefficient, and unfair on lawyers, to launch a complaint investigation and assess conduct that occurred many years ago.

In our view, there should be a time limit (possibly one to two years) for making a complaint to the legal services regulator. The regulator will need a discretion to extend the time limit where it is fair and reasonable to do so. For example, the standard time limit may not be applicable if the complainant could not reasonably have known there was cause for complaint, if the lawyer in question contributed to the complaint being delayed, or where a notifier may have been understandably reluctant to raise concerns about a workplace colleague.

Interestingly, when the Act was passed in 2006 a transitional provision prohibited the Law Society (under any circumstances) from considering complaints about conduct or services that occurred more than six years prior to the passage of the Act.[339]

We note that under the Legal Profession Uniform Law in Australia a complaint needs to be made within three years of the alleged conduct occurring. The regulator may waive this requirement if it is fair and just to do so (having regard to the reasons for the delay) or if the complaint alleges misconduct and it is in the public interest to deal with the complaint.[340] After public consultation, the Legal Ombudsman in England and Wales has recently reduced the time limit to bring a service complaint from six years to one year.[341]

We would support the new regulator consulting on an appropriate time limit for legal service complaints in New Zealand.

334 Code of Health and Disability Services Consumers' Rights, right 10(3).

335 New Zealand Bankers Association *The Code of Banking Practice* (April 2021).

336 Solicitors Regulation Authority *SRA Code of Conduct for Solicitors, RELs and RFLs* (30 May 2018), reg 8.5.

337 Lawyers and Conveyancers Act, s 138(1)(a).

338 An obvious example is a will, where a problem may only come to light during administration of an estate, years after the will was drafted.

339 Lawyers and Conveyancers Act, s 351(2)(b).

340 See Legal Profession Uniform Law 2014 (NSW), s 272(1).

341 Legal Ombudsman "Changes to the Legal Ombudsman's Scheme Rules" (press release, 28 October 2022).

11. Cultural challenges: improving diversity, inclusion, conduct and mental health

This chapter highlights ongoing cultural challenges in the profession. We discuss how to further promote diversity in the legal profession, support a culture that is inclusive, welcoming and healthy, prevent unacceptable conduct, in particular bullying, harassment, discrimination and racism, and respond firmly when such conduct is reported.

The regulator can exert influence on the culture of a profession in several ways:

- An independent new regulator with an objective to ensure an 'independent, strong, diverse and effective legal profession' can support initiatives to improve diversity and inclusion.
- Barriers to effective participation in the profession need to be removed. Several regulatory requirements are having a discriminatory effect. This includes rules that unjustifiably penalise those who have taken time off paid work and rules that restrict flexible contracting arrangements.
- The regulator should collect firm-level data on characteristics such as gender and ethnicity and publish aggregate data on trends across the profession.
- The regulator should take a firm line on unacceptable conduct (including bullying, sexual harassment, discrimination and racism), closely monitor the effect of rule changes in 2021 and respond to any gaps or over-reach.
- The regulator should monitor and report on mental health and wellbeing in the profession, be alert to harmful work practices, intervene sensitively so that practitioners have access to appropriate support and remediation, and encourage initiatives by representative bodies to promote a healthy work/life balance.

Our terms of reference required us to consider "how inclusion and diversity should be expressed in the regulatory framework". This chapter focuses on the role of the regulator and representative bodies in promoting a welcoming and inclusive legal culture that reflects the diversity of the community it serves, encourages good conduct and supports the mental health and wellbeing of lawyers.

We acknowledge the foundational work in recent years on changing the culture of the legal profession, including the Cartwright Report,[342] the Bazley Report,[343] the Purea Nei report,[344] research and reports from the Superdiversity Institute,[345] Zoë Lawton's #metoo blog documenting the experiences of many women lawyers[346] – and the work undertaken by the Law Society to progress these issues.

342 *Report of the New Zealand Law Society Working Group*, above n 41.
343 Bazley, above n 64.
344 Allanah Colley, Ana Lenard and Bridget McLay *Purea Nei: Changing the Culture of the Legal Profession* (December 2019).
345 Superdiversity Institute "Reports" <www.superdiversity.org>.
346 Zoë Lawton *#metoo blog* (April 2018) <www.zoelawton.com>.

Progress on diversity but challenges remain

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.

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,[347] Asian lawyers and disabled lawyers.

Key diversity statistics

- 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/King's Counsel (QC/KC) and only 27 per cent of current KCs 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 November 2022, Crown Solicitor firms in urban centres such as Christchurch, Napier and Gisborne had no Māori Crown prosecutors.[348]
- There is a lack of reliable data on disabled lawyers. In a longitudinal study,[349] only 7 per cent of law students reported having a disability, yet 1 in 4 New Zealanders have a disability.

For the past 30 years there have been more female law graduates than male, with women accounting for 72 per cent of new admissions to the profession in 2021.[350] Despite this trend, the **lack of gender equality** in senior positions within the profession is striking. The Solicitor-General has observed this issue can be traced back to the culture of the profession:[351]

> It's quite evident that we have all the things in place that we've always said, and been told, are the precursors to gender equality: we've got the supply pipeline, we've got the role models, and we've certainly got the determination. The results in equity of outcome and shared seats in the institutional power roles shows us these precursors are not enough – so again I ask, what on earth is going on?
>
> The answer lies in something deeper: it lies in the culture of our legal profession. I am confident this is so because the promise of equality, the oft-stated commitment to diversity, the burgeoning pipeline of women in our profession simply hasn't delivered meaningful inclusion or equity of outcome for women.

347 For discussion of the challenges facing Pacific people seeking to enter (and remain) in the legal profession, with recommendations for law schools, the Law Society and government, see Mele Tupou-Vaitohi and Wiliame Gucake *Fofola na ibe – Improving Pasifika Legal Education in Aotearoa Report on Talanoa Research Findings and Recommendations* (Michael & Suzanne Borrin Foundation, November 2022).

348 The Crown Solicitors in these centres report continuing efforts to recruit Māori lawyers to work as Crown prosecutors.

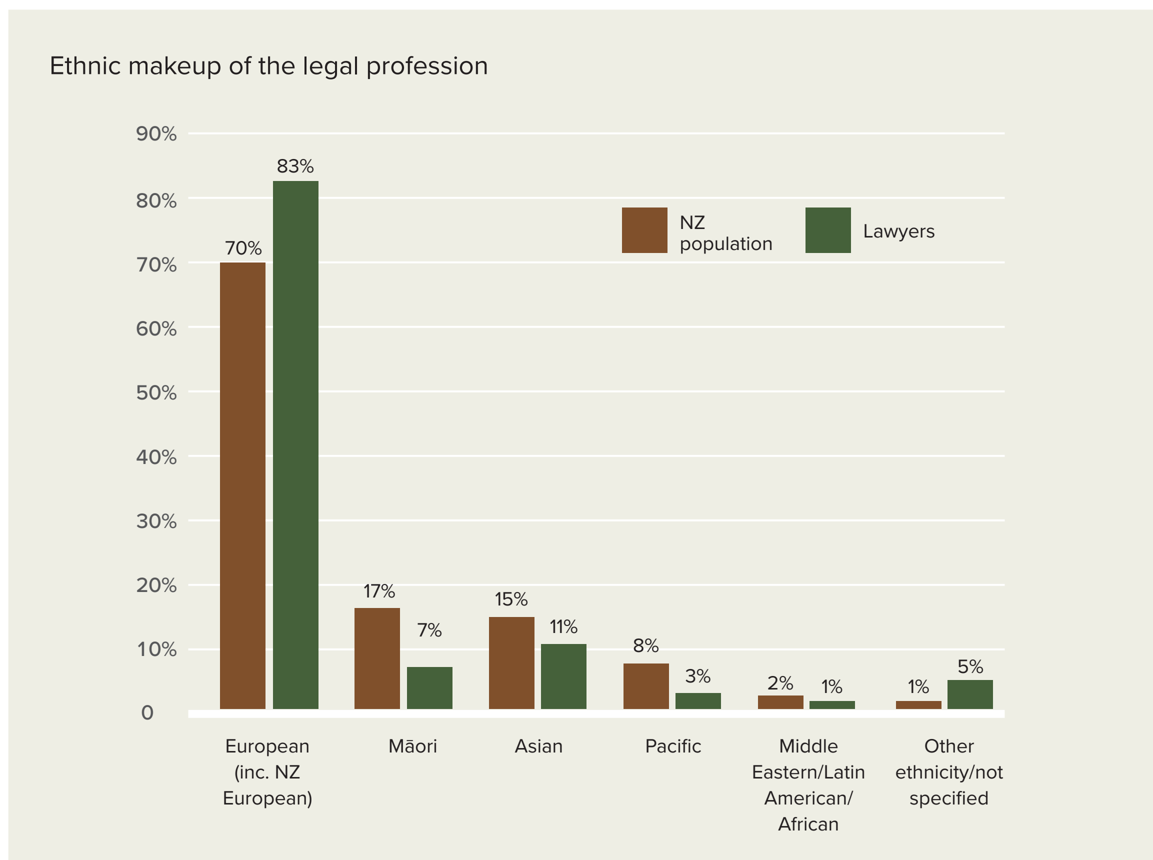
349 Lynne Taylor and others *The making of lawyers: Expectations and experiences of first year New Zealand law students* (May 2015).

350 New Zealand Law Society "By the numbers" <www.lawsociety.org.nz>.

351 Una Jagose, Solicitor-General "Imagining the Future Lawyer" (23rd Annual New Zealand Law Foundation Ethel Benjamin Commemorative Address, 24 October 2019).

The make-up of the legal profession is also conspicuous for its **lack of ethnic diversity**, as shown below in Figure 6.[352] Asian, Māori and Pacific peoples comprise 40 per cent of New Zealand's population, but only 21 per cent of the legal profession.

Figure 6: Ethnic makeup of the legal profession



A significant contributor to the lack of diversity within the legal profession is the pipeline into the profession. 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.[353]

Submitters want a more inclusive and diverse legal profession

Throughout our consultation we heard from many lawyers that the legal profession is not sufficiently inclusive or diverse. 56 per cent of survey respondents agreed that changes are needed to improve diversity and inclusion, with only 26 per cent disagreeing. A large number of law students at Auckland University expressed concern at the lack of diversity in the legal profession, especially in terms of ethnicity.[354]

The demographic breakdown of the survey responses shows much higher levels of support within younger groups, women and ethnically diverse groups for the idea that the profession needs to be more inclusive:

352 Barnett, Burt and Nair, above n 80. Note, some lawyers may identify with more than one ethnicity.
353 Stacey Shortall "Social Mobility | why it matters in our workplaces" (23 February 2021) Our Words Matter <www.ourwordsmatter.co.nz>.
354 Personal communication from Zoë Lawton, Professional Teaching Fellow (Legal Ethics), University of Auckland (November 2022).

- 75 per cent of those aged 20-29 agreed that changes are needed, with less than 10 per cent of respondents disagreeing.
- 71 per cent of women agreed there was a case for change, compared to 44 per cent of men.
- 75 per cent of Pacific peoples and 68 per cent of Asian respondents agreed there was a case for change.

Many of the specific examples submitters raised have been canvassed elsewhere in this report, including the barriers faced by parents returning to work, the challenges some groups faced in providing suitable referees to the Law Society, and the negative experiences of some lawyers interviewed by the Practice Approval Committee, particularly if proposing to work in a non-traditional manner (eg, using fixed fees, or through a virtual chambers).

Some submitters raised concerns about whether the legal profession is welcoming to Rainbow and gender diverse people, suggesting that "the legal profession unconsciously excludes queer and gender non-conforming people". We also heard of encouraging developments such as large law firms signing up for Rainbow Tick accreditation, as a way of signalling their intention to make their workplace inclusive and open for all.

We heard from submitters who highlighted that the business models of many large law firms resulted in a culture where junior lawyers are seen as a disposable commodity, with a focus on high workload. A decade ago, James Farmer KC noted:[355]

> The demands made [by] law firms of the lawyers that they employ (including in that term the partners who own the firms) has grown exponentially. This is driven to a substantial extent by the profit motive and the accompanying transition from law firms as professional practices to commercial businesses.

Although practice is changing, some firms still do not provide support for flexible working or make accommodation for those with disabilities or language issues. A submitter observed:

> The legal profession is woefully behind other professions when it comes to the actual underlying enablers for diversity and inclusion: many law jobs are still entirely inflexible (both in terms of flexible hours and flexible location) and not family-friendly – which often rules out women, and makes many men have to make an incredibly difficult sacrifice.

Increasingly, new entrants to the profession are unwilling to work the excessive hours typical of practice in large law firms since the 1980s. Changing expectations and 'millennial mobility' were highlighted in a research report in 2016 on the experiences and retention of New Zealand's junior lawyers.[356] Changes in work patterns have accelerated during the Covid-19 pandemic, as office-bound workers used technology to work from home and enjoy newfound flexibility.

Other submitters query the need for regulation

Although there is general support for the profession to become more diverse and inclusive, there is also scepticism about the basis for regulatory intervention. Some submitters pointed to the advances made by women in reaching partnership, leadership roles in the profession and appointment to the senior courts:

355 James Farmer "Happiness, living a balanced life and legal practice" (9 January 2012) <www.jamesfarmerqc.co.nz>.
356 Josh Pemberton *First Steps: The Experiences and Retention of New Zealand's Junior Lawyers* (New Zealand Law Foundation, 2016).

> Those who call for more urgency in accelerating change do not appear to credit how quickly the profession has changed and adapted already and that the process of continual organic improvement is bound to continue without legislative change.

Others pointed out that law firms are already highly incentivised to improve their composition and internal work culture, for recruitment and retention reasons. Firms increasingly appreciate the need to be diverse in order to attract talented young lawyers.

Some questioned whether a push for diversity would be at the expense of merit:

> The intellectual and ethical requirements of membership of the legal profession have developed in order for it to discharge the profession's ethically valuable role of serving the public and social order in the form of the operation of the legal system. It would be wrong to relax those requirements and compromise the discharge of that role in order to meet diversity goals.

Others questioned the legitimacy of regulatory intervention in this area and criticised it as "fashionable" and "trendy". One submitter pithily noted that "regulation of lawyers is not an instrument for social change and to burden it with such responsibilities will fail".

The role of the regulator in supporting diversity and inclusion

We recognise that the legal profession has changed significantly in its gender composition and ethnic diversity. However, the make-up of the profession does not yet reflect the diverse community of Aotearoa New Zealand. It is difficult to avoid the conclusion that parts of the profession have not moved with the times, and that further changes are needed if the profession is to better reflect and serve our diverse population.

In our view, the lack of diversity and the exclusion of some groups from the profession – in particular from senior roles – will not change without continued focus.

We consider that the regulator does have a role – alongside the representative body for the profession and other groups – in removing barriers and encouraging a diverse and inclusive profession. We accept that there is a need for balance by the regulator in how it promotes diversity and inclusion. Regulators risk losing the support of the regulated profession if diversity and inclusion issues are pushed too far. As noted earlier,[357] in 2017, the Law Society of Ontario introduced a requirement that licensees acknowledge an "obligation to promote equality, diversity and inclusion". The new mandate proved highly divisive within the legal profession and was revoked in September 2019.

We do not support the regulator setting targets or quotas. Rather, we envisage the regulator taking a lead by removing regulatory barriers that are having a discriminatory effect, collecting and publishing relevant data, continuing to spotlight diversity issues in its reporting, commissioning qualitative research and surveys on diversity and helping to engage the profession on what more should be done. This might include developing a diversity strategy and a regulatory action plan to address specific issues of concern. Examples from overseas include the Diversity Action Plan of the Law Society of British Columbia, the Bar Standard Board's (England and Wales) equality and diversity strategy, and reports from the Solicitors Regulation Authority (England and Wales) on

357 Above, text accompanying nn 175, 176.

"The business case for diversity" and "Promoting disability inclusion in law firms".[358]

The combined effects of the reforms we are recommending are likely to support efforts to improve diversity and inclusion within the legal profession:

1. The independent regulator will have a **new objective** to encourage an "independent, strong, diverse and effective legal profession". As outlined above, we would expect the regulator to ensure there are no artificial barriers or discriminatory hurdles caused by regulation and to encourage diversity by collecting and publishing relevant data, commissioning research and highlighting areas for improvement.
2. The composition of the independent **regulator's board will be more diverse** and will likely be more responsive to diversity issues.
3. A **new Te Tiriti o Waitangi clause** will ensure a focus on Māori in the regulator's work to support inclusion. We would expect the regulator to undertake effective outreach, consultation and co-design with Māori, to partner with Māori in the delivery of certain functions, and to make improvements to regulatory procedural matters.

Recommendation: remove regulatory barriers that have a discriminatory effect

The Law Society's regulations are making it harder for certain groups of lawyers to practise law. We consider there is a strong case to remove several barriers that are having a discriminatory effect.

Practising on own account rules adversely affect those returning to the workforce

The case for more flexible work arrangements for lawyers, and the positive impact that will flow for the culture of the legal profession, is well made by Sarah Taylor in her 2017 report, *Valuing our lawyers: The untapped potential of flexible working hours in the New Zealand legal profession*:[359]

> Embracing flexibility is not just about having a flexible working policy but about setting an environment and culture that supports flexible working regardless of gender, age, role, level, or reason. There is a call for new role models in our profession and an expanded value system that recognises the importance of lawyers' lives outside of work.

In chapter 8 we examined the negative impacts from the regulatory requirements that lawyers must meet to become a sole practitioner. Our recommendation to introduce a new 'freelance' lawyer model will improve diversity within the legal profession by making it easier for lawyers to return from parental leave, supporting new contracting models, and making the provision of legal services more accessible to lawyers who do not want to work in a traditional legal practice.

While the 'freelance' lawyer model will make a material difference for many lawyers who have taken time off work, it will not help those lawyers who want to become partners, barristers, or want the option to work in sole practice in reserved areas for whom the 'hours worked' threshold to be eligible to become a sole practitioner (or partner) sets too high a bar.[360] The hours a lawyer has worked in the preceding five years is not a proxy for competence. We agree with submitters that it is having a discriminatory effect and making it harder for lawyers, and women in particular, to progress their careers following parental leave. The minimum hours worked threshold should be removed as soon as practical. The other requirements to practise on one's own account (including

358 More information is available in the working papers produced for the Panel, accessible via <www.legalframeworkreview.org.nz/independent-legal-review-resources/>.

359 Taylor, above n 222.

360 Requiring a lawyer to have worked the equivalent of over two and a half years full-time in the preceding five years. Those who can't meet this threshold have to convince the Law Society that 'special circumstances apply'.

an interview process and 'Stepping up' course) are sufficient to enable the regulator to check an applicant's suitability to practise on their own account and, if sensitively applied, are less likely to be discriminatory in impact.

Admission and character referee requirements are viewed as exclusionary by some

We heard that some Māori feel excluded by the current admission ceremonies, which typically take place in the High Court and are characterised by a high degree of formality. Some newly admitted Māori lawyers would strongly prefer a process that was more inclusive of their whānau and community, and which might include an option for lawyers to choose an alternative marae-based ceremony. This issue was raised by Te Hunga Rōia Māori and in a wānanga of 90 Māori law students.

We support new lawyers being given the option of participating in a marae-based admission or the more regular court-based ceremony.[361]

We also heard that applicants, particularly those from lower socio-economic groups and smaller rural communities, sometimes struggle and feel excluded by an admission requirement to find someone who meets the Law Society's standard for a character referee. The Law Society's list of a 'preferred referee' includes a personal relationship with the likes of lawyers, registered professionals such as doctors, nurses, vets, a member of the armed forces, Justices of the Peace, or Members of Parliament. One submitter noted:

> The admission process places far too much emphasis on the 'people of standing' references, and the requirements for this are far too narrow. For people from families that are working or 'lower' class meeting this requirement is ridiculous. Not all of us personally know doctors or lawyers when we decide to enter the profession.

The Law Society has advised that those listed as 'preferred referees' are examples only and that it frequently helps applicants find suitable referees. However, there is a case for reviewing the certificate of character requirements and making clearer the types of referees that can be provided. The examples provided to prospective lawyers are outdated and should make clear that applicants can select a referee from a local community figure of good standing and from a broader set of registered occupations (eg, electricians, plumbers, builders).

Mental or physical conditions that may affect fitness to practise

Under section 55(1)(l) of the Act, "whether, because of a mental or physical condition, the person is unable to perform the functions required for the practice of law" is a matter the Law Society or the High Court may take into account for the purpose of determining whether an applicant is "a fit and proper person" to be admitted as a barrister and solicitor. Similarly, this factor may be taken into account by the regulator in determining whether an applicant is a fit and proper person to hold a practising certificate, under section 41(2)(a) of the Act.

These provisions are sensible and consistent with similar provisions in the regulatory regimes for other professions in New Zealand.[362] The community has a legitimate expectation that a professional regulator will ensure practitioners are fit to practise. However, the application form for admission and the Law Society's 'Guidelines for Applicants declaring health conditions' ask for detailed information about the nature and duration of the health condition, treatment and a medical certificate or report from a health professional, including information about prescribed medication, counselling undertaken and comments on fitness to practise – with the caveat that "Disclosing

361 We recognise that admission procedures are currently a matter for the High Court.
362 Compare the Health Practitioners Competence Assurance Act, s 27(1)(e).

such information will not necessarily result in your application being denied" and that an interview may be required.

We note that the Law Society's guidance assures applicants: "Knowing that the legal profession is a collegial one and that mental health issues do not have a stigma attached to them can be beneficial when starting a legal career." However, we are unsurprised that asking for disclosure of such sensitive health information on an electronic form submitted to the Law Society can be perceived as intrusive and even traumatising for applicants with a history of serious mental illness – and that they may be fearful of exclusion, even when they produce medical evidence that their condition is well managed.

The regulator needs to ensure that its processes in requesting and handling such sensitive, highly confidential health information (particularly relating to mental health) do not trigger harm and operate as an unjustified, discriminatory regulatory barrier. People with well-managed physical and mental conditions should encounter a regulator that encourages and supports them in safe practice.[363]

The King's Counsel appointment process

The title of King's Counsel (KC) is seen as a mark of prestige awarded to barristers sole who have demonstrated excellence in their careers. KCs are typically able to charge higher fees[364] and are involved in a relatively high proportion of senior court cases.[365] A high proportion subsequently become members of the judiciary.[366]

Given the prominence and advantages that accrue to KCs, it is noteworthy that the diversity of KCs does not reflect that of the profession, let alone the broader community. Women comprise 42 per cent of barristers sole in Aotearoa New Zealand, but only 27 per cent of KCs, while very few Māori have ever been appointed as a KC. This may be partly due to lower rates of application[367] but it may also be attributable to a somewhat opaque appointment process.

The Act states that King's Counsel may be appointed by the Governor-General under the Royal Prerogative.[368] Appointments are made following recommendations by the Attorney-General with the concurrence of the Chief Justice.[369] The Attorney-General and the Chief Justice updated Guidelines for Candidates in 2019 to include a new criterion of a commitment to improving access to justice.

The Attorney-General is able to call for nominations and is required to consult with both the Law Society and the Bar Association on candidates.[370] The Law Society, through its regulatory functions and funding, undertakes vetting and referee checking prior to appointments being made.

We heard concern from some submitters that the lack of transparency around the appointment process reinforces the perception of an 'old boys' club', with an element of 'shoulder-tapping' and rewards for those who are 'well connected'. As noted in the Clementi report, a reformed regulator might ask "why, in a profession which stresses the importance of independence, the kitemark is finally bestowed by the State rather than the profession itself; and whether the system as a whole operates in the public interest".[371]

363 See, for example, Victorian Legal Services Board *Policy: Mental Health* (December 2011).

364 Michael Blackwell "Taking Silk: an empirical study of the award of Queen's Counsel status 1981-2015" (2015) 78 Modern Law Review 971.

365 30% of proceedings in the Supreme Court from 2015–2019 had at least one KC involved: Geoff Adlam "A rare honour: Queen's Counsel in New Zealand" (2019) 927 LawTalk 72 at 74.

366 33% of King's Counsel have gone on to be members of the judiciary: at 74.

367 Noting that 17% of women KC applicants from 2002–2018 were successful, compared to 9% of men: at 73.

368 Lawyers and Conveyancers Act, s 119.

369 Lawyers and Conveyancers Act (Lawyers: Queen's Counsel) Regulations 2012, reg 4.

370 Regulation 8.

371 Clementi, above n 91, at 7. In England and Wales, the appointment process was changed in 2004 to set up an independent panel to recommend appointees. The King's Counsel Selection Panel has nine members, consisting of four lawyers, a retired judge and three lay members (including a lay chair).

One submitter argued for a broader use of the KC title, to include all the best barristers, including those who practise commercial law, mediation, arbitration and other specialist areas. Another submitter raised broad concerns about the KC appointment process, set out in the table below.

Table 15: A selection of questions raised by a submitter about the KC appointment process

- Does the system appear to be elitist and archaic in an egalitarian society like NZ and likely to be increasingly perceived as such as the profession develops?
- Why is the preference system only available to one branch of the profession when we have a fused profession with excellent litigators and non-litigators in both branches of the profession?
- Does the secrecy of the system leave the profession open to suspicion that favouritism and nepotism play a part in the selection procedure?
- Is the system an inadequate methodology for conveying excellence to the public in that the selection procedure is inevitably arbitrary and subjective and because qualified applicants are excluded by an annual numeric limit?
- Is the system detrimental to the profession as a whole by conveying a message that there is an elite group and that those not appointed are not fully competent or as well qualified?
- If the profession is not yet ready to abandon the system should there be an independent public system of application and appointment as in the UK?

The Law Society advised that it is not the appointing body, that the topic is divisive, and it has already asked for changes to the system. At some point in the future the role of KC, and the process of appointment to the rank, merits reconsideration.

Regulatory initiatives to support diversity and inclusion

In addition to removing the barriers that are adversely affecting certain population groups, there are a number of steps the regulator can take to encourage diversity in the profession.

Improved transparency

We consulted on whether the regulator should have additional tools to promote diversity within the legal profession, including the ability to require firms over a certain size to publicly report on the gender and ethnicity of partners.

The views of submitters on mandatory disclosure

The profession was evenly split on whether there was a case to compel law firms to report on the diversity of people in senior roles. Submitters in favour noted that improving transparency would drive change as law firms reflect on their lack of diversity, but would also help prospective employees and clients to identify which firms they might wish to work for or engage. The Aotearoa Legal Workers' Union National Student Committee submitted:

> A large part of why the legal profession fails to be inclusive is because people belonging to underrepresented groups struggle to know which firms truly value and uphold diversity and inclusion and having a regulator that enforces transparency of this data would aid prospective students in choosing where to go, as well as make firms work harder in their efforts.

Those opposing any new disclosure requirements suggested that diversity should be left up to firms. As private businesses, they should be free to employ who they want. Submitters noted that many firms recognise having a diverse workforce makes good business sense and that the profession is already becoming more diverse. Mandates could result in new compliance costs for no identifiable benefit; such matters should be dealt with uniformly across all professions in Aotearoa New Zealand.

Recommendation: give the regulator new information-gathering powers

There is a case for the new regulator to be able to collect new information on the diversity of the profession. The objective of collecting diversity data would not be to publicly identify any firm, but to allow for research, analysis and reporting on *aggregate trends* within the legal profession. With a shift to entity regulation, it would be relatively straightforward to ask individual firms to confidentially report on their staff make-up.

The Solicitors Regulation Authority in England and Wales is a leader in this area. It collects diversity data every two years from the firms it regulates, publishes a report on key trends and makes the data publicly available through an interactive tool that allows users to view data. The tool allows people to view data disaggregated by population (eg, partners, solicitors, other staff), characteristic (eg, age, sex, ethnicity, school type, parental qualification or occupation) and firm type (eg, number of partners, region).[372] The SRA's analysis has highlighted that the largest law firms have the smallest proportion of partners comprising women, people from a Black, Asian or minority ethnic group, and disabled lawyers.

We do not support the legal services regulator having the power to require law firms to publicly disclose the gender and ethnicity of their partners/employees. Such a mandate would need to be considered by government in a manner that is consistent across occupations and sectors. We note a petition on this type of issue was recently presented to Parliament, calling for new mandatory pay gap reporting across Aotearoa New Zealand.[373]

Some firms have recognised the demand for publication of diversity information. For example, MinterEllisonRuddWatts publishes detailed information on their gender and ethnicity 'pay gaps' and their action plans for addressing the issue.[374] We expect that, over time, other firms will recognise the value of transparency along similar lines and that a voluntary approach will continue to gain traction.

Equitable briefing and reporting on gender equality

In December 2017 the Law Society and the New Zealand Bar Association launched the "Gender Equitable Engagement and Instruction Policy" ("the Equitable Briefing Policy"). Those who adopted the policy made commitments to support the retention and advancement of women in the legal profession. This included a commitment that by December 2018, having used "reasonable endeavours", women lawyers would take a lead on at least 30 per cent of court proceedings,[375] arbitral proceedings and major regulatory investigations. The Law Society committed to publicly reporting the impact of this policy.

By 2019, the Law Society had instructed female lead counsel in 35 per cent of the court cases in which it was a participant, increasing to 42 per cent in 2022.[376]

In 2022 the target for firms signing up to the Equitable Briefing Policy was lifted to 50 per cent, and the policy was incorporated into an updated Gender Equality Charter, aiming to improve the

372 See Solicitors Regulation Authority "Law firm diversity data tool" (2021) <www.sra.org.uk>.

373 See MindTheGap <www.mindthegap.nz>.

374 See MinterEllisonRuddWatts "Community | Hapori" <www.minterellison.co.nz>; and MinterEllisonRuddWatts "Diversity and inclusion | Kanorau me te whakawhanaungatanga" <www.minterellision.co.nz>.

375 Noting that 40% of barristers sole are women.

376 Data provided by the Law Society.

retention and advancement of women lawyers. The latest Gender Equality Charter Survey Report was released in November 2022.

We would expect the regulator to continue to lead by example in equitable briefing and in publicly reporting on progress in advancing gender equality in the legal profession.

Representative changes to support diversity and inclusion

Representative bodies have an important role to play in championing change, identifying barriers and highlighting successful initiatives to improve diversity and inclusion. We would expect the Law Society, as a national membership body, and other representative groups to continue to put in place initiatives that help make the legal profession more welcoming and inclusive.

Submitters noted that other jurisdictions are more advanced in the type of initiatives their membership bodies are putting in place to tackle issues with diversity. We list some of those initiatives and proposals here simply to note potential programmes and initiatives that organisations may want to consider in the future:[377]

- Roundtable discussions within the profession and reports that examine key diversity issues, such as flexible working, bias, bullying and harassment and gender pay gaps (Scotland)
- Engaging law school students to develop strategies to address diversity barriers in the workplace and raise awareness of the issues (UK)
- Research into best practices for improving diversity and inclusion within large law firms (NSW)
- A Diversity and Equality Charter, for organisations to publicly commit to upholding the stated principles (Australia)
- A Diversity Committee, aimed at developing policies to increase diversity, focused on lawyers with disabilities, indigenous lawyers and women in the profession (Victoria)
- A business case that provides evidence and tips to law firms for why investing in diversity and inclusion makes financial sense (NSW)
- Scholarships to reduce barriers to entry
- Mentoring programmes, particularly for new lawyers from lower socio-economic backgrounds
- A joint outreach programme to schools from membership bodies and law firms to help change public perceptions on who can be a lawyer.

Addressing conduct and cultural problems in the legal profession

A healthy and positive professional culture depends on work environments where lawyers feel safe, good conduct is encouraged, and the mental health and wellbeing of lawyers is supported. It is clear the legal profession faces some significant challenges. The Law Society's 2018 workplace survey identified that:[378]

- 18 per cent of respondent lawyers had been "sexually harassed" during their working life.
- 52 per cent of respondent lawyers had been bullied in the workplace. Ethnicity plays a role in bullying, with prevalence levels higher among Māori, Pacific and Asian lawyers.
- 24 per cent of respondent lawyers reported they were not appropriately managing their workplace stress.

377 Additional information on many of these initiatives is available in the working papers that have been published as part of this review, accessible via <www.legalframeworkreview.org.nz/independent-legal-review-resources/>.

378 Colmar Brunton *Workplace Environment Survey* (28 May 2018), prepared for the New Zealand Law Society. 3,516 lawyers from 13,662 randomly selected lawyers completed the email survey (a response rate of 26%).

While these problems are not limited to the legal profession, there is a growing body of evidence that there are distinct reasons why these behavioural issues persist in the legal profession – why they take place, how they have become normalised and why there is often a reluctance to address the issues.[379] The known risk factors for bullying and harassment include the power imbalance (exacerbated under a partnership model), a cultural trait of workplace competition, lower worker diversity, long working hours and excessive alcohol consumption. Targets of inappropriate conduct (and witnesses) are often very reluctant to report such conduct for fear of being viewed as disruptive, damaging their career prospects, and out of a recognition that law firms have typically viewed junior lawyers as disposable.

The demands of legal practice can take a heavy toll on mental health. New Zealand is experiencing a rising tide of mental distress and addiction.[380] Lawyers are not immune. A Wellbeing360 online health assessment survey completed by more than 400 lawyers in New Zealand in 2016 found that 1 in 2 lawyers are insufficiently active, 1 in 2 don't get enough sleep and 1 in 3 "could improve their mental wellbeing".[381] These results are hardly startling. More concerning are reports of practitioners becoming disillusioned and burnt out, and of high rates of depression, alcohol addiction and drug abuse in the legal profession, and lives lost to suicide.[382]

Discrimination and racism are a problem

Disappointingly, we heard that discrimination and racism are still a problem within the legal profession. After admission, some Māori, Pacific and Asian lawyers experience discrimination on the basis of ethnicity. We heard from Asian lawyers that they are discriminated against and hit a "bamboo ceiling" in firms, leading to isolation, poor mental health and decisions to leave the profession:

> If you can't figure out how to behave, you don't flourish. Serious career choices are being made by Asian lawyers that have to do with their reception in fora of the law, that depend on culture – not intellect or integrity.

As long ago as 1999, the Law Commission noted a lack of detailed research about the experiences of Māori, Pasifika and other minority lawyers but concluded that available information suggested these groups faced discrimination in the legal profession.[383] The Cartwright Report in 2018 noted that "Race or cultural bias appears to be a factor underlying bullying of ethnic minority group lawyers in the profession."[384]

During our consultation, Māori lawyers reported experiences of their cultural values being ignored, with some firms unwilling to grant leave to attend tangi and important hui, or study te reo. A study led by Deputy Chief Caren Fox of the Māori Land Court and then lawyer Kiritapu Allan in 2014 identified five broad categories of barriers for Māori women in the law.[385] Pacific lawyers said they are often seen as homogeneous: "Many people don't understand there is a plurality of Pasifika cultures – it gets homogenised."

Lawyers with disabilities are under-represented in the profession and are often overlooked

379 See Rachel Doyle *Power & Consent* (Monash University Publishing, Melbourne, 2021); and Pearl Philpott "Cleaning Up the Legal Professions Act: How to Tackle Bullying, Harassment and Discrimination?" (unpublished research paper, University of Auckland, 2022).

380 *He Ara Oranga: Report of the Government Inquiry into Mental Health and Addiction* (November 2018) at 65.

381 Sarah Harmer "How healthy are New Zealand lawyers?" (2017) 907 LawTalk 47.

382 Sasha Borissenko and Elliot Sim "Mental Illness in the Legal Profession" (2014) 855 LawTalk 4.

383 Law Commission *Women's Access to Legal Services* (NZLC SP1, 1999) at 174.

384 *Report of the New Zealand Law Society Working Group*, above n 41, at 26.

385 Caren Fox and others "Strategies for Survival – Māori perspectives" in *Women, the Law – and the Corner Office* (New Zealand Law Society seminar, October 2014). See also Keely Gage "Māori Underrepresentation in the Legal Industry" (2020) 9 Employment Law Bulletin 1.

in discussion of discrimination in the workplace.[386] In evidence given to the Disability Royal Commission in Australia, Oliver Collins submitted:[387]

> There are so few, positive stories of people with disabilities entering industries like the legal industry and having the same career trajectories as able-bodied colleagues. As a result, it is taking a more extended period of time to overturn and debunk the negative stereotypes that have traditionally served to discourage those with disabilities from aiming for gainful employment and participating fully in the workforce.

We heard of inadequate support for people with disabilities in the transition from university to practice and to enable them to flourish in senior roles, with Kieran Berry submitting:

> There is a cultural narrative of disability which considers persons with disabilities, particularly those with sensory (visual or hearing) impairments, to be less effective at practice than their unimpaired contemporaries. The culture of the profession prevents frank and open discourse about a person's particular needs and how the impact of their disability can be effectively mitigated to enable full participation in the workplace.

Negative stereotyping is depriving the legal profession of a cohort of talented lawyers with much to contribute. Firms may assume that lawyers with disabilities will take extra time, be resource-intensive and lead to increased costs for clients: "These are all assumptions. I might take longer to read the material, but I can produce the work in the same or less time than my colleagues."[388] Another submitter noted: "If a firm has a sound culture, respects expertise, respects diversity ... there is no reason why [an employee with a disability] will not be a top performer."

It will continue to be important to ensure that Rainbow and gender-diverse lawyers are welcomed and encouraged in their legal careers. At a consultation at the Law Society Waikato / Bay of Plenty branch, lawyer Kevin Smith recounted an early career experience of being on the receiving end of homophobic slurs and "obscene bullying voicemails" from a legal employer. This had a severe impact on his mental health. He also described his more recent experience of an inclusive profession that welcomes Rainbow lawyers.

Recent developments to prevent and detect unacceptable conduct

The Cartwright Report 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 Law Society made extensive changes to the rules[389] 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

386 A submitter noted that in the 2018 Cartwright Report, "Disability is not mentioned once".

387 Statement of Oliver Collins, Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, Australia, 9 December 2020, para 20, accessible at <disability.royalcommission.gov.au/>.

388 Submission from Kieran Berry.

389 See Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Amendment Rules 2021; and Lawyers and Conveyancers Act (Lawyers: Ongoing Legal Education – Continuing Legal Education) Amendment Rules 2021.

- new reporting requirements on law practices under which the Law Society must be notified by a designated lawyer about inappropriate conduct, with annual filing obligations
- lawyers having a duty to report to the Law Society if they have reasonable grounds to suspect that another lawyer may have engaged in misconduct
- power for the Law Society to mandate CPD activities, which could include courses on unconscious bias, anti-bullying and harassment (as discussed in chapter 9).

The new rules have been complemented by a strong statements from the Lawyers and Conveyancers Disciplinary Tribunal and the High Court about misconduct in a disciplinary context.[390] In a leading ruling in 2021, the Tribunal noted:[391]

> The profession expects of its members that those who work with lawyers are respected and safe. A basic behaviour expected of lawyers towards those they work with is that they are respectful and do not abuse their position of power. There is no place for objectification of women or indeed any person, by those in the profession of law.

On appeal, when increasing the penalty of suspension to the maximum of three years, the High Court emphasised that “it is vital that the public can and does have confidence that practising lawyers will act honourably and with integrity” and that “members of the public and of the profession should be able to have confidence that practitioners entering the profession at a junior level will be safe and treated with respect by other members of the profession”.[392]

Some commentators have called for even harsher penalties,[393] while a number of submitters doubted whether the new conduct standards and reporting requirements will be effective to address conduct issues within the profession. Te Hunga Rōia Māori noted that the negative experiences many Māori lawyers have within the legal profession are not simply individual disciplinary matters but involve “structural and deeply-rooted” issues.

We also heard views that the new obligations on lawyers to report suspected misconduct are a relatively blunt instrument and may be creating new issues – as outlined in Table 16. Some submitters argued that widening the focus of professional conduct to include employee welfare has, along with attendant publicity, consumed disciplinary resources that otherwise could have been used to determine client complaints more promptly.

Table 16: Issues with mandatory reporting of suspected misconduct

The mandatory reporting rules are not without challenges. We have heard that there is a reluctance of lawyers to abide by their duties to report misconduct. There have been stories of senior practitioners getting junior lawyers to raise concerns about the fitness to practise of one of their senior colleagues, rather than making the report themselves.

390 Lawyers and Conveyancers Act, ss 6 and 7(1)(b).

391 *National Standards Committee No 1 v Gardner-Hopkins* [2021] NZLCDT 21 at [173].

392 *National Standards Committee (No 1) of the New Zealand Law Society v Gardner-Hopkins* [2022] NZHC 1709, [2022] 3 NZLR 452. The New Zealand High Court’s approach may be contrasted with the more cautious approach of the High Court in England and Wales in *Beckwith v Solicitors Regulation Authority* [2020] EWHC 3231 (Admin), [2021] IRLR 119 in considering the extent to which a regulator may scrutinise a professional person’s private life.

393 Ana Lenard “James Gardner-Hopkins penalty decision” [2022] NZLJ 79 argues that the legal profession remains a relatively safe space for sexual predators.

> We have also heard of an occasion when a male practitioner was approached by a female colleague to sound him out about the potentially inappropriate behaviour of another colleague. While the female colleague did not want to formally report the matter, the male practitioner then felt that, having now heard of the behaviour, he was legally required to report his male colleague to the Law Society. The mandatory reporting rule may have the inadvertent consequence of further isolating victims of bullying and harassment.[394]

The new conduct and reporting rules only took effect in 2021. In our view, it is premature to assess whether additional measures are required. The new regulator will need to closely monitor implementation of the rules and respond to any gaps or over-reach.

Entity regulation may help address conduct issues

The traditional view of occupational regulation is that it should only address instances of harm that affect consumers. Under such an interpretation the Law Society, or the new independent regulator, would leave all matters of workplace harassment and inappropriate conduct to WorkSafe as the health and safety regulator. We understand that this was the justification for officials not supporting entity regulation following the Cartwright Report.[395]

As outlined in chapter 8, we recommend the introduction of entity regulation to support the liberalisation of permitted business structures and to better protect consumers from unethical conduct that is driven by corporate behaviour, rather than to solely address employment matters.

However, an additional dimension to entity regulation is that, over time, it may allow the regulator to address systematic failings at a firm level where the firm's policies are contributing to an individual's breaches of the Conduct and Client Care Rules. Unlike many other occupations, lawyers can be sanctioned by the regulator for behaviour that is unconnected to their provision of regulated services if that behaviour means they are no longer considered to be a "fit and proper person" to practise as a lawyer.[396] The legal services regulator therefore has a wider remit than many other occupational regulators to consider the totality of a lawyer's behaviour, including their interaction with colleagues.

We see a link between workplace conduct of lawyers and the role of an occupational regulator to protect consumers. There is emerging evidence that sexual harassment in the legal profession may have negative impacts on the quality of services consumers receive.[397] This seems self-evident. A lawyer who is subjected to sexual harassment, racism and bullying in their workplace is likely to provide inferior services to consumers.

We heard repeatedly from submitters that their mental health suffered following instances of workplace harassment, racism and bullying and that their ability to continue working effectively within that environment was compromised. This reinforced the findings from the Law Society's workplace survey, which showed that of those who had been sexually harassed, 39 per cent said the experience affected their mental wellbeing and 32 per cent said it directly affected their career;

394 A lawyer is exempted from the mandatory reporting requirement if they received the information "in the course of providing confidential advice, guidance, or support to another lawyer": Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules, sch r 2.8.4(a).

395 "We have tested thoroughly whether the scope of the LCA could be extended with MBIE's Occupational Regulation Experts Group. Their view was that to justify extending the NZLS's regulatory powers there would need to be clear evidence of problematic workplace behaviours resulting in clients receiving substandard legal advice. This is the only reason that would justify extending the NZLS's current powers.": Ministry of Justice "Aide Memoire to the Minister of Justice: Meeting with the NZ Law Society" (August 2019) (obtained under Official Information Act 1982 request to the Ministry of Justice).

396 Lawyers and Conveyancers Act, s 7(1)(b)(ii).

397 See, for example, Jan Breckenridge and others *Rapid Evidence Review: Professional Standards and Sexual Harassment* (Gendered Violence Research Network, November 2021).

while of those who experienced bullying, 48 per cent suffered a loss in confidence and 45 per cent experienced anxiety.

With evidence suggesting particular risk factors within the legal profession that predispose it to harmful workplace conduct, we think it important that the regulator can intervene directly where the root cause of problems can be traced back to a firm's policies or actions. If incidents of harassment are recurring at a particular law firm, the regulator should be able to hold that firm accountable for its workplace policies and the environment it is overseeing. Entity regulation will also help address issues where a firm might retaliate against those who reported misconduct.

The role of the regulator in promoting mental health and wellbeing

A legal services regulator has a role to play in promoting mental health and wellbeing in the profession. The Law Society has, for over a decade, highlighted the importance of lawyers looking after their mental health, and the availability of support, through its 'Practising Well' initiative. Free counselling and mentoring support is available, as well as confidential advice from a National Friends Panel or (for lawyers subject to a complaint) a Complaints Advisory Panel.

These initiatives, while sound, are somewhat piecemeal. A good start would be to commission research on current mental health and wellbeing in the legal profession in New Zealand. Examples from overseas regulators include the Victorian Legal Services Board & Commissioner's 'Lawyer Wellbeing Project'[398] (based on interviews with a small and varied sample of practitioners) and surveys of lawyers to understand the impact of workplace cultures on their wellbeing.[399]

The Federation of Law Societies of Canada, in collaboration with Canada's law societies and the Canadian Bar Association, commissioned the first comprehensive national study on the wellness of legal professionals in Canada in 2020–2022.[400] The study surveyed 7,300 legal professionals during the Covid-19 pandemic and found that in all areas of practice and in all jurisdictions legal professionals suffer from significantly high levels of psychological distress, depression, anxiety, burnout and suicidal ideation, with those in the early years of practice experiencing some of the highest rates of distress.

A progressive regulator – in concert with representative bodies – should develop a mental health strategy and action plan to prevent mental illness and addictions among lawyers, and support lawyers affected by these issues to recover and practise safely. An example is the strategy adopted by the Law Society of Ontario after it established a Mental Health Strategy Task Force in 2015.[401]

As discussed in chapter 9, the regulator also needs new powers to respond to a practitioner's health concerns in a confidential and sensitive manner, to enable rehabilitation and a return to safe practice.

The positive impact of pro bono services

At the heart of the legal profession is a tradition of service. The full Latin phrase, 'pro bono publico', nicely encapsulates the concept of public good. For many lawyers doing work pro bono extends beyond fee-paying clients to include providing legal services at a reduced charge, or free, to those in need of assistance but who cannot afford to pay.

We acknowledge the significant commitment and efforts by lawyers throughout New Zealand to undertake pro bono and 'low bono' work. We also recognise that many lawyers, for example

398 Michelle Brady *VLSB+C Lawyer Wellbeing Project* (Victorian Legal Services Board & Commissioner, 2020).

399 See, for example, Victorian Legal Services Board & Commissioner "Survey findings highlight diversity of workplace wellbeing experiences" (press release, 1 April 2022).

400 Nathalie Cadieux *Towards a Healthy and Sustainable Practice of Law in Canada. National Study on the Psychological Health Determinants of Legal Professionals in Canada, Phase 1 (2020–2022) Research Report* (Université de Sherbrooke, 27 October 2022).

401 Law Society of Ontario *Mental Health Strategy Task Force: Final Report to Convocation* (28 April 2016).

among the ranks of criminal defence barristers and sole practitioners, are earning modest incomes serving clients from lower socio-economic groups – and that suggestions they should be doing pro bono work would be unwelcome and unjustified.

Pro bono work not only benefits consumers; it contributes to a fair and efficient justice system and is often a rewarding experience for the lawyers involved. Making it easier for lawyers to provide pro bono services, and giving such work more visibility, can indirectly contribute to a positive culture within the profession.

We note that, for those lawyers who are able to undertake pro bono work, their efforts may reinvigorate their sense of service in practising law and boost their mental health and wellbeing – as well as helping individual clients and contributing to the public good.

Appendix

List of those who made written submissions

Individuals

Alan Sorrell
Andrew McClunie
Andrew Scott-Howman
Anna Muir
Ben Russell
Benny Jones
Brendan McDonnell
Brian Keene
Bridgette Toy-Cronin
Chris Browne
Chris Kelly
Chris Patterson
David Gibbs
David More
David Roughan
Denise Schmidt
Dhilum Nightingale
Elana Geddis
Emily Moore
Erika Butters
Fraser Goldsmith
Garth Gallaway
Gary Judd
Geoff Brodie
Giles Brant
Grace Haden
Graeme Riach
Graham Jones
Grant Adams
Grant Pearson
Heather Murdoch
Helen Comrie-Thomson
Helen Mackay
Herman Roose
Ian Lowish
Jack Wass
James Mowat
Jeremy Callander
John Anderson
John Billington
John Cantin
John Fitchett
John Goddard
John Hannan
John McLean
John Seton
Jonathan Gillard
Jono Whyte
Kaku Nishio
Kate McKenzie-Bridle
Katie Pludthura
Keith McClure
Kieran Berry
Lawrence Anderson
Louisa Jackson
Marcus Wilkins
Martin Dillon
Mary Hubble
Matt Farrington
Michael Bright
Mike Edison
Nat Dunning
Nick Barraclough
Nick Kearney
Noon Sirisamphan
Owen Vaughan
Paul Chambers
Peter Chandler
Peter Watts
Piers Davies
Prue Tyler
Rajesh Sharma
Ravi Casinader
Rhonda Evans
Richard Johnstone
Richard Rowley
Rob Fitchett
Robert Muir
Robert Wilson
Rodney Lewis
Ross Holmes
Royden Somerville
Ruby Iyer
Sally Rossiter
Sean McAnally
Selene Mize
Simon Dench
Simon Scannell
Sophie Gladwell
Sophie Gladwell, Arla Kerr and Julia Batchelor-Smith (joint submission)
Stuart Cummings
Susie Barnes
Tim Blake
Tim Dare
Timothy Little
Warwick Ayres

Organisations

Auckland District Law Society (Council and Committees)

AJ Park Law

Aotearoa Legal Workers' Union

Aotearoa Legal Workers' Union National Student Committee

Aotearoa women's law associations (joint submission):

- Auckland Women Lawyers' Association
- Canterbury Women's Legal Association
- Otago Women's Law Society
- Waikato Bay of Plenty Women in Law Association
- Wellington Women Lawyers' Association

Arbitrators' and Mediators' Institute of New Zealand

Anderson Lloyd

Asian Legal Network

Buddle Findlay's Diversity and Inclusion Committee

Chartered Accountants Australia and New Zealand

Citizens Advice Bureau

Coalition for Safety of Women and Children

Coleridge Law

Community Law Centres

Consumer New Zealand

Ebborn Law

Employment Law Institute of New Zealand

EY Law

Family Law Section, New Zealand Law Society

Gaze Burt

Government Legal Network – Crown Law

Hart & Lowe

Iconiq Legal Advocates

In-house Lawyers Section, New Zealand Law Society (ILANZ)

Lane Neave

Large Law Firm Group

- Bell Gully
- Buddle Findlay
- Chapman Tripp
- Dentons Kensington Swan
- DLA Piper
- Duncan Cotterill
- Minter Ellison Rudd Watts
- Russell McVeagh
- Simpson Grierson

Lawyers for Climate Action

Māori Legal Academics

Meredith Connell

Ministry of Business, Innovation and Employment's Occupational Regulation Experts Group

Nelson Branch, New Zealand Law Society

New Zealand Asian Lawyers

New Zealand Bar Association

New Zealand Council of Legal Education

New Zealand Council of Trade Unions

New Zealand Law Students Association

New Zealand Institute of Legal Executives

New Zealand Society of Conveyancers

New Zealand Women's Law Journal

Otago Branch, New Zealand Law Society

Property Law Section, New Zealand Law Society

Rice Craig

Simpson Grierson

South Auckland Bar Association

Southland Branch, New Zealand Law Society

Te Hunga Rōia Māori o Aotearoa

Te Kura Huna

Te Ngāpara Centre for Restorative Practice

In addition to those submitters identified above, we received 14 submissions from parties that did not wish to be identified.