New Zealand Law Society
Te Kāhui Ture o Aotearoa

NZLS Independent Review response survey and written submissions

Thematic Analysis

July 2023

Survey on the eight Independent Review recommendations

The Panel's report was publicly published on 9 March 2023 and at the same time the Law Society opened channels for questions and feedback.

The survey on each of the Panel's recommendations was open between 23 March 2023 and 12 May 2023[1].

Although 965 lawyers *opened* the survey, not all fully completed the survey. The average number of respondents for each quantitative question was 712 (range 708-717).

In addition to the survey responses, there were 64 written submissions which contributed to this thematic analysis[2].

It is noted there was the possibility for a lawyer to make more than one response (thus potentially creating a bias in the results), however, our analysis confirms that there were no duplicate responses to the survey.

The survey, covering eight recommendations with 23 questions, asked for a response of:

- Accept,
- Accept in principle,
- Needs more consideration,
- Do not accept, and
- I do not know/I do not have an opinion.

Free text space was available after each question. This document aims to provide a balanced summary of both quantitative and qualitative data from the survey, and incorporate the themes contained in the email submissions.

Consumers and consumer agencies were not approached for their responses to the Panel's recommendations and are thus unrepresented in this analysis.

1 It was initially to close on 5 May 2023 however was extended by a week
2 This covers those submissions received to 1 June 2023

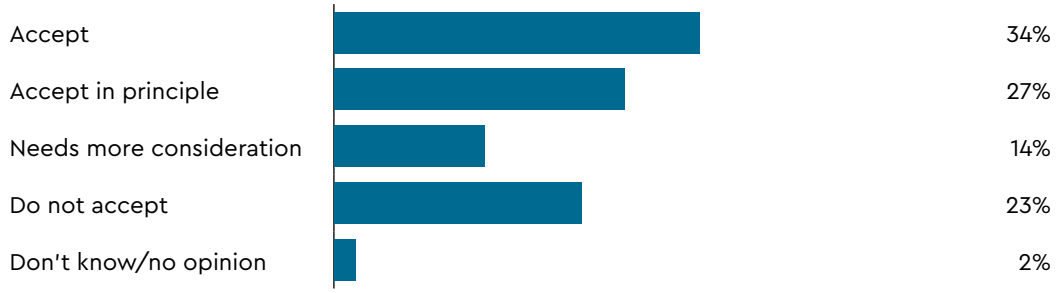
Recommendation 1

Establish a new independent regulator to regulate lawyers in Aotearoa New Zealand.

Background

The Independent Review Panel consider that 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, the Independent Review Panel's 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.

Survey results



Comments summary

Those against this recommendation do not see evidence the current system is broken. They are concerned about the increase in costs and over-regulation, and that the regulator would not be truly independent, but politicised. Some did not accept the cost-benefit analysis.

Those who accept the recommendation comment that there will be better accountability, transparency, and credibility with the regulator. They also state that a new regulator will improve the actual or perceived conflict of interest in the current system.

General comments include the views that the independent regulator should comprise of lawyer members who understand the unique nature of law practice, and that the regulator must serve lawyers, not just consumers.

Quote(s)

"In my view the current system is broadly effective and does not require a complete overhaul as proposed. There is need for reform, but this should be within the broad framework of the current operating model."

"I do not think a new independent regulator would provide any tangible benefit to the profession or the public and agree it would just be unnecessarily expensive."

"If the public is to have confidence in any disciplinary body, it needs to be a separate entity form[sic] the one that promotes lawyers' interests."

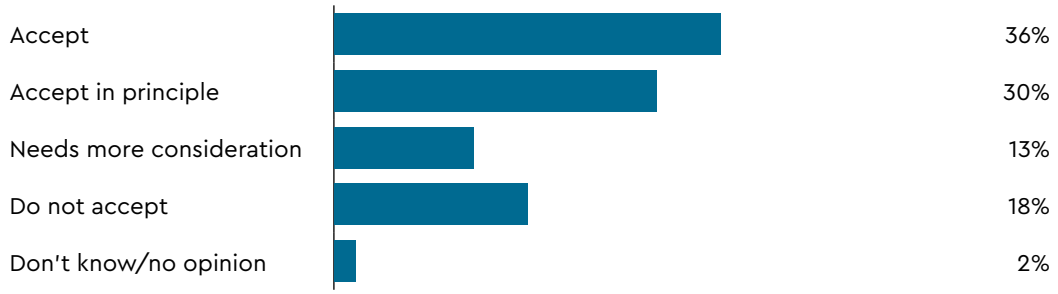
Recommendation 2

a) Ensure the independence and effectiveness of the new regulator by institutional arrangements that include establishing an independent statutory body, which is not a Crown Entity and not subject to direction from Ministers.

Background

The Independent Review Panel 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.

Survey results



Comments summary

Comments included a strong message that an independent regulator must be completely free from government influence, either through funding or appointing Board members with strong political or ideological views. Included also, were concerns about any influence from government on law reform, and a number of commenters state that law reform belongs with the membership body not the regulator.

Concern was expressed about increased costs and bureaucracy with an independent regulator. There were suggestions that the functions of upholding the rule of law and facilitating the administration of justice be clearly defined. Further consideration was suggested on topics of funding of the regulator to ensure independence from government, and how the regulator will be regulated.

Quote(s)

"If there is any Ministerial influence in the process the outcomes will be policitcal [sic] and unfair. If an independent body is to be created, it must be independent from government."

"It wouldn't be appropriate to have the body subject to ministerial influence etc. However, it appears sensible to make the regulator a creature of statute where its powers and processes are enshrined in law."

"We have an independent regulator right now and there is no need to create a strange quasi independent crown entity to achieve what is already baked into the existing system."

"I am not confident such a body would be truly independent, rather than being "captured" by those with strong ideological views and links to political parties."

b) Ensure the independence and effectiveness of the new regulator by institutional arrangements that include a new governance 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.

Background

The Independent Review Panel conclude that 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. The Panel 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.

Survey results

Comments summary

Comments expressed general agreement that board needs to be diverse, with relevant skills and experience. The kind of diversity was questioned as to whether other ethnicities, or gender would be considered. There was objection and, to a lesser degree, some support to specific board members having te ao Māori insights. The need for a definition of ‹te ao Māori insights› was stated. Some questioned how it would assist with governance.

Some views expressed that the board should be elected, and only/majority made up of lawyers, and that the chair should be a lawyer/retired judge. Some felt the 10-years tenure was too long, and some were concerned about the skill and experience that public members would (need to) have.

Quote(s)

"Although I support the principles of bringing te ao Maori insights, diversity concerns are not addressed by having two board seats reserved for those that bring those insights. The board ought to reflect our society – e.g. why are Asian interests not represented?"

"I do not agree with the involvement of public members – this is our society, that we fund and it should be governed by our members. Setting aside two board positions for te ao Maori seems excessive and unnecessary"

"I agree that a split between lawyers and non-lawyers and some te ao Maori representation is a good idea. However, moving away from elected members removes a level of accountability to the profession, and concentrates power on whoever (or whatever entity) has the power of appointment to the board. This risks a lack of diveristy [sic] and representation."

"The requirement for one race having automatic appointees on the committee demeans the committee, that race, and the profession. Racism has no place in the legal profession, and having one race with special rights is clearly racist. Elections for the lawyer seats should also be held – how else are they selected to ensure the lawyers appointed have the respect and mandate of their profession?"

c) Ensure the independence and effectiveness of the new regulator by institutional arrangements that include 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.

Background

The Independent Review Panel recommend that 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 (e.g., 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.

Survey results

Comments summary

There were strong concerns about ministerial appointments and the risk of political bias, and interference undermining the integrity of law reform work. There was preference for the board to be elected by members. There were concerns that Te Hunga Rōia Māori would have representation on the Nominations Panel at the exclusion of other interest groups (Pacific Lawyers Association, NZ Asian Lawyers, Inhouse Lawyers Association NZ, gender groups), and which consumer representatives would be on the Panel. The risk of limiting appointments to popular individuals and having the same pool of people considered for the Panel and the Board was also highlighted.

Quote(s)

"If a new regulator is indeed to proceed, appointments should be made in accordance with the Panel's recommendation."

"Comfortable with this if the sole function of the regulator is to regulate the profession and handle complaints. Very uncomfortable if this body is providing law reform advice. Significantly undermines the integrity of proposals."

"Political appointments to the professional standards oversight body will only drive enforcement of what is in the political interest to enforce – not necessarily the allocation of right enforcement budgets and focus to what is right to enforce for the benefit of the profession and long term upholding of the rule of law in NZ society"

"The government of the day should not have any influence in the appointment of the regulator of the legal profession."

Recommendation 3

a) Incorporate Te Tiriti and regulatory objectives in the new Act and update the fundamental obligations of lawyers by 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.

Background

The Independent Review Panel recommend 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 Independent Review Panel had a minority and majority view on additional statutory objectives for a new independent regulator. The 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. The majority view 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, rather than with the regulator.

Survey results

Comments summary

Of the conflicting views on this recommendation, those in agreement noted this in their comments. Those opposed raised questions about how te Tiriti sits with the rule of law (stating that it conflicts), the lack of definition of tikanga and the principles, and what effect the recommendation would have on day-to-day practice. Some noted that tikanga is not consistent at iwi and hapu level.

There were also questions about how compliance would be monitored and what the consequences would be for non-compliance. Comments from those opposed noted that te Tiriti is between Māori and the Crown, not an independent regulator or individual lawyers.

Quote(s)

"How would we incorporate those practices. I agree that incorporating te reo Maori is a great idea but what does the rest of it actually mean? How are we going to preserve tikanga? Are we going to use a restorative justice perspective to resolving complaints? How are we going to promote climate change consciousness? It's all very well to say we will do this, but we need to actually have a plan."

"I have been practising for 30 years and have hardly ever had to deal with Maori issues. I expect the position of many other practitioners is similar. The treaty is not relevant to the vast majority of the work that we do. Therefore, this proposal will create confusion and uncertainty. It is simply the wrong focus for most practising lawyers."

"Promoting the Treaty of Waitangi to some higher level of authority relative to other law is unjustified and inappropriate. Many very good articles have been published on this topic by members of the profession. The Treaty has significant relevance to some areas of practice (e.g. Treaty claims), but negligible to nil relevance to other areas (e.g. commercial contracts). The principles of the Treaty may have relevance to the Government's exercise of powers, but not to the day to day practice of many lawyers."

" I also support the minority view recommendations to introduce support for the use of te reo Māori and other first languages, and for preservation of tikanga, rather than assuming these will be sufficiently covered or focused on if relying solely on broad requirements for professional and cultural competence."

b) Incorporate Te Tiriti and regulatory objectives in the new Act and update the fundamental obligations of lawyers by setting out regulatory objectives, with an overarching objective to protect and promote the public interest.

Background

The Independent Review Panel consider that a 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; and 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.

Survey results

Comments summary

Strong opposition to incorporating te Tiriti was expressed, including uncertainty as to the definition of the principles. The view that the five objectives were in conflict with the concept of te Tiriti partnership was also expressed. More support was given to objectives 1-3 than to 4-5, and a preference for the primary objective to be 'upholding the rule of law and facilitating the administration of justice' was raised.

There were concerns around the meaning of cultural competence, and how it could be measured and enforced. It was also noted by some that this is a multi-cultural nation, and all lawyers need to be sensitive to the needs, values, and beliefs of all their clients, and not just based on ethnicity. Some noted that the role of promoting diversity and cultural standards did not sit with the regulator, but the representative body.

Some were concerned about the increase in costs, which would be passed onto clients.

Quote(s)

"The Rule of Law and administration of justice should be the primary objective. Public interest is a fickle thing and should not be the primary objective."

"I think there should be general consideration to diversity and different cultures. I don't think Maori should be given more priority than other cultures as it is the culture of the lawyer and/or the client/complainant that should be relevant in any different complaint."

"Very strongly do not accept. Our professional code of conduct already adequately deals with public interest concerns. The clients we serve come from a range of different backgrounds, and recording in statute Treaty obligations will signal we should put these obligations first, rather to our clients."

"I see the incorporation of Te Tiriti as being incredibly important"

c) Incorporate Te Tiriti and regulatory objectives in the new Act and update the fundamental obligations of lawyers by 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.

Background

The Independent Review Panel propose changes to lawyers' fundamental obligations in a new regulatory framework. 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. The Independent Review Panel also suggest a new, fundamental obligation on all lawyers "to maintain their competence and fitness to practise in their areas of practice".

Survey results

Comments summary

Promoting and protecting clients' interests is a point of difficulty for some respondents who are unsure of what promoting entails. It was noted that conveyancers acting for both parties cannot simultaneously promote both parties' interest, and concerns were raised about where the line is drawn between promoting a client's interest and providing the best defence when those things are in conflict.

Many comments stated that the inclusion of promote and protect is not necessary, and that it is already a current obligation. Some noted that the Panel had not provided rationale in the Review for 'promote and protect' to be included.

There were also strong views that the inclusion of te Tiriti is not necessary. While a few agreed that the incorporation of te Tiriti was important.

There was some concern around competence, and fitness to practise was raised in terms of how this would be measured/assessed, and whether it would require alignment with political views/ideologies.

Quote(s)

"This is not clear on what "promote and protect" means in addition to the existing obligations on lawyers in respect of their clients. Further, it is not clear what the requirement to "maintain competence and fitness to practice" means in addition to the existing models (CPD and confirming fit and proper by declaration)."

"The proposed new fundamental obligation makes sense. However, I wonder how that would be measured (other than completing relevant/mandatory CPE), and who is responsible for ensuring this is actually achieved (i.e. should employers be responsible for all their employed lawyers' achievement and maintenance of current competency – and how would they do this without risking a slew of employment disputes ?)"

"In principle these sound fine but I'm uncomfortable with the ideologically driven undertones of the recommendations. I'm concerned that the "fitness to practice" requirement could be used to require adherence to political ideologies of the day which could be used to silence import debates (for fear of losing your career) and reduce diversity of thought in the profession."

Recommendation 4

a) Reform the scope of regulation, by maintaining the current focus of the regulatory framework on lawyers and conveyancers, rather than extending it to cover other unregulated legal service providers.

Background

The Independent Review Panel conclude that 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. The Independent Review Panel consider the current areas of practice reserved for lawyers (primarily related to litigation) to be appropriate.

Survey results

Comments summary

There were many comments voicing support for regulating non-lawyer advocates and any services that appear to be legal services. Key concerns around not regulating legal services of non-lawyers included gaps in consumer protection, different standards applied to lawyers and non-lawyers services when they should be the same, damage to the reputation of lawyers by non-lawyers, advocates appearing in litigation without the fundamental duties to the Court creates an imbalance in obligations, and the risk of regulatory avoidance by lawyers not practising in reserved areas. Some believe reserved areas should/could be expanded. A minority view that de-regulation promotes open justice & access to legal services was expressed.

Quote(s)

"It appears that the use of non-lawyers is increasing as access to justice issues become more pronounced. Against that backdrop this appears to be a very weird recommendation which goes against protecting those areas of society that are most vulnerable."

"I strongly agree with the conclusion that the new regulatory regime should exclude those who are not lawyers. Other industries may or may not need their own oversight and systems, but to include them under the regulator for the legal profession essentially tells the public that those people are, or can be treated as, lawyers. The legal profession should be made up of people with legal training."

"It is self-evident that an unregulated legal service provider should be regulated. If, in the eyes of the public, the provider is providing legal services then they should be regulated to protect the public. To contemplate doing otherwise is to undermine the profession and undermine consumer protection."

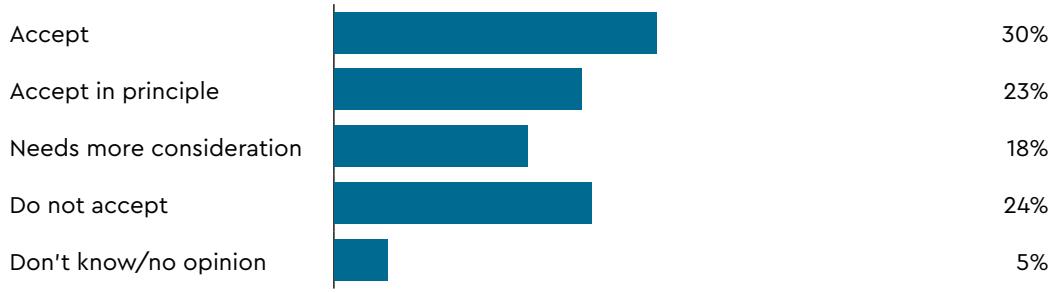
"Regulation should cover all working in providing legal services otherwise it is not a level playing field"

b) Reform the scope of regulation, by 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.

Background

The Independent Review Panel consider that 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. The Independent Review Panel 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.

Survey results



Comments summary

Those who accepted the recommendation commented that they consider current restrictions are outdated, expensive and onerous. They believe the current requirements limit innovation and discriminate against lawyers in particular circumstances. They would like to see more flexibility in the way they work. They comment that the requirements need to be re-examine regarding the factors that assure competency, e.g., minimum post-qualification experience (PQE), period of supervision, training on handling client money, and running a practice.

Those who do not accept the recommendation note that getting approval is not a high barrier and is a useful control mechanism. They are concerned about consumer protection and standards of service,

and how the regulator will monitor freelance lawyers, and hold them to account. Some mention that comparing the New Zealand situation with the UK diminishes the significant difference that UK lawyers undergo a two-year clerkship/internship before being able to practise on own account. Some believe that all freelance lawyers should be required to hold professional indemnity insurance.

It was noted in a couple of comments that working in non-reserved areas does not require a practising certificate, so lawyers would not even need to acquire one if they were in this situation.

Quote(s)

"I agree with the findings that the current requirements create a barrier for some lawyers who wish to return to the workforce (i.e. after having children), limits flexible working arrangements and is likely to be excessively protective in situations where there is minimal risk of consumer harm."

"Sounds reasonable as long as there is good supervision or oversight to the work provided and the freelance lawyers can be held accountable. It is also important to ensure the freelance lawyers have adequate support."

"I don't think being required to get approval to practice on your own account creates any barriers, or fails either lawyers or consumers. Just the opposite – creates protection for consumers."

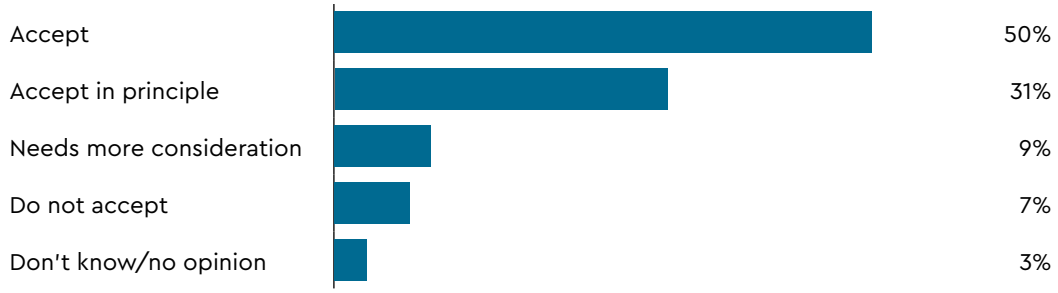
"People practicing on their own account need to be subject to some regulatory oversight to ensure they are fit to practice and do not bring the profession into disrepute."

c) Reform the scope of regulation, by permitting employed lawyers to provide pro bono services to the public in non-reserved areas.

Background

The Independent Review Panel consider that 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 Independent Review Panel conclude that the statutory blanket ban on employed lawyers providing legal services outside the course of their employment is overly broad and not justifiable. The Independent Review Panel's 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. The Independent Review Panel recommends that employed lawyers be 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.

Survey results



Comments summary

Generally, there was strong support for allowing pro-bono work as it improves access to justice. Some considered in-house lawyers were a wasted resource when it came to pro-bono work.

There were comments it should be limited to areas of expertise and/or minimum PQE, and that supervision is needed. There were concerns raised regarding professional indemnity insurance and lawyers' liability, as well as reputational risks to employers and conflicts of interest with employers.

There was also some objection that lawyers could be burdened with the responsibility for access to justice when it is the government's responsibility. A few comments about pro-bono work needing to have the same professional standards as paid work were shared.

Quote(s)

"Permitting lawyers to provide pro bono services outside their area of expertise could place vulnerable clients at risk of receiving, and relying upon, advice that is deficient, or worse still, incorrect."

"I think this is a great idea. I work within a community that is in dire need of better access to the justice and I know there are many amazing lawyers in this community who would be happy to provide pro bono services to their community."

"Thought should be given to the protections offered to those who receive and rely on pro bono legal services provided by an individual outside of their employment. What protections would be put in place to ensure that those providing these pro bono services have the necessary knowledge and skill? Presumably these pro bono clients would not be entitled to PI cover from the lawyer's firm."

"If this recommendation proceeds there should be safeguards to the effect that the relevant employer has no responsibility or liability in relation to the pro bono work done."

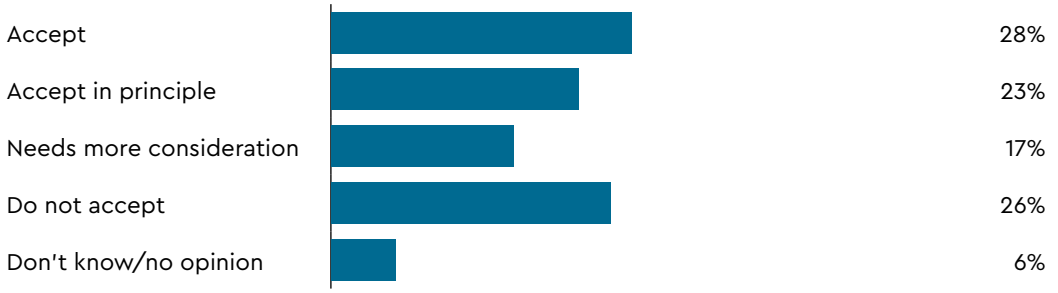
d) Reform the scope of regulation, by permitting new business structures, to allow non-lawyers to have an ownership interest in law firms and lawyers to enter into legal partnerships with non-lawyers.

Background

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. The Independent Review Panel consider that 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 (e.g., 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, The Independent Review Panel did not identify any issues resulting from changes in technology that require a wholesale reconsideration of how legal services are regulated.

Survey results



Comments summary

Those who tended to agree with this recommendation commented that multi-disciplinary services could offer better advice to clients, and that safeguards can be put in place to mitigate professional risks.

Some questioned where the evidence was that changes in business structures were needed. Some were concerned that lawyer's work would be devalued by the sector ending up with chains of large professional services organisations that wipe out smaller firms, akin to the Chemist Warehouse and owner-operator pharmacies. Further comments of disagreement with the recommendation stated that the independence of lawyers would end up being compromised, with profit motives and conflicting obligations and duties with partners taking effect. Some believe this would reduce access to justice and create an environment where traditional law firms are unable to compete.

Quote(s)

"Allowing greater ownership structure flexibility has nothing to do with consumer benefit. To suggest it as one reason for reform is absurd. If anything, loosening ownership restrictions is likely to result in commercial benefit taking precedence over protection of the public as the interests of lawyer owners and non-lawyer owners will be misaligned."

"Independence for lawyers is paramount. In practice and also in image. Any proposed benefits I consider to come at too great a cost to the importance of retaining independence in law."

"Agree with recommendation for the reasons set out in the executive summary. The current model is outdated. If implemented alongside reform of the regulatory body, then the new independence and oversight of that regulatory body will be well suited to monitor and oversee any risks to consumers."

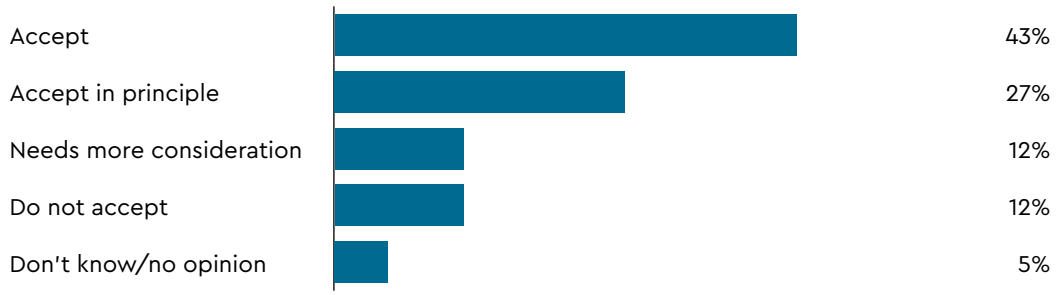
"The traditional law firm model is at risk of becoming obsolete if it does not allow lawyers to adopt more innovative business models. The way legal advice is given is also changing, with legal advice often being given in conjunction with other business advice. The current system prevents lawyers from fairly competing in the market for 'advice' if they are unnecessarily restricted in the way they do business."

e) Reform the scope of regulation, by directly regulating law firms, with new firm-level obligations.

Background

The Independent Review Panel consider that 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. The Independent Review Panel recommends 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.

Survey results



Comments summary

Those who tend to agree with the recommendation commented that this is important to prevent issues in large law firms, such as those that occurred recently, and that there were currently no real consequences to firms except brand damage. They comment that acting on this recommendation will improve accountability and transparency. Some commented that those who are firm owners should have CPD requirements related to running a firm, and that the regulator should be able to investigate firms – though the details on how this is done will matter.

Disagreeing comments included the plea not to increase regulation for firms as they already face a lot of regulation, that any regulation of firms should be proportional to a firm's size, and that individual lawyers should take full responsibility for their own behaviour. A few queried how this would work with a multi-disciplinary organisation in line with recommendation 4d.

Quote(s)

"No further regulation into the day-to-day operations of law firms is necessary. Already law firms are burdened with blanket excessive regulation (e.g. AML)."

"I am concerned about this as a law firm could put every process in place that is considered reasonable and there will still be those outliers who have to be dealt with. One person doing something wrong should not ruin the careers of an entire partnership. It is a very small market and I think this would cause a chilling effect. Law firm structures work for ensuring mentoring and good training."

"Accept – internal politicking, power imbalances and opaque reporting lines at law firms currently leaves individual lawyers in a vulnerable position if they want to (or, theoretically, must) report unsatisfactory conduct / misconduct to the NZLS."

"Law firms should never be functionally invisible to the regulator. The reason being many of them get their work (especially when the government is procuring legal work) on the name of the firm (and therefore based on its reputation). The firm should always be held to the highest standard, and always be required to front and accept culpability in the way they allow their employees to operate, not just the individual lawyer."

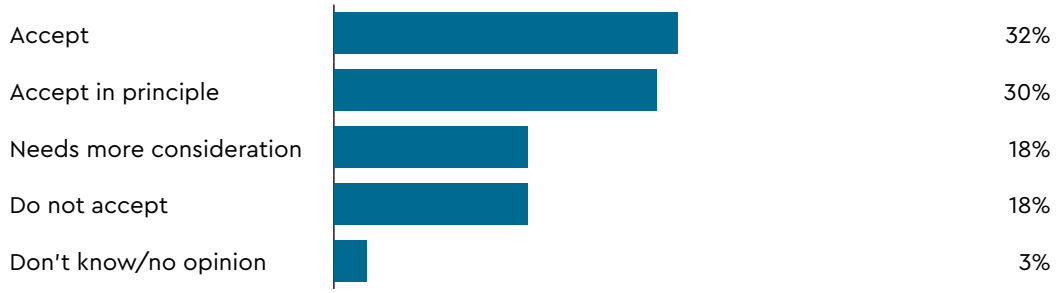
Recommendation 5

a) Enable the regulator to better protect consumers, support practitioners and assure competence, by 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.

Background

The Independent Review Panel consider that 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. 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. The Independent Review Panel recommends a number of new regulatory tools with an emphasis on consumer protection and maintenance of competence. They include: 1. 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; 2. 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); 3. The ability to undertake practice reviews to monitor lawyer and firm compliance with professional and ethical standards; and 4. The ability to impose bespoke conditions on a lawyer's practising certificate (e.g., to limit scopes of practice or to require supervision).

Survey results



Comments summary

Some of those who agreed with the recommendation considered education and support is still the best action to take when genuine mistakes are made. They expect that enacting this recommendation

will help protect consumers, that proportional responses from the regulator are appropriate, and that there should be no (training) orders when a complaint is not upheld. They comment that this recommendation is long overdue.

Those who disagreed comment that there are sufficient powers currently and the ability of the regulator to take someone's livelihood away is too great a power/invasive. There were also some questions around how the bar might respond to requirements for supervision.

Comments about mental health issues ranged from concern that lawyers who are suffering from them should not be stigmatised, to mitigating actions need to be taken to protect consumers from lawyers who are unwell and unable to provide competent services.

Quote(s)

"Good. I agree that the current system is far too focused on the disciplinary aspects and is too reactive, slow and cumbersome. The consumer protection aims of the new laws would be much better served by a more proactive approach where-by there can be early intervention with lawyers who are struggling or are at risk."

"It is important that any disciplinary action is not an attempt at what is thought the public wants but what is in fact a just response for the misconduct."

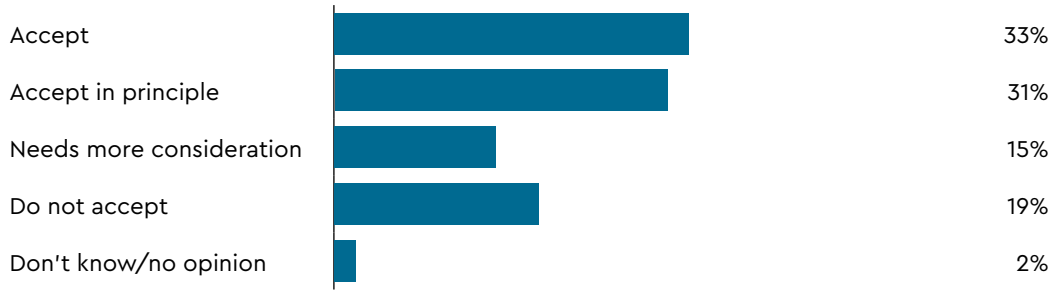
"But the currently approach to lawyers with mental health issues is very concerning and stigmitising [sic]. The report recognises this, at least to an extent. This needs to be fixed if the regulator is going to be given the power to require health assessments of practitioners."

b) Enable the regulator to better protect consumers, support practitioners and assure competence, by 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.

Background

The Independent Review Panel consider that 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. The Independent Review Panel does 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. The Independent Review Panel recommends some more immediate changes, such as trusting lawyers to do part of their 10 hours through self-paced (and therefore non-verifiable) learning. They 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.

Survey results



Comments summary

Those who generally agree with the recommendation comment that mandatory well-being and practising well-type courses would benefit the profession, and lawyers who manage people need training on managing people. Some commented that there should be compulsory ethics training, and some commented that all lawyers should learn tikanga.

Those who generally disagree commented that lawyers can be trusted to learn what they need to learn, that the quality of courses is the issue, that more requirements would be burdensome, and that it would seem incongruous to tighten CPD requirements while making practising on own account easier. Some also disagreed that learning tikanga should be mandatory.

Quote(s)

"CPD is not currently always workable or relevant to in-house lawyers. There should be better scope for in-house lawyers to promote their confidence through CPD that is relevant to their roles, noting this isn't always directly black-letter law learning."

"Currently CPD is basically a blunt instrument. This proposal focuses more on education needs to allow lawyers to discharge their key duties and competencies."

"CPD is not a magic bullet that ensures competence. It is a tick box exercise"

"Including topics such as tikanga as a mandatory requirement will be counterproductive, divisive and worthless (those interested and engaged have many avenues to explore those areas)"

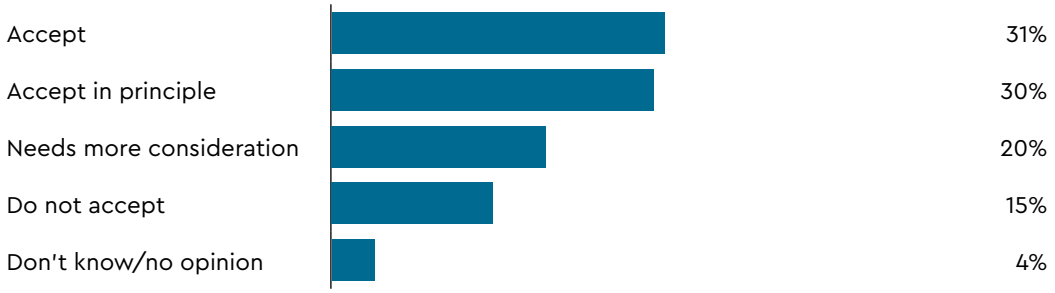
Recommendation 6

a) Reform the system for handling complaints about lawyers and introduce a model in which complaints will be assessed and determined by in-house specialist staff, rather than by volunteers on Standards Committees.

Background

The Independent Review Panel 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.

Survey results



Comments summary

Supporting comments on this recommendation were based on beliefs that the current process is slow, open to abuse, heavy handed, and traumatic for practitioners. A few with direct experience of sitting on Standards Committees noted that some lawyers find it difficult to take a hard line on poor behaviour. There were some comments that standards committees lacked diversity and cultural insights.

It was noted in many comments that the quality of in-house staff and staff training would be critical to the success of a new complaints process. There were also some comments about a partial change where only consumer complaints (such as fees, delays, communication issues) are handled by non-lawyers, and serious complaints continue to be heard by Standards Committees.

Those opposed to the recommendation comment that the current system is sufficient, and only lawyers know the pressures and environment of law practice, so are the only ones able to make a judgement on complaints. There were also strong concerns about the extra cost and 'bureaucracy'.

Quotes

"This is one area of change that I agree is needed. They system is broken. It best serves clients who simply do not want to pay and use the system as a way of achieving that, or at least delaying payment for a very long time."

"The current model does not serve the community or profession. Specifically, the excessive delays and poor quality of determinations by Standards Committees."

"Who are these "in-house specialists" and who decides if they are in fact competent to decide these matters. How are they held to account? A lot of questions need to be answered before setting this up if at all."

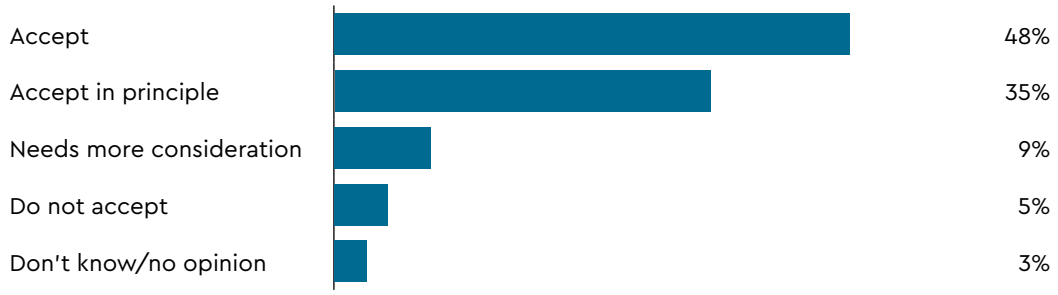
"The current system of standards committees is more likely to work better as those on the committees have current and in depth understanding of how the profession works in practise. There is a risk that in-house staff on a separate regulator would be out of touch and unrealistic in their expectations."

b) Reform the system for handling complaints about lawyers and introduce a model in which formal investigative and disciplinary processes will be reserved for those matters that require a disciplinary response from the regulator. Complaints about 'consumer matters' (e.g., fees, delay, poor communication) will instead go through a dispute resolution process.

Background

The Independent Review Panel proposes 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.

Survey results



Comments summary

Agreement with the recommendation was accompanied by comments stating it would allow the complaints system to focus on serious issues. Frustration with the current system stemmed from the feeling that it had become adversarial, and that too many frivolous and vexatious complaints gained traction. There were also some comments that warned that (repeated) consumer issues can be based on a competency and/or conduct problem.

Those who disagreed with the recommendation believe it will add bureaucracy and protect 'dodgy' lawyers.

Some respondents wonder how situations will be handled when one or both parties refuse to engage in a resolution process, at what point repeated consumer complaints cross the threshold

into a disciplinary matter, and how this will prevent clients from delaying their bill payment by using the complaints process. More details on the recommendation and the inclusion of a tikanga process was requested.

Quotes

"The lack of flexibility of the current system to support rebuilding of relationships between client and practitioner has been an issue. This would be a welcome change."

"It would seem likely that this approach would allow the complaints system to focus on serious breaches, which should allow such matters to be dealt with more efficiently than is currently the case."

"All three of the examples of 'consumer matters' could give rise to a disciplinary response. It depends on the facts. Lawyers should not avoid scrutiny of issues with overcharging or poor performance."

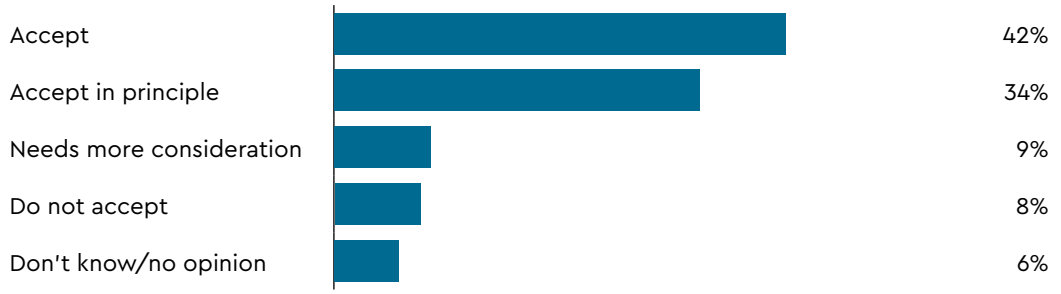
"Agree for fee disputes, but not for delays and poor communications, which can be a problem across multiple clients/stakeholders and cause considerable time, stress, and expense to the other party."

c) Reform the system for handling complaints about lawyers and introduce a model in which 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'.

Background

The Independent Review Panel consider that a regulator should 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. The 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. The Independent Review Panel recommends 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.

Survey results



Comments summary

Those who agreed with the recommendation state we should be focussed on reconciliation and resolution rather than punitive measures, though serious breaches should still involve identification and public interest should also be considered (e.g., sexual harassment cases). Some noted that 'naming and shaming' was contrary to cultural practice and values. Some commented that all lawyers found guilty of unsatisfactory conduct and misconduct should be named while others wondered whether too many identifications would dilute the impact of naming.

Those who disagreed commented that the existing system is sufficient with some modifications and were concerned that the recommendation would further protect 'dodgy' lawyers.

Those who would like this recommendation to be considered further comment that repeat complaints and multiple findings should precipitate naming, they are concerned about who will make the decision to name, that the proposal is contrary to the ideal of increasing public confidence, and that consumers have the right to know the kind of lawyer they are engaging.

Quotes

"The current process is extremely upsetting and stressful, impacting upon mental wellbeing and work capacity, even for lawyers who are ultimately exonerated."

"It depends on what is considered 'exceptional'. The ability to name and shame provides a form of protection for consumers and for legal staff and should continue to be an option."

"Lawyers who have been found to engage in unsatisfactory conduct should be named. This is both a consumer protection and a deterrent for some. I strongly disagree with concealing the names of lawyers engaged in unsatisfactory conduct or misconduct."

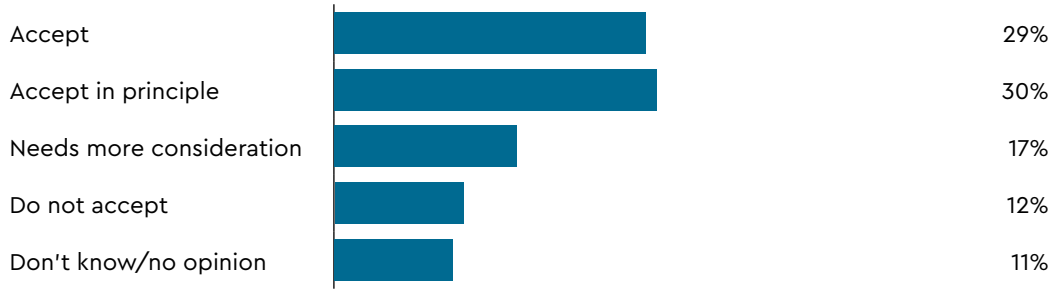
"Practitioners should be publicly accountable and consumers should have full information available to them. The profession should not be avoiding transparency."

d) Reform the system for handling complaints about lawyers and introduce a model in which 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.

Background

The Independent Review Panel consider that 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.

Survey results



Comments summary

Those who agreed with the recommendation noted that the LCRO (Legal Complaints Review Officer) needed to be replaced as this would improve independence and reduce the appearance of bias.

Some commented that the recommendation is agreeable as long as the committee is made up of lawyers and is independent from the regulator.

Those who disagreed did not trust that an external adjudicator would understand legal practise, and that the current LCRO just needed to be properly funded.

The most common feedback was that there is insufficient detail in the report to make a judgement on the recommendation.

Quotes

"The LCRO process is unnecessarily formal, expensive and has become bogged down in delays and detail"

"But needs representation from practising lawyers to avoid risk that the people involved lack sufficient understanding or develop a culture that failures to take into account relevant considerations."

"Too many questions about who would be involved in the review mechanism, how much facilitation would the regulator give, what powers would the review mechanism have etc. More discussion needed here."

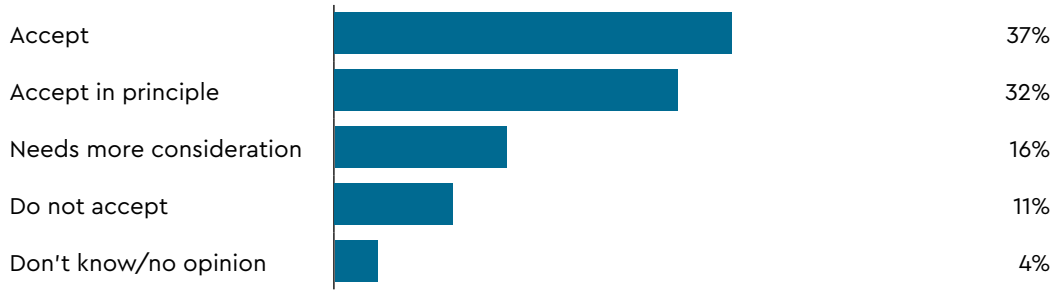
"I think the LCRO does a very good job and it is very useful to have a review officer overseeing the complaints. I am not sure why this needs to be changed."

e) Reform the system for handling complaints about lawyers and introduce a model in which lawyers will be subject to a new duty to ensure complaints are dealt with promptly, fairly, and free of charge.

Background

The Independent Review Panel 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, the Independent Review Panel recommend that lawyers be subject to a new duty to ensure that complaints are dealt with promptly, fairly, and free of charge.

Survey results



Comments summary

Those who agreed commented that the recommendation seems self-explanatory.

Some commented that complaints should not cost the lawyer anything, and that cost recovery (from the complainant) should be allowed where the complaint is egregious/vexatious. Others believed that lawyers are already required to have a free complaints process.

Those who disagreed argued that the report assumes that all complaints are valid, the recommendation would encourage frivolous complaints, and that NZLS, not lawyers, are responsible for delays. They were concerned at the higher-than-average burden on small firms and sole practitioners, and that another duty adds complexity to existing professional obligations.

Quotes

"There will always be a cost to these type of proceedings. To say it would be free of charge would potentially encourage litigious people to tie up lawyers from being able to do their BAU."

"Lawyers are already essentially subject to this duty, if a lawyer failed to respond to a complaint fairly or promptly they would already be in breach of various rules. This is unnecessary."

"A separate duty does not need to be created. It is in lawyers interests to deal with any complaint made against them. It is just additional unnecessary legislation/regulation."

"The delays involved are not the fault of the lawyers. An independent body would need proper funding and therefore reduce delays."

Recommendation 7

a) Encourage diversity and inclusion in the legal profession, by 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.

Background

The Independent Review Panel recognise 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.

Survey results

Comments summary

Views were expressed both ways as to whether diversity and inclusion should be an objective of the regulator or not.

A common theme from the comments relates to competence or merit being more important than diversity as a basis for entry into the profession. Other comments related to representatives of the profession, rather than the regulator, being the better advocate for diversity. Some noted that the universities were commencing the entry process, so the responsibility lay with them. Other comments included diversity of opinion/thought is just as important as the conventional types of diversity discussed.

Quotes

"A focus on diversity and inclusion must not override the overriding need for competence. Imposition of quotas defined by ethnicity, gender or other non-merit -based characteristics should be approached with caution."

"Yes. The current regulatory system discriminates against women and minorities. This is essential to remove structural discrimination."

"I believe that our profession is and should be based on merit. I cannot see how diversity in culture can be implemented at this level. This would need to be implemented from grassroot level such as schooling and universities."

"Simply an unnecessary expense, politically motivated."

b) Encourage diversity and inclusion in the legal profession, by removing regulatory barriers that are having a discriminatory effect.

Background

The Independent Review Panel consider that 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.

Survey results

Comments summary

The most recurrent comments were those noting that some regulatory barriers existed for important reasons, such as ensuring practitioners were competent and fit to practice. Other comments noted if one measure (e.g., hours worked) was removed, another would need to be found to indicate competence; registration as a lawyer is not the only barrier, law school and gaining employment are greater barriers; and the burden could be reduced, but not removed. Others did not believe there were discriminatory barriers.

There were also comments supporting the removal of discriminatory barriers, some stating that the barriers are not fit for purpose.

Some stated that mental health conditions are often irrelevant to the ability to practise well, and others that mental health conditions that affect competence should be disclosed.

Quotes

"Agree with removing regulatory barriers that are having a discriminatory effect. However, there need to be some rules to ensure that lawyers are fit and proper to carry out their work. Every rule will exclude someone."

"I think there is a reason for these barriers and that is to help ensure a level of competence in the legal profession, including being up to date on the law."

"I agree that this should be by removing barriers with a discriminatory effect – so for example, the requirement to have worked a certain number of years to practice on your own account where women are more likely to have been on parental leave."

"To have anything other than competency and character standards is asking for racially or gender based biases."

c) Encourage diversity and inclusion in the legal profession, by giving the regulator new powers to collect diversity data from law firms and publish aggregate data on trends within the profession.

Background

The Independent Review Panel consider that a regulator, alongside representative groups, has a role in removing those barriers and encouraging a diverse and inclusive profession. The Independent Review Panel also recommends 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.

Survey results

Comments summary

Those who agreed with this recommendation also noted that pay-gap data should be collected, and that accurate, raw data should be provided by firms.

Those who disagreed argue that this is not the role of the regulator, that firms cannot be forced to be 'diverse', that it is just imposing quotas, and some aspects of diversity are private. Some noted that this is not the best way to address the issue, others did not believe there were any barriers to becoming a lawyer and cultural diversity is about more than counting numbers.

Quote(s)

"I very strongly support this recommendation. It is critical to have accurate data to achieve progress in this area."

"This makes me concerned that "diversity and inclusion" will become a tick box exercise."

"Diversity is second to competence. Consumers need protection and access to justice and the person acting for them must be competent first, before they are diverse."

"As the legal profession is a small one, there is concern that the collection and publication of such data could have privacy concerns. Furthermore, there is the risk that collection of data would soon turn into a quota requirement for particular types of diversity."

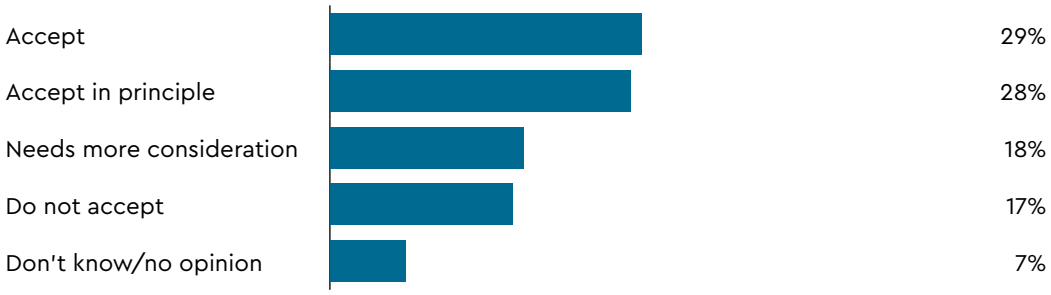
Recommendation 8

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.

Background

The Independent Review Panel concluded that 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. The Independent Review Panel suggests a single governance layer, with a board of 8-10 members including public members to complement the skillsets of elected members.

Survey results



Comments summary

Many comments supported the Law Society retaining a representative function and acting as advocate for principles such as the rule of law (though some of this support was also in favour of retaining a dual representative/regulator model).

Commenters also raised questions about how a representative body would fit with others in the sector like ADLS (with a couple suggesting they merge). There were strong views against public members on the board, and mixed views about the size of the board, and how the board should be selected.

Some noted they are looking forward to a representative body that solely supports and advocates for lawyers, and some were concerned about how it would be funded. Others were concerned about the eventual model of services, particularly the funding and availability of libraries. Accessibility and resourcing of libraries is key to facilitating equitable access to justice, upholding the rule of law, and the administration of justice.

Quotes

"The lawsociety [sic], to maintain its independence, and to protect the rule of law should continue as a national representative body."

"I accept that a single governance layer is sufficient. I do not necessarily agree that public members are necessary for the purposes of the new organisation."

"Given this is a representative body with no regulatory function it's hard to see the need for public members."

"The elephant in the room here is the ADLS (or "Law Association" as it wants to be). Is there really room in NZ for two separate (and sometimes antogonistic) [sic] general representative bodies? It seems inevitable that either one will wither away, or they will end up serving different interests in the profession, thus undermining the purpose of speaking up for all. In the meantime, lawyers or their employees will be asked to spend even more on professional memberships."