Report of the

The New Zealand Law Society Working Group

To enable better reporting, prevention, detection, and support in respect of sexual harassment, bullying, discrimination and other inappropriate workplace behaviour within the legal profession

NEW ZEALAND LAW SOCIETY

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Contents

Foreword

Earlier this year the legal profession was shocked and chastened by the disclosure of reports of sexual harassment against young lawyers and summer clerks. As the publicity expanded, more and more incidents were revealed. The New Zealand Law Society examined its regulatory history and processes, and rapidly came to the conclusion that the absence of complaints was due largely to the fact that its procedures were inadequate to deal with complaints of sexual violence and harassment, bullying and discrimination. Disciplinary procedures designed to protect consumers of legal services simply could not accommodate such sensitive complaints.

Lawyers enjoy the trust of clients and the Courts, and have a privileged position in the New Zealand community. With privilege comes responsibility. The NZLS took steps immediately to review its disciplinary measures and established a Working Group which I chair. Other members were appointed for their expertise and experience in the areas that the Working Group was asked to advise on. Mostly they have given their time to the profession without payment.

The report which follows has drawn on this expertise as well as invaluable advice given by a range of groups and individuals who reviewed the report in draft. The Working Group also considered measures adopted around the world as other legal associations contend with these concerns. Among those who offered observations and advice, in particular I would like to thank Dame Margaret Bazley for her thoughtful comments, and Gill Gatfield who has conducted research in the areas of bullying, harassment and discrimination for many years. She provided the Working Group with an analysis of published research demonstrating that these issues are not new. It is to the profession's shame that it has done little to address these concerns until now.

However, the most influential information was drawn from the voices of people affected in Aotearoa New Zealand. An important source is Zoë Lawton's blog which recorded the experiences of over 200 lawyers of all ages and status in the profession. The experiences shared on the blog provide the impetus for vital regulatory change. Zoë's contribution to the future of the profession is immeasurable.

It has extended beyond curating the blog, to research which will without doubt, inform the future management of complaints about sexual harassment, bullying and discrimination.

I add my personal thanks to lawyers Charlotte Walker, Dale La Hood and Rosie Kós. They have drafted, debated and designed the report with great skill and dedication. Their work has done much to ensure that the report will be an invaluable resource for current and future work to be undertaken by NZLS and the legal profession generally.

The Working Group is conscious that all who have assisted it in its work have done so with the interests of the profession and its future at heart. There remains much work to be done if the legal profession in New Zealand is to regain its status as a trusted group, one which is ethical and devoted to serving the public with integrity and honour. The recommendations the Working Group makes for regulatory reform are just one part of that work.

The Hon Dame Silvia Cartwright
PCNZM, DBE, QSO, DStJ, Chair

Glossary

ADR	Alternative Dispute Resolution
CPD	Continuing Professional Development
ERS	New Zealand Law Society's Lawyers Complaints Service – Early Resolution Service
HSWA	Health and Safety at Work Act 2015
LCA	Lawyers and Conveyancers Act 2006
LCDT	Lawyers and Conveyancers Disciplinary Tribunal
LCRO	Legal Complaints Review Officer
LCS	New Zealand Law Society's Lawyers Complaints Service
NDA	Non-disclosure Agreement
NZCLE	New Zealand Law Society Continuing Legal Education
NZLS	New Zealand Law Society
PCBU	Person Conducting a Business or Undertaking, as used in the Health and Safety at Work Act 2015
Roll	High Court Roll of Barristers and Solicitors
Rules	Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008
SCU	Special Complaints Unit, proposed in this report
WEC	United Kingdom Women and Equalities Committee (House of Commons)

Executive Summary

2018 is a watershed moment in the culture of the New Zealand legal profession. The experiences of five young women and media reports drawing on the #MeToo movement exposed sexual violence and harassment in the legal profession. The outpouring of shared experiences that followed confirm that unacceptable behaviour – in the form of sexual violence, harassment, discrimination and bullying – is part of the fabric of the legal profession. This conduct has remained unchecked in the profession for too long.

The elimination of this type of behaviour is imperative for the reputation of the profession and to secure its future. The legal community must be a safe place for all.

The calls for change are clear and must be answered. This requires the legal profession to hold up a mirror to itself and to make a commitment to implementing change. The New Zealand Law Society (NZLS) as regulator has been required to take leadership. The establishment of this independent Working Group is part of a series of initiatives undertaken by NZLS to begin this vital work.

The Working Group Process

The purpose of the Working Group is to focus on whether regulatory change is required to address unacceptable behaviour and what that change might be. The Working Group was asked by NZLS to inquire into and report on the current regulatory framework so as to enable better reporting, prevention, detection, and support in respect of sexual harassment, bullying, discrimination and other inappropriate workplace behaviour within the legal profession.

People who have experienced sexual violence, harassment, bullying, discrimination and other unacceptable behaviour say that these behaviours take many forms. This report refers to "sexual violence, sexual harassment, bullying and discrimination" and "unacceptable behaviour". These descriptions are adopted as shorthand only and should be read as including a full range of inappropriate and often illegal conduct, including racism, sexism, homophobia, transphobia and abuses of power.

The Working Group was appointed by NZLS to bring together different expertise and perspectives from within and external to the legal profession. The Working Group members are:

- The Hon Dame Silvia Cartwright, PCNZM, DBE, QSO, DStJ Chair
- Jane Drumm, QSO, General Manager Shine
- Joy Liddicoat, barrister and solicitor, University of Otago
- Professor Elisabeth McDonald, MNZM, University of Canterbury
- Philip Hamlin, barrister

The Working Group examined the history, prevalence and nature of unacceptable conduct in the legal profession in New Zealand with the assistance of Gill Gatfield. It reviewed comparative regulatory regimes in overseas jurisdictions and other New Zealand regulated professions to identify effective approaches to tackling sexual violence, harassment, bullying and discrimination.

The Working Group consulted with a range of organisations and individuals with expertise and interests in this area. Feedback and suggestions for change were received through consultation and from members of the wider legal community through a dedicated email address where comments could be made.

Proposals for regulatory change

There have been low levels of reporting and few complaints made about this type of behaviour. The few complaints received have resulted in concerns about how they were handled. The Working Group examined why this was the case and identified two key drivers for these concerns:

- Unclear reporting and conduct standards;
- Regulatory mechanisms and processes not specifically designed for, or effective in, dealing with complaints about sexual violence, harassment, discrimination and bullying.

The Working Group has identified the following areas for change:

Clearer conduct standards

Unclear conduct and reporting standards contribute to an environment in which unacceptable conduct can be treated 'in-house' as an employment issue. There must be no scope for confusion. This type of conduct is a professional and regulatory concern for lawyers and NZLS.

The Working Group proposes new rules that specifically require high personal and professional standards of lawyers (including outside work) and that specifically refer to sexual harassment, bullying, discrimination and other unacceptable behaviour.

Clearer conduct standards will assist lawyers to meet their reporting obligations. There must also be appropriate safeguards and support mechanisms in place for people who report and appropriate exceptions. A new rule is required to specifically prohibit victimisation of people who report in good faith. The Working Group also proposes extending reporting obligations to practices or lawyers who are responsible for a practice.

Closer regulation of workplace obligations

Closer regulation of legal workplaces is a way to achieve a safer environment.

The focus of the current regulatory regime is on individual lawyer responsibility. A fresh approach is required that extends obligations to legal practices or the lawyers who are effectively responsible for practices. The Working Group proposes a number of changes to create an effective regulatory model that will enable NZLS to more effectively monitor and regulate legal workplaces. This includes:

- Imposition of minimum obligations on legal workplaces or lawyers who are responsible for workplaces, including:
  - Anti-harassment, bullying and discrimination policies;
  - Extended reporting requirements;
  - Continuing professional development;
- Auditing and monitoring compliance;
- Preventing lawyers using non-disclosure agreements to contract out of the Rules and to conceal unacceptable behaviour.

Reform of the procedures around confidentiality and suppression

The strict confidentiality restrictions are generally effective for dealing with consumer related complaints. However, in relation to sexual violence, sexual harassment, bullying and discrimination the strict provisions have been problematic. In the context of complaints of this nature, the restrictions are inflexible and have contributed to concerns about a lack of transparency and accountability.

The Working Group considers change is required and it proposes a more flexible, two-staged approach to confidentiality for complaints and decisions about sexual violence, bullying, sexual harassment, discrimination and related conduct.

Changes to the Lawyers Complaints Service and Standards Committee Process

The Lawyers Complaints Service is an effective process for the significant volume of consumer and practice related complaints that it receives each year. The process does not appear fit for purpose to deal with complaints about sexual violence, harassment, discrimination and bullying.

Improvements to the current complaints process for complaints about this type of conduct must make people more confident about making a complaint. The Working Group proposes a number of changes to enable this including:

- increasing depth and diversity of those people responsible for assessing complaints;
- increasing support and assistance to people working in the process;
- providing more support for people going through the process;
- reducing the size of committees dealing with complaints of this type and targeting expertise;
- encouraging the use of independent investigators; and
- finding and considering alternative methods of resolution.

Creation of a specialised process for dealing with complaints of unacceptable behaviour

The Working Group considers that the current system is not set up for responding effectively to complaints about unacceptable behaviour. An option for change is a specialised pathway for complaints about sexual violence, bullying, harassment, discrimination and related personal conduct issues.

The Working Group proposes the creation 'Specialist Complaints Unit', made up of non-lawyers with expertise in receiving complaints of this kind and offering support, which does not share information with the NZLS. This unit would provide support and assistance for people considering making a complaint and act as a triaging point for dealing with complaints of this type. A Specialist Committee, comprised of people with experience in relevant areas, would also be formed to act as the Standards Committee for complaints of unacceptable behaviour. The Committee should adopt specialist processes, and its members should undergo specialised training.

Changes to the procedures of the New Zealand Lawyers & Conveyancers Disciplinary Tribunal (LCDT)

The Working Group is concerned that the LCDT process is perceived as formal and combative. This perception may deter complainants from reporting complaints. The Working Group has identified options to change the LCDT process to offer greater protections to complainants, and to make the process less intimidating for those who participate in it. These options specifically relate to cases about sexual violence, harassment, bullying and discrimination.

The Working Group's proposals relate to increasing diversity, greater case management and potential for alternative processes, clear protections for people during the evidential process, tailoring confidentiality and suppression provisions and reviewing the penalties and orders the LCDT may make.

Imposition of mandatory training

Regulation offers three opportunities to expose the legal profession to effective educational programmes. The first is through CPD requirements; the second is when lawyers are preparing to practise on their own account; and the third is training LCS staff and members of Standards Committees. The Working Group recommends work be undertaken in each of these areas to identify effective educational programmes for addressing culture problems in the legal profession.

Implementation and monitoring

For change to be meaningful it must be enduring. The Working Group wish to ensure that the recommendations made are implemented effectively and that positive changes within the culture of the legal profession continue to develop for the future. The Working Group proposes that an implementation and monitoring programme be established to achieve this objective.

The NZLS Task Force

The NZLS established a Culture Change Task Force as a separate initiative after the Working Group had been established. The work of the Task Force will be ongoing and it has been established for an initial term of three years and will deliver an initial draft strategy and action plan to NZLS by 30 November 2019. In this report the Working Group has identified areas in which the Task Force may have a role. These are outlined here.

- Actively engage with organisations including Te Hunga Rōia Māori o Aotearoa and The Pacific Lawyers Association in relation to implementing the proposals and initiatives suggested in this report.
- Review NZLS' processes for receiving confidential reports to ensure support and protection is available for reporting lawyers.
- Draft and implement a model policy for legal workplaces to address sexual violence, harassment, bullying and discrimination.
- Enquire into effective educational and training programmes for lawyers to address these behaviours.
- Identify effective ways to educate legal workplaces on the financial and reputational risks of allowing this conduct to occur.
- Enquire into the best way to implement a "climate survey" for legal practices to be provided by the NZLS.
- Identify ways that legal practices can use results of surveys and other data for risk assessment and management.
- Engage with WorkSafe New Zealand to develop a workplace inspection scheme for Standards Committees to consider as a remedial option.
- Enquire into effective disciplinary measures to change behaviours and provide guidance to the LCS about this.
- Investigate ways to encourage self-reporting of health and competence issues affecting a person's ability to perform tasks required of a lawyer.
- Explore a 'tick sysem' initiative to evaluate a legal practice's performance and efforts in relation to tackling sexual harassment, bullying and discrimination.

While the report that follows sets out the difficulties facing the legal profession, it should be read with an eye to the future. The Working Group acknowledges the strong and positive commitment to change that it has already observed since it began by former members of the legal profession, lawyers, law firm staff, professional bodies and NZLS as regulator. The Working Group hopes that the proposals in this report will go some way towards effectively dealing with all forms of sexual violence, harassment, discrimination and bullying in the legal profession.

The Working Group's task

The purpose of the Working Group is to inquire into and report on the current regulatory framework in order to enable better reporting, prevention, detection, and support in respect of sexual violence, sexual harassment, bullying, discrimination and other inappropriate workplace behaviour within the legal profession.[1]

The Working Group looked at the current complaints and disciplinary framework in respect of conduct of this nature.

In this report, the key sources for lawyer obligations that are referred to are the Lawyers and Conveyancers Act 2006 (**LCA**) and the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (**Rules**). Information about the regulatory framework is contained in Appendix 2.

Terms of Reference

The Working Group is to inquire into and report on:

- Is the current framework adequate to enable reporting and investigation of sexual violence, harassment, discrimination and bullying?
- Does the current framework provide adequate support for people affected?
- Does the current framework enable effective action to be taken in response?
- What changes may be required to the current framework to enable better reporting, prevention, detection and support?
- What types of change and improvements to the framework might be required to effectively address sexual violence, harassment, discrimination and bullying?
- What changes, if any, may be required to improve the way the current framework is implemented by the NZLS and the Lawyers Complaints Service in respect of conduct of this type?
- What changes, if any, may be required to lawyers' continuing professional development?
- What impact, if any, may changes have on people affected to seek or obtain other forms of redress?
- What other matters have the Working Group identified as relevant to its inquiry?[2]

The Working Group has examined the current framework and ways to address sexual violence, harassment, bullying, discrimination and unacceptable behaviour with these questions in mind.

Guiding principles

The Working Group identified a set of principles to take into account in assessing an effective regulatory system that is well equipped to address sexual violence, harassment, bullying, discrimination and all forms of unacceptable behaviour. Those principles include: [3]

- compassion and humanity;
- manaakitanga, aroha and āwhina (and including support and assistance);
- respect for confidentiality and privacy;
- commitment to the principles of Te Tiriti o Waitangi;
- competency; and
- natural justice.

This paper sets out the conclusions drawn by the Working Group and the proposals for change it has identified. These guiding principles inform the proposals.

Methodology

In carrying out this work, the Working Group has made a detailed assessment of the issues raised by the Bazley Report (Dame Margaret Bazley *Independent Review of Russell McVeagh: March – June 2018*), the incidents and concerns highlighted in early 2018 in media reports and the powerful and compelling posts written on a blog created by Zoë Lawton. The Working Group has also conducted a literature review and made a detailed assessment of the NZLS' policies and procedures.

The Working Group provided public updates on its progress in July, August and October 2018. The Working Group also invited people to share their thoughts and ideas about possible changes and improvements to the regulatory framework. It set up a dedicated email address to make communication with the public easier. A number of people shared their ideas about how to improve aspects of the process.

The Working Group met with the President of the Law Society, Kathryn Beck, Dame Margaret Bazley and Zoë Lawton. Gill Gatfield provided historical and contextual research for inclusion in this report.

The Working Group also provided a draft working copy of this report for comment to groups, organisations, individuals and international legal regulators with a particular interest in bullying, sexual harassment and discrimination. The Working Group is grateful to Te Hunga Rōia Māori o Aotearoa for the contribution it made to reviewing and commenting on the final draft of this report. The Working Group believes that Te Hunga Rōia Māori o Aotearoa will be able to provide invaluable insight and assistance in relation to implementing the proposals and initiatives suggested in this report. It encourages NZLS and the Task Force to actively engage with it.

The Working Group wishes to acknowledge and thank everyone who participated in this process.

Before assessing changes to the New Zealand regulatory framework, the Working Group conducted a detailed review of sexual violence, harassment, bullying and discrimination in the legal profession and considered what happens in the regulation of lawyers in other countries and regulation of other professions in New Zealand.

An overview of comparative regimes overseas

The Working Group considered a number of comparative legal regulatory regimes overseas to identify their approaches to regulating unacceptable conduct within the legal profession. These regimes include Australia, the United Kingdom, Canada, the Republic of Ireland and Scotland.

The Working Group has identified common indicators of an effective approach to addressing sexual violence, harassment, bullying and discrimination. These are outlined here.

- The existence of defined obligations focused on the prohibition of "harassment, bullying and discrimination" within legislation and rules of professional conduct (see: the Australian Solicitors' Conduct Rules and Legal Profession Uniform Conduct (Barristers') Rules (Barristers' Conduct Rules);[4]
- The existence of "anti-victimisation" provisions within legislation to protect lawyers reporting misconduct by other lawyers (see: the United Kingdom Bar Standards Board Handbook);[5]
- The existence of separate entities outside regulatory bodies that:
  - provide confidential and neutral non-legal advice, information and options;
  - resolve concerns informally with the consent of both the complainant and respondent;
  - report and provide anonymised statistical reports on harassment and discrimination to the legal regulator; and
  - provide their services to lawyers, law students, clerks, and legal professionals course students.

  An example of this model is found in the Canadian Equity Ombudsperson models, which sit alongside the Law Societies of Saskatchewan and British Columbia.[6] The Discriminatory Harassment Counsel service operates in a similar way and is funded by the Law Society of Ontario.[7]
- Equality and Diversity Committees resourced to provide training, support, advice and guidance to the Legal Profession in relation to safe and diverse workplaces.
- Functional separation of the complaints and disciplinary arm of the regulatory body from other core regulatory functions (see, for example, the model in the Republic of Ireland);[8]
- A "Friends Panel" or "advice line" to act as a dedicated legal, professional and ethical query advice line. This may be independent of any regulatory body or integrated into its structure (see the United Kingdom Bar Standards Council model).[9]

An overview of regulatory regimes for other professions

The Working Group has considered the regulatory regimes for other professions in New Zealand, in particular health practitioners, teachers, and social workers.

These regimes are similar in structure, yet have some key differences. For example, the Education Council Rules 2016 provide that criteria for reporting serious misconduct by a teacher include emotional abuse and breaching professional boundaries (in respect of a student).[10] For doctors, the Health Practitioners Competence Assurance Act 2003 does not address bullying or harassment. Even so, the Medical Council of New Zealand has issued guidance on appropriate professional behaviour. For social workers, the Social Workers Registration Act 2003 is silent on harassment and bullying, but the Code of Conduct for registered social workers deals with these behaviours specifically.

None of these regulatory regimes provide a specialised alternative pathway for complaints of unacceptable behaviour. Yet, these other Acts do give special protections to complainants in some cases. These protections include a presumption that the hearing will be closed to the public when the complainant gives evidence,[11] and provide for suppression of the complainant's name.[12]

The legal profession and sexual violence, sexual harassment, bullying and discrimination in 2018

The experiences of five young women have brought into sharp focus unacceptable culture in the legal profession in New Zealand. These women were part of Russell McVeagh's summer clerk programme in 2015–2016 and raised allegations of serious sexual misconduct at the firm by a partner and by a solicitor.

The significant harm caused to these young women was compounded by the law firm's response to these incidents: [13]

> *The poor handling of the incidents had serious consequences for the summer clerks including loss of confidence and lack of faith in the legal profession. This was described as particularly devasting given the clerks were all top law students with promising futures. The junior lawyer supporting the clerks was also significantly affected.... She told us that she was told she was thought of as a "troublemaker" and she felt that her career suffered as a result.*
> *— Dame Margaret Bazley ONZ DNZM*

An approach was made to NZLS by one of the summer clerks and a support person. The clerk recounted her experience, and had an expectation that the NZLS would act in some way but she heard nothing. No confidential reports were made to the Regulator, the New Zealand Law Society (**NZLS**), by the law firm or its partners about the partner's and solicitor's behaviour.[14] The partner and solicitor stopped working at Russell McVeagh, but they continued to work as lawyers. The law firm even continued to work with the partner on "legacy" files.[15]

While NZLS has a different perception of its discussion with the summer clerk, or her support person, and the steps it was able to take, its response has been criticised and concerns have been raised about its ability to deal with sexual violence, harassment, bullying and discrimination by lawyers.[16] This

has led NZLS to carefully examine its role and to implement initiatives to lead the way in tackling unacceptable behaviour within the legal profession. This independent Working Group is part of that ongoing process.

The summer clerks' experiences and the media reports and commentary drawing on the #MeToo movement that followed, exposed sexual harassment and sexual violence in the legal profession. In the wake of this, there has been an outpouring of stories about and commentary on sexual harassment and violence, bullying and discrimination.[17]

The recent disclosures of sexual harassment in New Zealand law firms are not limited to one law firm.[18] There have been widely publicised reports of incidents at a number of other firms. For example, in 2016 an incident occurred during a Bell Gully litigation team retreat.[19] DLA Piper acknowledged two unspecified "behavioural incidents" occurred around 2017 Christmas events that resulted in a report being made to the NZLS and the partner in question leaving the firm.[20] An anonymous LawTalk article published in 2017 recounted sexual harassment experienced by a young female practitioner from two senior male lawyers in two different law firms, both in positions of influence regarding her employment.[21]

NZLS undertook an online survey between 5 April and 1 May 2018 to gain further information about the current extent of harassment and other unacceptable behaviour within the profession.

The results showed that experiences of discrimination, including sexual harassment, sexual violence, and bullying are clearly endemic in the legal profession.

The New Zealand Law Society *Legal Workplace Environment Survey* (**NZLS Survey**) of 3516 lawyers revealed the following results: [22]

- 18 per cent of lawyers (31 per cent of women and 5 per cent of men) have been sexually harassed during their working life
- 10 per cent of lawyers (17 per cent of women and 3 per cent of men) have been sexually harassed in the last five years
- 28 per cent of lawyers have witnessed sexual harassment in a legal environment during their working life
- 33 per cent of female lawyers have experienced crude or offensive behaviour
- 30 per cent of female lawyers have experienced unwanted sexual attention
- 12 per cent of female lawyers have experienced inappropriate physical contact/sexual assault, and 5 per cent have experienced sexual coercion
- 24 per cent of all lawyers have frequently experienced person-related bullying in the last six months
- One in five lawyers have been bullied in a legal environment during the past six months
- Experiences of bullying behaviour and sexual harassment are more prevalent among Māori lawyers
- About 40 per cent of lawyers under 30 years' of age believe major changes are needed to their workplace culture

The results of the NZLS survey are referred to in more specific detail throughout this report.

The Criminal Bar Association surveyed its members in March 2018 and found that over 88 per cent of respondents had personally experienced or witnessed harassment or bullying behaviour.[23]

Law firm Russell McVeagh commissioned an independent review following media reports of sexual harassment and sexual misconduct at the firm during the summer of 2015–2016. Dame Margaret Bazley ONZ DNZM undertook the review (**Bazley Report**). The Bazley Report found failings in the way the firm dealt with specific incidents and broader problems within the culture of the firm.[24] These failings resonate with the experiences of others within the wider legal community.

Sexual violence, harassment, bullying and discrimination are unacceptable in the legal profession and cannot be tolerated. These behaviours have a devastating and lasting impact on people who work within this industry and on the reputation of the legal profession.

The experiences of people who have courageously spoken up confirm a wide range of unacceptable behaviour in the legal profession. The Working Group also wishes to acknowledge people who may have felt unable to speak up for fear of the consequences. The proposals in this report aim to make sure that in the future people can come forward easily if they wish to. The Working Group's hope is that fear or uncertainty will not be a reason to remain silent. The recommendations in this report are directed towards ensuring that people who do come forward will be supported.

The history of sexual violence, sexual harassment, bullying,and discrimination in the legal profession

Sexual violence, harassment, bullying and discrimination are not recent developments within the legal profession.[25] Sex discrimination and sexual objectification of women lawyers has taken place in the New Zealand legal profession since at least the 1950s.[26]

Discrimination against women lawyers within the profession was first quantified in 1982.[27] A survey of 205 Wellington lawyers by the Wellington District Law Society found that 83 per cent of respondents considered there was discrimination against women in the profession. Women lawyers were much more likely to hold that view (women 91 per cent; men 76 per cent).

> **"I was objectified, I was sexually harassed by clients. I saw sexual harassment, and worse, within the firm."**
>
> — *Quote from interviewee who worked at a top-tier firm in* Josh Pemberton First Steps: the Experiences and Retention of New Zealand's Junior Lawyers *(New Zealand Law Foundation, Wellington, 2016) at 44.*

The first nationwide survey of 1,469 lawyers by Gill Gatfield and Alison Gray in 1992 revealed widespread sex discrimination (reported by 82 per cent of women lawyers), pay inequity (20–30 per cent pay gap), and sexual harassment (reported by 38 per cent of women lawyers).[28] Further quantitative analysis established clear patterns of historic, cultural and structural bias against women at all levels of the profession.[29] In 1996 Gill Gatfield reported that women lawyers were leaving the law at nearly three times the rate of men.[30]

Over ten years later, an online survey of 300 lawyers by Natalya King re-tested aspects of the 1992 survey and uncovered similar results.[31] The 2012 survey found the majority of participants said there was discrimination in the profession (70 per cent), with women lawyers more likely to consider this an issue than their male colleagues (women 73 per cent, men 54 per cent). Of those who elaborated on the forms of discrimination, 90 per cent identified gender as the main basis for discrimination (women 93 per cent, men 72 per cent).[32]

The Law Commission's Study Paper on *Women's Access to Legal Services* in 1999 included powerful examples provided by New Zealand women lawyers of the barriers to their full participation in the legal profession.[33] The report also noted a lack of detailed research about the experiences of Māori, Pasifika and other minority lawyers but concluded that the information existing at that time suggested these groups also faced discrimination in the legal profession.[34]

Ongoing research and analysis in this area has confirmed that discrimination and harassment continue to be significant issues of concern for the legal community. For example, a 2015 report by Dr Rebecca Michalak found evidence of widespread bullying and sexual harassment of legal professionals.[35] The report was based on a 2011 Australasian survey of the impact of workplace experiences on legal professionals. The study involved 540 lawyers, including an estimated 100 New Zealand lawyers.[36] Half of the survey respondents were exposed to at least some form of sexual harassment, consisting of three dimensions: gender harassment, unwanted sexual attention and sexual coercion. In a comparative analysis of other professionals, Dr Michalak found lawyers were more likely than other professionals to be exposed to negative interpersonal behaviour, psychosocial risks, including incivility, interpersonal deviance, verbal abuse, work obstruction, emotional neglect, mistreatment overall, bullying via destabilisation, isolation, overwork, and threat to professional standing behaviours, gender harassment, and overall sexual harassment.[37]

Unacceptable behaviour within the legal profession is well established and has been able to flourish in the profession for too long. The #MeToo movement has added momentum to the clear case for change.

How is sexual violence, bullying, harassment and discrimination manifested in the legal profession?

In addition to sexual violence and harassment, men and women within the legal community have shared experiences of racist comments, inappropriate observations about appearance, family status, sexual orientation and threats and intimidation. Physical harm is also part of this behaviour, including unwanted touching, assault and sexual violation. Bullying behaviour includes ridiculing, isolating, making unreasonable demands and punitive work assignments (including less challenging or seniority-inappropriate work).[38] Perpetrators use many ways to target people including the use of information communication technologies to perpetrate these behaviours, such as sound or video recordings, texts and social media.

This behaviour occurs in many locations and contexts. It occurs in workplaces (such as work social settings), in public (such as at collegial events), in universities, and in the courts. This behaviour can be directed from senior lawyers to junior staff, lawyer to lawyer in different firms, employer to employee (including towards non-legal staff) and by clients towards lawyers (including lawyers condoning the

discriminatory behaviour of their clients directed at other staff).[39] Clear examples also exist of lawyers forming inappropriate relationships with vulnerable clients.[40]

Types of Sexual Harassment

The nature of the sexual harassment identified in the profession varies widely. Two-thirds (66 per cent) of lawyers who had personally experienced sexual harassment described some form of inappropriate physical contact, actual or attempted rape or sexual assault. For the 31 per cent of women lawyers who had been sexually harassed (within the meaning of sexual harassment outlined by the Human Rights Commission), many said this behaviour happened on more than one occasion and fell into four categories: [41]

1. Unwanted sexual attention, described by 93% of women, including sexually suggestive comments or jokes that were offensive (81%), inappropriate staring or leering that made them feel intimidated (66%), intrusive questions about their private life or physical appearance that were offensive (63%), unwelcome touching, hugging, cornering or kissing (58%), repeated or inappropriate invitations to go out on dates (29%), and repeated or inappropriate advances on email, text, social networking websites or internet chat rooms by a work colleague (17%).
2. Crude/offensive behaviour, recorded by 86% of women who were sexually harassed, including sexually suggestive comments or jokes that made them feel offended (81%), sexual gestures, indecent exposure or inappropriate display of the body (23%), and sexually explicit emails, texts or social media messages (19%).
3. Sexual assault, described by over half (56%) of the women sexually harassed, involving inappropriate physical contact (56%) and actual or attempted rape or sexual assault (6%).
4. Sexual coercion was experienced by one-quarter (25%) of women who were harassed. This behaviour included unwelcome conduct of a sexual nature (41%), requests or pressure for sex, or other sexual acts (20%), and implied or actual threats of differential treatment if sexual activity was not offered (12%).

Overall, the proportion of women lawyers affected by sexual harassment in 2018 has remained largely unchanged for over 20 years, at around 30–40 per cent. The 2011 Australasian study reported 50 per cent of lawyers experienced gender harassment. Key changes are evident – in the increased numbers of men affected, and the significant increase in both the amount of unwanted and inappropriate physical contact, and the severity of the harassment behaviour in terms of sexual assault and sexual coercion.

Other types of discrimination

The 2018 NZLS survey focused on workplace environment, harassment and bullying, and did not include questions about wider forms of discrimination as defined in the Human Rights Act 1993. Other recent surveys and studies, however, demonstrate ongoing unlawful discrimination against women lawyers, Māori lawyers, lawyers of diverse ethnic origins, and other groups in the profession. NZLS

data also points to a continuing gender pay gap with men lawyers having a 7 per cent to 10 per cent higher average charge-out rate, which is maintained in almost all circumstances, regardless of size of firm, location and years' post qualification experience. The traditional law firm model for calculating salaries is based on a lawyer's ability to earn fees for a firm. Typically, lawyers and legal executives with a charge-out rate are referred to internally in firms as "fee earners" and have a target "budget" they are required to reach. For this reason, a lower charge-out rate will inevitably affect a lawyer's salary level. Female lawyers' salaries fall below their male counterparts at the lower and upper ends of the scale.[42] Sexual harassment is also a form of sex discrimination, causing adverse employment, economic and health consequences.[43]

To date, no comprehensive information has been obtained on the experiences of non-legal staff who work in law firms, clients or members of the public affected by discrimination, harassment and bullying by lawyers. On the basis of the power differential that underpins discrimination, harassment and bullying, it is probable that women and ethnic minority non-legal staff, at the very least, experience similar levels of discrimination, harassment and bullying by lawyers. Research on the experiences and needs of these groups is needed as a high priority. The pathways for redress, access and support including through the Lawyers Complaints Service process, must also be clear.[44]

Race Discrimination and Racial Harassment

The first quantitative assessment of race discrimination in the New Zealand legal profession in 1992 by Gatfield and Gray found that 35 per cent of lawyers considered discrimination on the grounds of ethnicity or race occurred in the profession. Women lawyers were more perceptive of this type of discrimination than men lawyers.[45] Asian, Pasifika and Māori lawyers had higher levels of personal experience of discrimination. Nearly 60 per cent of non-European lawyers had experienced some form of discrimination, compared with 45 per cent of European/Pākehā lawyers. Racial discrimination was the most prevalent, with 35 per cent of non-European lawyers having personally suffered from this compared with only four per cent of European/Pākehā lawyers.[46]

The 2012 survey of 300 lawyers by Natalya King found that 28.5 per cent of participants identified ethnicity/race as a basis for discrimination, with no difference between the sexes (28 per cent women, 28 per cent men).[47]

Multiple types of discrimination are experienced by non-European lawyers. In 2016 Ngaroma Tahana noted in a NZLS Continuing Legal Education programme: 'As Māori women we face both gender and cultural biases. These gender/cultural dimensions are also our greatest strengths.'[48] She cited a 2014 paper by Judge Caren Fox setting out common barriers facing Māori women in the law, as identified by members of Te Hunga Rōia Māori o Aotearoa, including: [49]

- Barriers in the legal profession and culture;
- Gender perceptions – battling the status quo;
- Working arrangements and motherhood;
- Confidence to act and/or be at the table; and
- Lack of role models and role modelling for wāhine Māori (Māori women) (the counter-factual position being that wāhine Māori in senior roles are required to be all things to all people).

The 2018 NZLS survey found that lawyers from ethnic minority groups were more likely than European lawyers to experience bullying and harassment.[50] Under the Human Rights Commission definition of harassment, 23 per cent of Māori lawyers have been sexually harassed in a legal environment at some time in their working life, compared to the overall average of 18 per cent. Experience of sexual harassment within the past five years is significantly higher than average for Māori lawyers (16 per cent of Māori vs 10 per cent overall). The disparity is even more marked with the behavioural definition of sexual harassment: 40 per cent of Māori lawyers have experienced sexual harassment in the last five years compared with 27 per cent on average. This disparity is relevant to both both men and women: 29 per cent of Māori male lawyers vs 14 per cent of all male lawyers have experienced sexual harassment; 46 per cent of female Māori lawyers vs 40 per cent of all female lawyers have experienced sexual harassment.[51]

Māori lawyers are more likely than average to have experienced the following types of harassment in the last five years. These disparities are also evident among female Māori lawyers (compared to all female lawyers): [52]

- Inappropriate staring or leering that was intimidating. 19% of Māori lawyers vs 11% of all lawyers (27% of female Māori lawyers vs 18% of all female lawyers)
- Intrusive questions about the lawyer's private life or physical appearance that was offensive. 23% of Māori lawyers vs 13% of all lawyers (30% of female Māori lawyers vs 21% of all female lawyers; and also 12% of Māori male lawyers vs 4% of all male lawyers)
- Inappropriate physical contact. 15% of Māori lawyers vs 8% of all lawyers (18% of female Māori lawyers vs 12% of all female lawyers)
- Repeated or inappropriate advances on email, text, social networking websites or internet chat rooms by a work colleague. 8% of Māori lawyers vs 3% of all lawyers (11% of female Māori lawyers vs 5% of all female lawyers).

Using the Worksafe New Zealand definition of bullying,[53] 62 per cent of Māori lawyers have been bullied at some point in their working life (compared to 52 per cent of all lawyers surveyed), and 34 per cent of Māori lawyers have been bullied in the last six months (compared to 21 per cent of all lawyers). The incidence of bullying increases under the NAQ-r definitions of bullying,[54] where nearly three-quarters (74 per cent) of Māori lawyers have experienced one or more negative person-related behaviours of any frequency in the last six months (compared to 66 per cent of all lawyers).

Race or cultural bias appears to be a factor underlying bullying of ethnic minority group lawyers in the profession. Māori lawyers who have been bullied are more likely than New Zealand European lawyers to believe the bullying behaviour was motivated by race or culture (15 per cent vs 2 per cent). Asian lawyers are even more likely to attribute bullying behaviours to race or culture (35 per cent).[55] In the 2016 study of Auckland law students 75 per cent of students surveyed said that stereotyping occurs at the Law School, with female, Māori and Pasifika students, as well as students from outside the upper-middle classes suffering from negative stereotyping.[56]

In 2018 the Pacific Lawyers Association Executive observed that non-European lawyers face specific challenges associated with being part of a minority group within a European dominated profession.[57] Among barriers to success and personal fulfilment affecting ethnic minority lawyers, the Executive pointed to the prevalence of cultural bias, observing:

> *"A lack of visibility and diversity in the legal profession allows unconscious bias to prevail in these spaces, which is another, more inauspicious, barrier. Unconscious bias is something that firms are actively trying to tackle of late. While it is perhaps almost impossible to quantify, it is incredibly pervasive. Importantly, it is acknowledged that unconscious bias is not simply limited to skin tone, ethnicity and cultural background. Without significant change, unconscious bias is something that will exist for a long time as a challenge for non-European lawyers as they progress in their careers."*

Changing Demographics

At present, the New Zealand legal profession does not reflect the ethnic diversity of the wider New Zealand population. As at 30 June 2018 the ethnic make-up of the profession was over 85 per cent European compared to 74 per cent of New Zealanders of working age. Representation of the other main ethnic groups in the profession is well below the national demographic profile, with Māori 6.1 per cent, Asian 5.9 per cent, and Pasifika Peoples 2.8 per cent.[58]

Change to the profession's ethnic makeup is underway. The ethnic make-up of law students and graduates confirms the demographic shift. During 2017 the ethnicity of students completing a bachelor's degree was: European 70.6 per cent, Asian 17 per cent, Māori 13 per cent, Pasifika 7.3 per cent and "other ethnicity" 4.9 per cent. Ministry of Education statistics for students completing legal professionals courses show that almost 20 per cent are of Asian ethnicity and nearly 10 per cent are Māori.[59]

Based on the evidence of a higher incidence of harassment and bullying related to ethnicity, culture and race, coupled with the fast-changing ethnic makeup of the profession, the need to urgently address racial and ethnic discrimination, racial harassment and bullying in the legal profession is clear.

How is the culture and structure of the legal profession a contributing factor?

The legal profession's cultural issues highlighted in the Bazley Report have a much wider application than just to Russell McVeagh. The Working Group considers that the lack of equality and diversity in the legal profession provide an environment for unacceptable behaviour to grow and remain unchecked. Barriers to achieving equality and diversity are historical, cultural and structural. Changes to the regulatory system need to take into account these interconnected factors. The culture of the profession and the outcomes for women and minority groups will not change when the supporting structures allow or cause discrimination, harassment and bullying. A comprehensive framework of cultural and structural change is required.

There are significant structural barriers in legal workplaces and institutions (both formal and informal) to achieving equal opportunities and outcomes for different genders, races and ages. Structural barriers include:

- Power imbalances in roles, authority and influence, which can facilitate the exploitation of staff and vulnerable clients and which enable discriminatory and bullying behaviour.
- Inequitable recruitment practices.[60]
- Work allocation and briefing practices that exclude full participation of women and minority groups.
- Pay equity issues[61] and inflexible work arrangements.
- Problematic business models, which may focus on financial success to the exclusion of proper professional conduct and devalue positive personal attributes, or may involve a high turnover of junior staff who are made to work long hours, leaving them vulnerable, for example, when working in isolation during weekends or at night.[62]
- Poor leadership or management skills in those who supervise other lawyers. [63] [64]
- Decision-making processes that do not enable the voices of women, ethnic and other minority groups to be heard or considered.[65]
- The adversarial nature of legal dispute resolution, which of itself may also contribute to a combative and unsupportive, rather than collegial culture.[66]
- Unclear professional conduct standards and concerns about reporting processes.

There are also cultural inhibitors associated with or created through these structural barriers, including:

- A culture of silence in which those who experience and witness misconduct and other inappropriate or unlawful behaviour feel powerless to intervene or report it. This culture appears to be reflected elsewhere in the legal profession, including in law schools.[67]
- A "work hard, play hard" culture that enables and even encourages excessive alcohol use.[68]
- Keeping unacceptable behaviour 'in-house' and out of view through inappropriate use of non-disclosure agreements. This creates impunity and a lack of accountability for perpetrators of unacceptable behaviour. In some cases, perpetrators of this behaviour are allowed or sometimes actively supported to simply 'move-on'.[69]

Who is affected and who is responsible?

The power imbalance between people affected by these behaviours and perpetrators enables sexual violence, harassment, bullying and discrimination to continue, and correlates to the low incidence of reporting.

Who is affected by this behaviour?

A focus on the survey data outlined here risks diminishing individuals' deeply personal and harmful experiences of sexual harassment and violence, discrimination and bullying. Yet understanding the broad characteristics of those who experience inappropriate, unlawful or unethical behaviours is needed to fully inform a programme of change and to provide a benchmark for measuring progress.

Since the first surveys of lawyers in the 1980s, the profile of complainants has remained largely the same. Women lawyers are much more likely to experience sexual harassment than men lawyers, and younger women are more likely to do so than women lawyers over 40 years old.[70] In the 2018 NZLS survey, people affected most were an employee lawyer in a law firm (women 62 per cent, men 47 per cent), followed by employee in-house lawyers (11 per cent overall) and law clerks or interns (11 per

cent overall). Relatively few people affected were partners (6 per cent), in-house lawyers in charge of staff (2 per cent) or directors (1 per cent).[71]

The areas people work in also influenced the extent of harassment reported by women lawyers, with higher than the average (17 per cent) being experienced by women lawyers working in criminal law (30 per cent), tax (23 per cent), immigration (22 per cent) and civil litigation (21 per cent).

Bullying also predominantly affects women. Using the WorkSafe New Zealand definition,[72] 52 per cent of lawyers said they had been bullied at some time in their working life (women 60 per cent, men 44 per cent), and 21 per cent had been bullied in the last six months (women 26 per cent, men 16 per cent).[73]

Ethnicity, age, and gender all play a role in the prevalence of experiences of bullying. Lawyers working in criminal law, family law and Māori/Treaty of Waitangi law are more exposed to workplace bullying. Using the Negative Acts Questionnaire Scores across three key areas (work-related bullying, person-related bullying, and physically intimidating bullying), higher than average overall NAQ-r scores are reported among: women lawyers; Māori, Asian, and Pasifika Lawyers; and by those aged under 30.[74]

Who is carrying out this behaviour?

Sexual harassment is most likely to be by men in positions of responsibility (men were identified as the perpetrator by 98 per cent of the women lawyers who reported being sexually harassed under the Human Rights Commission definition).[75] For all respondents in the 2018 NZLS survey, the harasser was most likely to be a person's manager, supervisor, or a partner or director in the firm (52 per cent overall). Women lawyers are more likely than men lawyers to be harassed by someone in a more senior position, including harassment from a more senior co-worker (26 per cent), other co-worker (12 per cent) and others associated with the workplace (11 per cent). Clients were the harasser for 14 per cent of lawyers. Six per cent of respondents identified judges as the harasser.[76]

74 per cent of male respondents affected by sexual harassment identified the harasser as a woman.[77]

The profile of perpetrators of sexual harassment has remained largely unchanged. In the 1987 Auckland survey, discrimination against women was attributed to law firm partners (by 46 per cent of women surveyed and 21 per cent of men) and to clients (by 44 per cent of women surveyed and 32 per cent of men).[78] Again, in the 1992 national survey, partners and employers were most likely to harass women lawyers, being identified as perpetrators by 49 per cent of women lawyers.[79]

Bullying behaviours are most often by someone in a senior role in the workplace, with 65 per cent of bullies being managers, supervisors, partners or directors, and 20 per cent being co-workers in a more senior position than the person affected. Judges are a perpetrator of bullying for 15 per cent of lawyers surveyed, a percentage that increases to 44 per cent for those practising criminal law. Men are more likely to be the perpetrator (52 per cent) but nearly half of bullying cases involve women, either as the sole perpetrator (31 per cent) or with others (17 per cent).[80]

What is the impact on people and the profession?

These experiences have a long-lasting personal and professional impact on those affected.[81]

Targets of unacceptable workplace behaviour suffer significant physical and psychological harm. The effects are wide ranging and include depression and anxiety, sleep disturbances, high blood pressure and nausea.[82]

> **"I had such a bad experience and my feeling of self-worth in a professional sense was so low that I couldn't see myself being a particularly good lawyer anywhere."**
>
> — *Quote from interviewee in Josh Pemberton* First Steps: the Experiences and Retention of New Zealand's Junior Lawyers *(New Zealand Law Foundation, Wellington, 2016) at 15.*

Those affected face significant career and employment consequences. For example, 42 per cent of people bullied and 32 per cent of people sexually harassed reported an impact on their career and job prospects in the 2018 NZLS Survey. This impact has significant ramifications for the legal profession and attrition rates. The legal community is losing people who have a valuable and diverse contribution to make, because of the unacceptable conduct of others.[83]

How has a lack of confidence in the regulatory framework and complaints process contributed to the problem?

As outlined in this report, it is beyond doubt that sexual violence, harassment, discrimination and bullying continue to be a serious problem in the legal community. One important aspect to this, is the lack of trust in the regulatory framework to effectively address this issue. A lack of confidence in the framework can facilitate a culture of impunity in which those affected are reluctant to report misconduct because they are not confident perpetrators will be held to account. This report focuses exclusively on this particular aspect.

Clear concerns have been voiced about the fitness of the current regulatory framework and the ability of NZLS as regulator to effectively deal with sexual violence, discrimination and bullying and harassment.[84] Part of the problem is the lack of knowledge about how reporting and complaints processes work. There is a lack of confidence that NZLS will act against perpetrators and concern that in such cases "nothing has happened".[85]

Distrust in the process or the outcome is a common barrier to taking action. 57 per cent of those harassed took no further steps. Many felt it would make no difference (40 per cent), the incident would not be kept confidential (30 per cent), they would not be believed or supported (25 per cent) or that NZLS could not resolve the matter (15 per cent). Still others said they did not think the harassment was serious enough, 38 per cent said they had dealt with it themselves, while others did not take action as they felt embarrassed or ashamed.[86]

Lack of confidence and perceptions that it is futile to report this conduct must be addressed urgently. The Working Group was asked by NZLS to examine ways to improve the regulatory framework for

lawyers in order to tackle sexual violence, sexual harassment, discrimination and bullying and to support its elimination from the culture of the profession.

The Working Group has examined why there is low reporting and why there are concerns about complaints processes for sexual violence, harassment, bullying and discrimination. Two key drivers for these concerns have been identified:

- Unclear reporting and conduct standards;
- Regulatory mechanisms and processes which are not specifically designed, or effective in, dealing with complaints about sexual violence, harassment, bullying and discrimination.

The rest of this report sets out how the Working Group went about its task and makes recommendations for regulatory reform. The Working Group acknowledges that regulatory reform is only one part of the broader programme of change that is needed.

Proposals for regulatory reform

The call for action to make the practice of law safe for all is clear. Change is required to effectively address sexual violence and harassment, bullying and discrimination in the legal profession through regulation. The Working Group has identified nine areas for change:

- clearer conduct and reporting standards;
- closer regulation of workplace obligations;
- improving the current Lawyers Complaints Service and Standards Committee process in respect of complaints about sexual violence, harassment, discrimination and bullying;
- creation of a specialised process for dealing with complaints of unacceptable behaviour;
- reform of the procedures around confidentiality and suppression;
- reducing delays in the review process;
- changes to the procedures of the New Zealand Lawyers & Conveyancers Disciplinary Tribunal (LCDT);
- imposition of mandatory training;
- effective implementation of change and long-term monitoring.

The need for clear conduct and reporting standards

The Rules governing lawyers' conduct do not expressly state that sexual violence, sexual harassment, bullying and discrimination amount to breaches of the Rules. Where these behaviours occur in a legal workplace, the lack of clarity allows them to be dealt with "in-house", as purely employment issues. The conduct can therefore be hidden from view, with the perpetrator facing only limited consequences. This appears to have contributed to the chronic underreporting of unacceptable conduct.

The Working Group considers changes to the Rules and legislation are needed to ensure that:

- the Rules specifically refer to sexual harassment, bullying and discrimination as unacceptable conduct for all lawyers;
- the statutory definitions of "misconduct" and "unsatisfactory conduct" in the LCA clearly capture sexual violence, sexual harassment, bullying and discrimination (irrespective of whether the conduct is 'connected with' the provision of regulated services);
- the obligation to report lawyer misconduct to NZLS is clear and adequate protections are in place for those reporting.

Conduct rules must be specific

The Rules set the minimum standards of professional and ethical conduct that lawyers must observe. Lawyers enjoy a privileged position and the trust of clients, the courts and other lawyers. With privilege comes responsibility. Part of that responsibility is the expectation that lawyers act with a high level of personal and professional integrity. The Rules signpost these expectations. As such, the Rules must reflect that sexual harassment, bullying, and discrimination are unacceptable.

The only rule that specifically relates to this type of conduct is rule 3.1. This rule requires that a lawyer must treat a *client* with respect and courtesy and must not act in a discriminatory manner.[87]

While harassment, discrimination and bullying and other inappropriate behaviour may breach a variety of non-specific conduct rules,[88] in the Working Group's view, it is unsatisfactory to attempt to fit this type of conduct within rules and obligations not specific to this type of behaviour.

The rules of professional and ethical conduct in certain overseas jurisdictions include specific obligations that prohibit "harassment, bullying and discrimination".

For example, the Australian Solicitors' Conduct Rules and Legal Profession Uniform Conduct (Barristers') Rules provide:

> ***Anti- discrimination and harassment***
>
> *A solicitor or barrister must not in the course of practice, engage in conduct which constitutes:*
>
> - *discrimination;*
> - *sexual harassment; or*
> - *workplace bullying.*[89]

The Australian Rules rely on the definitions of bullying and harassment that exist under the applicable state, territory or federal anti-discrimination or human rights legislation.

The Working Group believes that clear rules prohibiting sexual harassment, bullying and discrimination should be included in the New Zealand Rules. This could be linked to current definitions of such conduct found in Employment Relations Act 2000 and Human Rights Act 1993 and definitions of "bullying" established by WorkSafe New Zealand.

Proposed new rules

For example, Rule 10 could be expanded as outlined below:

> ***Maintaining trust and confidence in the legal profession***
>
> *10. A lawyer must promote and maintain proper standards of professionalism in the lawyer's dealings.*
>
> *10.1 Professional and personal standards*
>
> *A lawyer must promote and maintain a high standard of professional and personal behaviour and avoid any professional or non-work activity or behaviour that reflects adversely on the legal profession. The conduct captured under this rule includes (but is not limited to) discrimination, sexual harassment and/or bullying as prohibited under r 10.2.*
>
> *10.2 Anti-discrimination, bullying and harassment*
>
> *A lawyer must not engage in conduct that constitutes:* [90]
>
> - *discrimination;*
> - *sexual harassment; and/or*
> - *bullying.*

Whatever approach is adopted, any conduct definition must be non-exhaustive and not overly prescriptive. This will ensure that the regulatory regime is flexible, and perpetrators may not have recourse to technical legal arguments to avoid responsibility.

Clearer definitions will also assist lawyers in discharging their reporting obligations *[see: "Enhancing lawyer reporting obligations" on page 39]* by removing uncertainty or anxiety about whether the conduct is "misconduct" and therefore triggers the reporting obligation.

Conduct definitions must be clear

The LCA provides the statutory framework for investigating and disciplining lawyers who fail to meet their obligations.

To justify an adverse disciplinary finding under the LCA, the conduct of a lawyer must be either "unsatisfactory conduct" or "misconduct".[91] It is problematic that it is not clear how sexual violence, sexual harassment, bullying and discrimination currently fit within those definitions.

For example, if a lawyer behaves in an unacceptable way in a social situation, is that behaviour a professional disciplinary matter? The current answer to this question is not straightforward because the current definitions of "unsatisfactory conduct" and "misconduct" do not make clear that conduct unrelated to the provision of legal services is captured. The definitions of unsatisfactory conduct and misconduct are principally focused on conduct that occurs in the course of a lawyer providing regulated services to clients or are specific to the special position of a lawyer as 'Officer of the Court'.[92] Their application to other types of conduct can be complex and difficult.

Currently, "unsatisfactory conduct" has four separate definitions and there are three distinct species of "misconduct" that are further broken down into sub-categories. These definitions are set out in Appendix 2 of this report.

Conduct that is not strictly related to competence or client service will most typically be categorised as "unsatisfactory conduct", being behaviour that is:

- **Unacceptable, unprofessional or unbecoming conduct when providing regulated services**[93] High Court authority indicates this can include conduct "*connected to*" the provision of regulated services.[94] What the term "*connected to*" might capture creates uncertainty. For example, does it extend to capture harassment of a colleague or employee in the context of working on a case for a client?
- **A breach of the LCA or its Rules or any other Act relating to the provision of regulated services** This definition is silent about whether the relevant conduct must have happened *when* providing regulated services. This section has been interpreted as capturing non-regulated services if the conduct breaches a specific rule or relevant regulation.[95] For the types of conduct addressed in this report to be captured under this limb, the conduct must be linked to a breach of one of the current rules. As indicated above, the current Rules do not specifically refer to sexual violence, sexual harassment, bullying or discrimination. The Rules must be more specific to avoid any doubt about how they apply in any individual situation.

The effect of the statutory definitions and lack of specific reference in the Rules is that these types of behaviour, where wholly unconnected to the provision of regulated services, can only be addressed as misconduct. Misconduct is a high disciplinary threshold to meet. The current test for misconduct in this situation is that the conduct would justify a finding that the lawyer *is not a fit and proper person or is otherwise unsuited to engage in practice as a lawyer*.[96]

This creates a gap in the regulation – any behaviour when a lawyer is not providing regulated services cannot be the focus of a disciplinary response unless it is at the serious end of the spectrum. This

limits the ability of NZLS to effectively regulate sexual violence, sexual harassment, bullying and discrimination. These behaviours should be subject to regulation.

What behaviour is captured and when is it captured?

The Rules and legislation must make clear that sexual violence, sexual harassment, bullying, discrimination or other forms of unacceptable workplace behaviour are professional complaints and disciplinary matters. They are not only employment matters.

However, two important questions flow from this. When will these types of behaviour fall within the Rules, and is lawyer behaviour outside the workplace or professional environment covered? The Working Group received submissions on this point, some of which cautioned against "casting the net" too widely. Concern was expressed that extending obligations on lawyers to social and personal situations may be overly intrusive or disproportionate. For example, a submitter questioned whether a lawyer could be disciplined for a "one-off" obnoxious (but not unlawful) instance of behaviour in a social setting.

The Working Group acknowledges the concerns raised about imposing obligations too broadly. There will be a range of behaviours and situations when lawyers do not live up to the standards they expect of themselves – and the public are entitled to expect of them – but not all of these situations will warrant a disciplinary finding. The Working Group believes that these concerns can be effectively managed.

The starting point is that sexual violence, sexual harassment, discrimination and bullying by lawyers are not isolated to work environments or to work contexts.

The Working Group's view is that unacceptable conduct that occurs outside a workplace or professional context should be covered by the complaints and disciplinary regime when the behaviour may adversely impact on the reputation of the legal profession. This is consistent with the approach found in other regulated professions and various public, private and voluntary sector organisations. For example, the Codes of Conduct for Police, Registered Social Workers, Registered Nurses and State Sector employees all include obligations related to maintaining high standards of personal and

In the 2018 NZLS survey, crude and offensive behaviour described by women lawyers occurred in the form of sexually explicit emails, texts or social media messages (19 per cent). Similarly, unwanted sexual attention described by women lawyers included repeated or inappropriate advances on email, text, and social networking websites or internet chat rooms by a work colleague (17 per cent).[98]

For Māori lawyers, digital forms of harassment are even more prevalent. Repeated or inappropriate advances on email, text, social networking websites or internet chat rooms by a work colleague was experienced by 8 per cent of Māori lawyers compared with 3 per cent of all lawyers (11 per cent of female Māori lawyers vs 5 per cent of all female lawyers).[99]

These forms of communication take place anywhere and anytime, and are conducted by people known and identified in the majority of cases as lawyers. The regulatory approach must be flexible enough to deal with a wide range of situations.

professional conduct, including in respect of "non-work" activities.[97] The Working Group cannot identify any sound basis for limiting obligations on lawyers to maintain high standards to the purely professional sphere.

The Working Group considers that all sexual violence, sexual harassment, bullying, discrimination and other unacceptable conduct that meets the current definitions of misconduct under the LCA should be captured, regardless of whether the behaviour occurs at a time when the lawyer is providing regulated services. That is not casting the net too wide, as the misconduct thresholds are high. The conduct must be, relevantly:

- disgraceful or dishonourable;
- a wilful or reckless contravention of the LCA or Rules; or
- such that it would justify a finding the lawyer is not a fit and proper person or is otherwise unsuited to engage in practice as a lawyer.

In respect of the lesser standard of unsatisfactory conduct, the Working Group considers that all sexual harassment, bullying and discrimination in breach of the new r 10.2 should be caught by the definition of "unsatisfactory conduct". Again, this does not cast the net too widely, because conduct will need to be at a level that meets the specific definitions of those behaviours. Where conduct is unacceptable, but does not meet those particular definitions, the Working Group considers it should be captured under the definition of "unsatisfactory conduct" where it has brought or is likely to bring the profession into disrepute.

On this basis it is unlikely that a low-level and isolated incident of unacceptable behaviour would be captured.

Minor amendment to the LCA is needed to make it clear this conduct (and a breach of the new rules) is captured, as set out above. Careful drafting will be required to ensure there are no unintended consequences arising from any changes to the statutory definitions of *unsatisfactory conduct and misconduct.*

One barrier to adequately addressing sexual violence, sexual harassment, bullying and discrimination is unclear conduct standards. The lack of clarity impedes detection and deterrence of unacceptable personal behaviour. A clear signal to lawyers is required that this behaviour is unacceptable and is a professional disciplinary matter.

Proposed changes to conduct definitions in the Rules and the Act:

Amend the Rules

- Create a new rule to the effect that a lawyer must promote and maintain a high standard of professional and personal behaviour and avoid any professional or non-work activity or behaviour that may reflect adversely on the legal profession.
- Create a specific rule of conduct that addresses sexual harassment, discrimination and bullying.
- Align any definition of bullying, harassment and discrimination in the Rules with established statutory definitions.
- Ensure the definitions are non-exhaustive and broad enough to capture all types of unacceptable behaviour.

Amend the definitions of 'unsatisfactory conduct' and 'misconduct' in the LCA

- Amend the definition of misconduct so that sexual violence, sexual harassment, bullying and discrimination that meets the current threshold is captured regardless of whether the behaviour occurred at a time when the lawyer was providing regulated services.
- Amend the definition of unsatisfactory conduct so that conduct that breaches the new 10.2 is captured regardless of whether it occurs when the lawyer is providing regulated services, and other unacceptable behaviour is captured where it has brought or is likely to bring the profession in to disrepute.

Enhancing lawyer reporting obligations

This report examines lawyers' reporting obligations in two contexts. The first type of reporting is the established model of reporting lawyer misconduct, which this section discusses. The second type is within a new approach to compliance and regulation and is developed in the section "Closer Regulation of Workplace Obligations" from page 48 onwards.

New Zealand lawyers are subject to a mandatory reporting regime. The Rules require all lawyers to submit a confidential report to NZLS if they have reasonable grounds to suspect another lawyer is guilty of misconduct.[100]

Under the Rules, all lawyers may make a report to NZLS if they have reasonable grounds to suspect another lawyer is guilty of unsatisfactory conduct.[101]

> *Reporting misconduct*
>
> *2.8 Subject to the obligation on a lawyer to protect privileged communications, a lawyer who has reasonable grounds to suspect that another lawyer has been guilty of misconduct must make a confidential report to the Law Society at the earliest opportunity.*
>
> *2.8.1 This rule applies despite the lawyer's duty to protect confidential non-privileged information.*
>
> *2.8.2 Where a report by a lawyer to the Law Society under rule 2.8 may breach the lawyer's duty to protect confidential non-privileged information, the lawyer should also advise his or her client of the report.*

Why is a reporting requirement needed?

The Working Group's view is that reporting obligations should be retained, but that the current reporting obligations must be tailored to encourage reporting, and provision must be made for supporting those lawyers who do report.

Reporting requirements are a way of maintaining confidence in the legal profession. All lawyers have an interest in ensuring other lawyers meet the expectations held of them. Reporting obligations also

provide a mechanism for lawyers to use their privileged position to protect others from those who do not live up to the common values held by the legal profession.

As one American judge observed, *"... [t]he rationale behind the rule is simple – no-one is better suited to recognise a breach of the Rules or better situated to observe one."*[102] This observation is particularly relevant to unacceptable behaviour that happens in a private workplace, where the conduct may not be widely known.

However, there are a number of barriers to reporting. As indicated in the NZLS survey, distrust in the process continues to be a significant factor.[103]

Barriers to reporting were also noted among University of Auckland law students in the 2016 study, some of whom were law clerks. The researchers found: [104]

> *A strong theme that emerged from the discussion groups was the reluctance of many women students to publicly raise issues of gender and respond to sexism. Women were concerned about being seen as humourless and confrontational and attracting negative labels, for example being seen as a "bitch".*

There may also be cultural reasons for not reporting [105] including a complaint process that does not adequately acknowledge and incorporate appropriate culture responses.

It is evident from the lack of reports received by NZLS about sexual violence, sexual harassment, bullying and discrimination that the reporting mechanism is not working in New Zealand.[106] For the obligation to be effective, lawyers must believe that their report will have an effect, and must not fear the consequences of reporting.

Reports are unlikely to be made without clear obligations, and built-in protections and supports for whistle-blowers.[107]

The Working Group has identified weaknesses inherent in the current reporting mechanism. These need to be examined and changes made to the current obligations.

Improving the reporting mechanism

Reporting obligations must be clear and precise.

The Working Group received a submission advocating for mandatory reporting of all conduct-related incidents to NZLS and encouraging reporting by people who were admitted to the Roll but did not hold a current practising certificate. The Working Group was concerned about extending obligations too widely for a number of reasons. These include disproportionate regulatory burden and unintended negative impacts on individuals who are both affected by unacceptable conduct or who are the subject of allegations. The spectre of every workplace conduct issue being reported externally to a regulator may also have the unintended consequence of stifling complaints to employers. The Working Group considers that reporting obligations should be engaged by behaviour that is believed to be of the most serious kind. The Working Group does not consider those who do not hold practising certificates should

be subject to the reporting requirement, but clear information should be given to people in the legal community who are not lawyers about the complaints process and assistance that may be available.[108]

Improvements could also be made to the current reporting obligations to provide an effective mechanism for identifying unacceptable behaviour that may not otherwise come to NZLS' attention.

The ingredients for a reporting mechanism that effectively includes sexual violence and harassment, bullying and discrimination are:

- obligations on employers;
- appropriate exceptions;
- protections for reporters;
- processes in place to enable and support reporting;
- enforcement.

First, the Working Group considers it must be made clear that, while a person can make a confidential (and potentially anonymous) report, for the regulator to take action on the report may require the reporter to agree to their identity and the content of their report being disclosed. The Working Group has addressed below *[see: "Complaints about unacceptable behaviour need specialised processes" on page 75]* the option of allowing people to make confidential and anonymous reports to the NZLS, which do not necessarily go any further.

Second, the Working Group is of the view that clearer rules and conduct definitions will make it easier for lawyers to identify and report misconduct related to sexual violence, sexual harassment, bullying, and discrimination *[see: "The need for clear conduct and reporting standards" and the proposals made by the Working Group on page "Proposed new rules" on page 34]*.

Defining the obligations of employers

Currently, reporting obligations are imposed on lawyers as individuals. The Working Group considers that these obligations should be extended and placed on legal workplaces or the lawyers responsible for supervision of other lawyers as well.

The Working Group considers that reporting obligations should be placed on legal workplaces or on lawyers responsible for legal workplaces *[see "Closer regulation of workplace obligations" from page 48 onwards]*. This could include obligations to report:

- any personal grievance or employment-related complaint relating to sexual violence and harassment, bullying, discrimination or other unacceptable conduct in the workplace that results in an adverse finding against a lawyer; and
- any dismissal of a lawyer, employee or principal of a firm for sexual violence or harassment, bullying or discrimination; and
- if, within 12 months before the resignation of a lawyer, employee or principal of a firm, there has been any allegation of sexual violence or harassment, bullying or discrimination.

This ensures that unacceptable behaviour is not kept "in-house", allowing a perpetrator to move on to another job without disciplinary action. Imposing a reporting obligation on legal workplaces

would also ease concerns about the continued use of non-disclosure agreements to conceal unacceptable and harmful behaviour *[see: "Preventing lawyers using non-disclosure agreements to conceal unacceptable conduct" on page 62]*. Reporting of this kind may provide a mechanism for identifying unacceptable workplace behaviour in a way that lessens the burden on vulnerable employees to report.

These obligations would be additional to a proposed amendment to the current Rules to require a practice or lawyer responsible for a practice to report misconduct generally.

Discussion of who these obligations should rest on is below at *[see "Closer regulation of workplace obligations" from page 48 onwards]*.

Protecting people who make a report

Any lawyer to whom an incident of misconduct is disclosed by another lawyer, whatever the circumstances of disclosure, is obliged under the Rules to report it to NZLS. The current reporting rules offer no exception for lawyers faced with this situation seeking guidance on their obligations or for lawyers who act as trusted confidants (to victim or perpetrator).

Currently, only disclosures of misconduct captured by privilege are exempt. Legal professional privilege does not extend to communications made in confidence where the intention is to provide emotional support or professional guidance rather than legal advice.

The Working Group recommends an exception should be included for lawyers from whom a fellow lawyer has sought guidance and support. This exception is used in the United Kingdom where barristers who answer the advice phone line of the Bar Standards Council can provide help to other lawyers without having to report any misconduct disclosed to them in confidence.[109] Any similar exception in New Zealand could be subject to reasonable limits requiring the confidant lawyer to disclose in extraordinary situations, for example to prevent serious risk to a person's health or safety, or when the information is about an anticipated or proposed serious criminal offence.

The current obligations also fail to make exception for a lawyer who knows that NZLS has already received notice or a report about the conduct at issue. This should be put in place.

The burden of the obligation to report therefore currently falls on individual lawyers who may be in a precarious employment situation or an emotionally vulnerable position. In fact, literal interpretation of rule 2.8 of the Rules places an obligation on the person being bullied, harassed, or discriminated against to report it to the Law Society. An employee who witnesses unacceptable behaviour, but who may be vulnerable due to a significant imbalance of power, is also required to report the behaviour.

The consequences of reporting can be significant.[110] A lawyer may fear consequences in terms of their employment or career progression. They may also worry about the personal impact on the lawyer whose conduct they must report. Appropriate support and assistance must be in place to protect lawyers who report.

Further, the Rules do not expressly prohibit victimising a person who makes a report in good faith.[111] Inclusion of whistle-blower protection signals a zero-tolerance for any retaliatory action against a lawyer for making a report. The concept of victimisation in this context is wide; it should be defined to include employment-related actions, personal and professional slurs, lack of co-operation and bullying. The rule could be expressed:

> R2.8.3 *A lawyer must not victimise any person for making a report under rr 2.8 or 2.9 in good faith. Examples of victimisation, include (but are not limited to) unwarranted adverse employment related actions, unwarranted withdrawal of instructions, bullying, professional disparagement or lack of professional cooperation.*

A breach of the new rule 2.8.3 could justify a finding of either misconduct as a wilful or reckless contravention of the Rules or unsatisfactory conduct as a breach of the rule. The level of finding and consequent penalty would depend on the individual circumstances.

Putting processes in place that enable and encourage reporting

The Rules describe a "confidential" report. However, ensuring confidentiality may not be possible. One example is when a matter proceeds to a disciplinary process that requires witness testimony. Reporting lawyers need to be made aware of this and provided with support and guidance. There must also be some processes by which advice about the matter concerning the reporting lawyer can be obtained in a confidential way.

The Working Group has identified the following ways in which reporting misconduct could remain confidential:

- Having a senior lawyer provide confidential advice or support on a 'Friends panel' basis may be invaluable. The Working Group agrees with Te Hunga Rōia Māori o Aotearoa's view about the importance of support being provided by someone who understands the culture, perspectives and experience of the person seeking support. Te Hunga Rōia Māori o Aotearoa's Ngā Hoa Aroha Panel of Friends is an important initiative in this area.[112]
- For complainants, a report could be made to the Specialist Complaints Unit proposed in this report, which may be an avenue for such support *[see: "Complaints about unacceptable behaviour need specialised processes" from page 75 onwards]*.

These avenues would allow a person to obtain advice on whether they were required to – or in the case of a complainant, wished to – make a formal report, prior to doing so.

NZLS has initiated an online reporting tool.[113] This is supported by the Working Group. Online reporting provides a way for people to report in a way that may be less confronting and stressful than, for example, contacting a hotline.[114] The use of technology (such as apps and chatbots) in this area is discussed below *[see: "Using a specialist complaints unit as an alternative pathway for complaints" on page 77]*.

Enforcing the obligation to report

As one overseas commentator has said: [115]

> *Given the choice between potential and professional ruin and potential discipline should [the lawyer's] failure to report ever come to light, almost every lawyer will gamble (1) that [the] failure to report will never be discovered... and (2) that [the lawyer] can avoid or mitigate any sanction for not reporting the misconduct. These are good gambles, and the disciplinary authorities and courts are wrong to believe that most lawyers will behave differently.*

Like their international counterparts, New Zealand lawyers have not faced discipline for failing to report misconduct.[116] The professional and emotional difficulties that may be inherent in making a report may cause a regulator to find "disciplining" a non-reporter unpalatable. The professional breach of duty of failing to report may also not be seen as serious.

Without enforcement, the current reporting obligation is a *rule* in name only. Enforcement must be a visible consequence of a failure to report. However, the consequences of a failure to report must be proportionate.

One way to achieve proportionality is to focus on the relative responsibility of the reporting lawyer. For example, was the non-reporter responsible for the workplace in which the sexual harassment, bullying or discrimination occurred? Holding entities instead of lawyers responsible for not reporting unacceptable workplace behaviour may be one option that addresses the discomfort around disciplining "non-reporters" *[see "Entity Regulation" on page 51]*. An alternative is to place greater responsibility on those lawyers who own or manage the workplace in which the conduct occurs.

A person who is being bullied, harassed or discriminated against should not face disciplinary sanction if they choose not to report the conduct. Lawyers who have faced these types of unacceptable behaviour should be exempt from mandatory reporting requirements.

Similarly, a person who does not report due a risk of significant harm to their mental health, physical wellbeing or safety should not be required to report.

The Working Group proposes that the Task Force review and assess what appropriate protections could be put in place to prevent victimisation due to reporting.

What happens to reports?

The information gathered through reporting may be used for established purposes, such as initiation by NZLS of an own-motion investigation of a lawyer's conduct. It might also provide valuable regulatory intelligence for broader purposes – for example, by providing a picture about what is happening in a particular firm *[see further: "Closer regulation of workplace obligations" on page 48]*.

Reporting may also provide an opportunity for NZLS to engage with people affected by unacceptable behaviour in order to provide them information about support and assistance available. For example, through referral to the Special Complaints Unit proposed in this report *[see: "Complaints about unacceptable behaviour need specialised processes" from page 75 onwards]*.

Clear information should be provided about the collection of information and the way it may be used.

Enhanced "Fit and Proper" inquiries

To be admitted to the Roll of Barristers and Solicitors and to hold a current practising certificate a person must satisfy the statutory "Fit and Proper" test.[117] The lawyer must disclose to NZLS if there is any matter that may impact on their continuing eligibility to hold a practising certificate and must provide an annual declaration to that effect.[118]

In the Working Group's view, the life cycle of a lawyer's practice provides other points at which the "fit and proper" inquiry should be engaged, with particular reference to the types of unacceptable conduct that are the focus of this report. The opportunities for further "fit and proper" inquiries are identified below.

Applying to practise on own account

The test for a lawyer applying to practice on their own account is "suitability to practise on own account" with reference to non-exhaustive criteria related to this.[119] This test is premised on the basis that the person will already hold a practising certificate and therefore meet the "fit and proper" criteria. The names of those applying to practise on their own account are advertised and comments on suitability are called for. Currently, a history of unacceptable conduct could be considered as part of the suitability to practise on own account – for example, if the lawyer was intending to become an employer or to work unsupervised with vulnerable clients.

The Working Group is of the view, however, that there should be a clearer pathway and ability to consider this type of conduct in the context of a person applying to practise on own account. This could be achieved through an amendment to the LCA (Lawyers: Practice Rules) Regulations 2008 to specifically include consideration of any personal grievance or employment-related complaint relating to sexual violence harassment, bullying, discrimination or other unacceptable conduct.

Inquiring into the conduct of Judges and Queen's Counsel when appointed

The Working Group also suggests that a further fit and proper person inquiry is conducted when a person is proposed for appointment as a Judge or a Queen's Counsel. This should focus specifically on disclosure of incidents of sexual violence, sexual harassment, bullying and discrimination. The Working Group recommends that the various entities responsible for appointments ensure that robust checks of this type are well integrated in the process.

Joining the independent Bar

The Working Group received a submission suggesting that a fit and proper inquiry be conducted when an individual joins the Bar. A barrister sole holds a unique position as an independent advocate and may practise in chambers with employees and/or shared staff. The LCA provisions and regulatory processes allow for a lawyer to swap between modes of practise in an administratively smooth way provided that they have met the requirements to practise on own account, with limited exceptions.[120]

One option is for a lawyer to declare at this point if there is any matter that may affect their eligibility to hold a practising certificate and/or any adverse finding related to any complaint relating to sexual violence, harassment, bullying, discrimination or other unacceptable conduct.

Criminal conviction checks and notifications

Candidates for admission provide a criminal conviction check to NZLS when applying for a certificate of character.[121] Teachers, social workers and health practitioners are all subject to mandatory notification by the courts in relation to convictions for an offence punishable by imprisonment for three months or more.[122] By comparison, the legal profession relies on "self-disclosure", publicity or public referrals of criminal convictions.

The Working Group recommends that consideration is given to requiring criminal conviction checks at other points in the life cycle of practice – for example, when a lawyer applies to practise on their own account.

A mandatory notification provision for criminal convictions is also appropriate given that lawyers often hold positions of responsibility in relation to vulnerable clients.

The current reporting mechanism is ineffective. Improvements are required for the mechanism to be effective in identifying and addressing unacceptable behaviour from lawyers.

The Rules lack adequate protections for reporters and appropriate exceptions. The current obligations may also place an inappropriate burden on individual lawyers in certain situations.

Broadening the obligation to practices or lawyers who own and manage legal workplaces, while also providing appropriate exceptions and protections, may make it easier for lawyers to report.

Proposal to amend reporting obligations

- Require a practice or lawyer responsible for a practice to:
  - report misconduct under r 2.8;
  - report any personal grievance or employment-related complaint relating to sexual harassment, bullying, discrimination or other unacceptable conduct in the workplace which results in an adverse finding against a lawyer;
  - report the dismissal of any lawyer, employee or principal of a firm for sexual violence or harassment, bullying, discrimination or other unacceptable conduct in the workplace;
  - report, if within 12 months preceding a lawyer, employee or principal's resignation, there has been an allegation of sexual violence or harassment, bullying or discrimination.
- Incorporate a prohibition on the victimisation of any person making a report in good faith.
- Incorporate an exception for lawyers who have faced unacceptable personal conduct.
- Incorporate an express exception for lawyers who know that NZLS, as regulator, is aware of the relevant conduct.
- Incorporate an exception for lawyers providing confidential guidance and support about ethical and professional concerns (in circumstances when the cloak of legal privilege would not apply).
- Incorporate an exception for lawyers who by reporting would risk significant harm to their mental or physical wellbeing or safety.
- The Taskforce should review NZLS processes for receiving confidential reports to ensure adequate support and protection is available for reporting lawyers.
- Examine and implement enhanced "fit and proper" inquiries.

Closer regulation of workplace obligations

A legal workplace problem

Sexual violence, sexual harassment, bullying and discrimination are significant problems in the New Zealand legal community. Lawyers practising on their own account are responsible for the safety of people who work in or visit their workplaces.[123] The evidence is clear that these places are not always safe and inclusive places for the lawyers, legal executives, support, IT and administration staff, law clerks and graduates who work there.

The Bazley Report identified serious cultural concerns within large law firms, noting: [124]

> *In some cases, there is a link between the conditions which create a culture where sexual harassment and assault can occur and occurrences of general bad behaviour. At Russell McVeagh these conditions include the firm's gender imbalance at partnership level, and the enormous power imbalance between partners (the majority of whom are men) and junior staff, which means that junior staff feel unable to speak up and raise concerns. In this way, the stories I was told shared common characteristics with incidents of sexual harassment and assault – that is, senior people behaving badly and junior staff feeling they have no safe avenues to deal with the issues and fearing that, if they do speak up, their future progression at the firm may be compromised.*

These concerns are not isolated to the largest firms. The #MeToo movement has seen an outpouring of stories confirming longstanding and entrenched cultural problems in New Zealand legal practices. The culture that operates in a legal practice affects all staff, clients and others.[125]

Conditions in the workplace can enable inappropriate behaviour to occur, prevent people from recognising this behaviour as a problem, and may prevent those who experience such behaviour from reporting it.

Law firms have been treating sexual violence, sexual harassment, bullying and discrimination as primarily an employment matter. This has enabled unacceptable behaviour to be dealt with "in-house" – away from view and without any reflection on the regulatory implications of this type of behaviour.

Sexual violence, sexual harassment, bullying and discrimination are employment issues. However, this behaviour also raises issues of serious ethical and professional concern for the legal profession.

Lawyers must take responsibility for protecting their employees from these types of behaviour, both from lawyers working within the practice and from "third parties". "Third party harassment" is harassment by a client or someone else an employee must work with who is not an employee of the practice.[126] This is a serious concern affecting many lawyers.[127]

> **"It is really hard to speak out when the person who is bullying or sexually harassing you is paying your salary, controlling the type of work you are getting, and has the potential to ruin your career."**
> — *Quote from post on Zoe Lawton's blog: www.zoelawton.com/metoo-blog.html*

Defining a more proactive role for the regulator

Closer regulation of workplace obligations is a way to achieve a safer environment and to mark out sexual violence, sexual harassment, bullying, and discrimination as unacceptable within the legal profession.[128] Closer regulation means obligations tailored to the safe management of a practice and closer oversight.

The Women and Equalities Committee (**WEC**) of the United Kingdom House of Commons has recently reported on *Sexual Harassment in the Workplace*.[129] The Working Group agrees with the recommendation of the WEC that regulators must take a more proactive role in tackling sexual harassment. Regulatory regimes set expectations for the regulated and regulators are uniquely placed to oversee employer action to protect workers from sexual harassment.[130]

Regulators must make it clear that sexual harassment is a breach of individual and organisational regulatory requirements. Regulators must emphasise the need to report such breaches and consider this conduct when assessing the fitness and propriety of anyone working under regulation.[131] This is also true of all other forms of unacceptable workplace behaviour, including bullying and discrimination.

The Working Group believes that NZLS, as regulator, has a key role to play in addressing sexual harassment, bullying and discrimination in the legal profession through closer regulation of legal workplaces.

Who and what is regulated now?

Before exploring a model for closer regulation, it is important to understand how legal workplaces are currently regulated.

Legal workplaces take many forms: law firms set up as partnerships or incorporated entities, barristers' chambers, and sole practitioners. Whatever the form, these places must be safe and inclusive for all employees. Lawyers are responsible for the workplaces they manage and run.

Multi-lawyer firms are typically set up as partnerships. A law firm is therefore not usually a separate legal entity from its individual partners.[132] New Zealand currently has 1,398 partnerships or

single-lawyer law firms (approximately 600 of these are sole practices). Only 631 law firms in New Zealand are incorporated.[133] Most large firms (such as Chapman Tripp, Bell Gully and Russell McVeagh) are partnerships rather than incorporated law firms.

Some legal workplaces are also set up as barristers' chambers. NZLS authorises lawyers to work as barristers, individually, but in a shared office space.[134] An individual barrister may employ one or more junior barristers to work for them. Like partnerships, these barristers' chambers are not regulated under the Act or Rules as distinct entities.

The focus of the LCA regime is largely on individual responsibility of lawyers. Only a lawyer or incorporated law firm can be guilty of misconduct or unsatisfactory conduct, and a complaint can only be made against an individual lawyer or an incorporated law firm.[135] In practice, complaints are seldom made against incorporated law firms.[136]

Lawyers are already obliged to operate a legal practice responsibly.[137] Yet, the relevant obligations are fragmented and lack clarity or force. For example, the current rules concerning the management of a legal practice relate to operating trust accounts,[138] administering a practice so duties to clients are adhered to,[139] and administering a practice so that the reputation of the legal profession is preserved.[140] Additionally, a lawyer practising on their own account (which includes partners in law firms) must ensure the conduct of the practice and of the practice's employees is always competently managed and supervised.[141]

The regulatory regime needs to reflect that lawyers who are responsible for a workplace must provide a safe environment for all employees and anyone else working in or visiting the workplace. The consequences for failing to provide a safe environment must be real and provide a deterrent effect.

Implementing closer regulation of workplaces

An effective regulatory model must be in place so that NZLS can more effectively monitor and regulate the management and professional duties of law firms and the lawyers who are responsible for legal workplaces. The regulatory levers must be strong enough to achieve "buy-in" from the regulated. Lawyers must appreciate the risks and consequences associated with allowing unacceptable conduct to go unchecked. This type of organisational change has been described as "moving the dial from reactive and complacent to empowered, challenged and striving for best practice".[142]

The Working Group believes two options are available to implement this type of model under the LCA:

- **Option one:** entity regulation – the legal workplace itself is subject to obligations and sanctions.
- **Option two:** collective and individual lawyer responsibility – specific obligations are placed on individual lawyers in management positions within legal workplaces relating to the way the practice is run.

The obligations under these models would be similar, but the way these obligations are enforced would differ depending on the type of regulation. These models offer opportunities to deliver responsive regulation and early intervention to address and prevent unacceptable workplace behaviour.

The starting point is to clearly define within the LCA and Rules which legal workplaces are captured (recognising that other legal places such as the courts and government and corporate entities fall outside the LCA). This definition could be used in either model to provide the anchor point for specific obligations. Established statutory definitions of "law firm" already exist and could be used as a guide.[143] The Working Group recommends that any definition of "practice" is broad enough to include barristers' chambers.

The term "practice" as an umbrella term for law firms and barristers' chambers is adopted below for consistency.

Deciding on an effective regulatory model for the future

1. Entity regulation

One potential approach is to impose obligations on a practice as an entity, related to the management of the practice. Obligations would then be enforceable against the practice itself. This is a true "entity regulation" model and is already found under other legislation in New Zealand. For example, law firms have obligations under the Health and Safety at Work Act 2015 and under the Anti-Money Laundering and Countering Financing of Terrorism Act 2009. The Human Rights Act 1993 also specifically prohibits discrimination by partnerships.

Entity regulation of legal practices is found in various forms internationally. For example, in Nova Scotia, Canada, the Barristers' Society has jurisdiction over law firms, and can enforce the Legal Profession Act 1998 and professional rules against a law firm.[144] Under the Consolidated Nova Scotia Regulations, every law firm must register with the Nova Scotia Barristers' Society,[145] and must appoint a designated lawyer.[146] The Regulations provide for each law firm to assess itself, with a designated lawyer submitting the assessment to the Barristers' Society.[147] The purpose of self-assessment is to help law firms and sole practitioners maintain and improve their management systems for ethical legal practice.

Under an entity regulation model in New Zealand, the likely penalties against a law practice could include a fine, censure or educative orders. Extending the powers of Standards Committees to publish the identity of any practice that has failed in its obligations may be a powerful compliance lever. Negative publicity and the consequent reputational and financial damage of a disciplinary finding are likely to provide strong deterrents.

2. Collective and individual responsibility

An alternative to a true entity regulation model is an extension of the model already in place. This model places obligations on individual lawyers but recognises that those who operate a practice together should share a collective responsibility. An obligation of this kind already exists under the Health and Safety at Work Act 2015: officers of PCBUs have separate responsibility to exercise due diligence to ensure the PCBU complies with its duties and obligations.[148]

For closer regulation of practices to work, it is vital to clarify obligations relating to operating a legal practice. Every lawyer responsible for a practice could then be jointly and severally responsible for any breach of these obligations. The Working Group recognises that in some situations an individual lawyer should bear a greater share of or all the responsibility for a failure. The model must be flexible enough to accommodate this.

A similar model operates in New South Wales, Australia. Sole practitioners and law firms must give notice to the New South Wales Law Society of their intention to provide legal services.[149] All legal practices are then required to appoint an authorised "principal", who is responsible for ensuring the law firm complies with its professional obligations.[150] A law firm is not under a general obligation to implement and maintain an appropriate management system. Even so, it must put such a system in place if directed to do so after any examination, investigation, or audit. A breach by a law practice is treated as a breach by each of its principals under certain circumstances. To be liable, each principal must have failed to take reasonable steps to prevent the breach and knowingly authorised or permitted the breach, or have been in a position, or ought reasonably to have been in a position, to influence the conduct of the law practice in relation to the breach.[151]

A simpler approach may be to borrow from the Health and Safety at Work Act obligations on officers: did the principal exercise due diligence to ensure the legal workplace complied with its professional obligations under the LCA and Rules?

A "collective and individual responsibility" model is consistent with the current regulatory focus on individual responsibility. It is an attractive model because it makes lawyers more accountable if they are responsible for employees and workplaces. Individual and collective accountability may also provide greater incentive for partners to ensure they comply with professional and ethical obligations.

Practicalities of a new model

There are technical issues to consider in relation to both entity regulation and collective responsibility models:

- An entity regulation model may put practices to some expense to comply with their professional and ethical obligations. This may affect smaller practices more.
- Entity-based obligations may not be an easy fit for small practices more generally.
- If a new model is introduced, two matters to consider are potential defences and the scope for limiting responsibility.
- Both models should provide scope for alternative ways of holding primary perpetrators of unacceptable conduct to account. For example, the person who held the greatest individual responsibility for a failure may have left the law practice by the time the disciplinary proceedings are completed.
- A transitional period and guidance may be required to assist practices to set up appropriate governance and administration systems- for example, tailored guidance may be needed to assist barristers' chambers.

However, none of these technical concerns are insurmountable. Closer regulation of legal workplaces can potentially protect those working in the legal industry. It is important not to underestimate the

importance of this resulting benefit. The Working Group recommends that one of these models is adopted to enable closer regulation of legal workplaces by NZLS.

In-House Lawyers

In house lawyers make up 21.6 per cent of the legal profession in New Zealand.[152] The Working Group received submissions raising concerns that in-house lawyers would not be covered by the approaches to workplace regulation proposed in this report. The Working Group acknowledges these concerns. The technical difficulties in extending LCA regulation into the many different industries and organisations in which in-house lawyers practice would be significant. The Working Group considers that the new proposed conduct rules and definitions *[see: "The need for clear conduct and reporting standards" on page 33]* would be broad enough to capture unacceptable conduct by lawyers working in in-house legal teams. For example, an in-house lawyer could breach specific rules relating to sexual harassment, discrimination and bullying, or a General Counsel who allowed sexual harassment to occur in their team could be in breach of the obligation not to engage in conduct that has an adverse impact on the reputation of the profession.

Using closer regulation to impose minimum obligations

What might closer regulation of legal workplaces include? If legal practices are regulated either as entities or via the lawyers who are responsible for workplaces, certain minimum obligations should be included.

1. Registration

Under the current system, incorporated law firms must advise NZLS of the firm's name, and names of its directors and shareholders. The law firm must also notify every later change. If NZLS requests further information about the firm's structure, directors or shareholders, the law firm must promptly provide it.[153]

An entity regulation model requires practices to register with NZLS. This would involve the entity notifying NZLS that it exists, and then registering. It would also have to notify whenever its ownership or management changes. Overseas examples are found in New South Wales and Nova Scotia, as referred to above.

Under a collective and individual responsibility model, registration could be achieved by all those lawyers registered to practise on their own account identifying their place of work and role within it.

Registration is a mechanism that enables compliance of legal workplaces to be audited (which is discussed below). Mandatory notification of any changes to the ownership or management of a practice would also trigger reporting obligations when key personnel leave due to conduct issues *[see below and 'Enhancing Lawyer Reporting Obligations' on page 39]*.

2. Rules of conduct – extending obligations and enforcement

Chapter 11 of the Rules already contains rules relevant to the operation of a practice. These rules could be clarified to specifically refer to protection of staff and prevention of sexual violence, harassment, bullying and discrimination. Obligations could also be extended to lawyers responsible for a practice or a practice itself, depending on the regulatory model adopted. An example of what the rule could look like is:

> *11. A [lawyer responsible for a practice] [practice] must ensure the operation of the practice (including separate places of business):*
> - *is at all times competently supervised and managed by a lawyer who is qualified to practise on own account;*
> - *is at all times conducted in a way that ensures the conduct of all employees is competently managed and supervised;*
> - *has effective policies in place to prevent and protect all staff from the effects of sexual violence, sexual harassment, bullying, discrimination and other unacceptable behaviour;*
> - *is at all times conducted in a way that preserves the reputation of the legal profession.*

A finding of 'unsatisfactory conduct' or misconduct could be made against a practice or a lawyer(s) responsible for a workplace. Targeted orders could then be made to effectively address the relevant conduct – for example, educative orders, financial penalties or management systems directions (see below). Publication could also be a powerful tool and deterrent for firms concerned about reputational risk. This type of publication would be consistent with the concept of 'Adverse publicity orders' under the Health and Safety at Work Act 2015.[154]

3. Requirement to have harassment, anti-discrimination and bullying policies

As indicated above, the Working Group considers legal practices should be required to have a policy about sexual violence, sexual harassment, bullying, and discrimination in place. This policy would include procedures for making a complaint about this conduct.

For example, in the United Kingdom, all barristers' chambers must have a policy to deal with harassment and for making a complaint.[155] The Bar Standards Board provides a model policy that chambers can adopt or amend. This includes:

- chambers taking a no-tolerance policy to harassment
- examples of conduct that amount to harassment
- a procedure for raising complaints of harassment informally and formally
- a commitment to ensure no one who makes a complaint in good faith is detrimentally affected by making the complaint.[156]

The absence of an adequate policy then exposes either a legal practice or the lawyers responsible for the workplace to disciplinary action for failing to have or follow their own policies.

A model policy could be provided, and it is anticipated that developing this model policy would require external expertise.[157] The NZLS Task Force may be well positioned to initiate this work.

The Working Group would expect to see an effective policy address the following factors that contribute to or relate to sexual violence, harassment, bullying and discrimination:

- **Sexual violence and harassment:** a zero-tolerance approach should be outlined for preventing sexual harassment and violence.
- **Anti-discrimination:** a zero-tolerance approach for all types of discrimination, including explicit reference to racial discrimination and harassment.[158]
- **Anti-bullying:** an approach should be developed to enable action to prevent bullying and to proceed to disciplinary action if appropriate. This policy should include appropriate ways to manage poor performance by junior staff.
- **Work hours:** excessive work hours should be discouraged. Recognising the nature of legal work often requires lawyers to work beyond their contracted hours, an appropriate policy to recognise excessive hours worked (particularly by junior staff) should be put in place (this might include days in lieu or some other recognition).
- **Relationships between staff (including principals):** inappropriate consensual relationships should be addressed specifically.
- **Appointment of a person in charge of equality and diversity:** this may only be appropriate in larger legal practices.
- **Complaints procedures:** firms should create internal complaints procedures for raising concerns about unacceptable conduct. The process should incorporate different pathways to report conduct and/or enable access to support. There should be scope for anonymous reporting. Where this is not possible, firms should encourage the use of NZLS' confidential Law Care phone line or providers of employee assistance programmes.[159] Clear guidelines should state how the firm should investigate and record complaints.

3. Continuing professional development

Legal practices should be required to provide continuing professional development (**CPD**) to their staff relating to sexual violence, sexual harassment, bullying and discrimination. Training about a practice's policies and complaints procedures should be included.

Training on sexual violence, sexual harassment, bullying and discrimination will not solve the problem on its own.[160] Evidence-based data indicates that training on sexual harassment alone is ineffective.[161] Transformational culture change is required, and training must be combined with other action. Yet the Working Group considers that mandatory anti-violence, harassment, bullying and discrimination training is the first step towards changing the culture in an organisation. The Working Group recommends the Task Force enquire into effective training practices with a view to helping lawyers implement them in their own legal practices.

4. Other levers for change

The risks related to the reputational damage and consequent financial fall-out from allowing unacceptable behaviour to occur are very real. If law firms better understand this, they will be more likely to take steps internally to mitigate the risks.

For example, in other regulated sectors such as the financial services industry, work has been done on identifying and addressing cultural shortcomings. This work includes identifying key levers for change, such as more rigorous governance of non-financial risk, strong accountability standards reinforced by remuneration practices and cultural change to enable enhanced risk identification and remediation. Practical examples of steps that businesses take to incorporate these drivers of change include internal financial levers, such as team bonuses tied to culture (not just financial performance), strong accountability policies and financial claw-backs for conduct-related matters.[162]

Providing education to practices on the risks of allowing unacceptable behaviour to occur and risk-reduction strategies may be a strong lever of change. The Working Group recommends NZLS explore this in conjunction with the Task Force.

5. Effective Deterrents

As outlined below *[see: "Use the Standards Committees' powers in a more targeted way" on page 71]* the financial penalties and scope for compensation through the complaint and discipline process is limited. This has an impact on the ability of a Standards Committee to mark out particular behaviour and acknowledge the significant harm that can flow from this conduct. A lawyer practising on their own account is a business owner, either as a sole practitioner (barrister or barrister and solicitor) or as a partner or director in a law firm. Responsibilities related to being a business owner are already recognised in other legislation, such as the Employment Relations Act 2000 and Health and Safety at Work Act 2015. For example, pecuniary penalty orders can be made against employers under the Employment Relations Act: up to $50,000 for an individual, or for a body corporate, whichever is greater out of $100,000 or three times their financial gain from breaching their obligations.[163] Under the Health and Safety at Work Act, the maximum penalty for a body corporate conducting a business or undertaking for the most serious type of offence is $3 million,[164] or $1.5 million for a less serious offence.[165] For an individual, the maximum penalty is imprisonment up to five years or a $600,000 fine for the most serious type of offence,[166]or $300,000 for a less serious offence.[167] The professional and regulatory obligations that apply to lawyers must acknowledge these responsibilities.

The Working Group recommends that if the approach in this section is adopted, consideration should be given to increasing the maximum penalties available when a practice or lawyer(s) responsible for a workplace has breached relevant obligations. This may have a significant deterrent effect.

6. Reporting obligations

The Working Group considers that three aspects of the reporting obligations need amending for legal practices:

1. extending the reporting obligations on individuals to legal practices or lawyers responsible for legal workplaces;
2. requiring each practice to undertake periodic surveys of staff to get feedback on the climate within the firm; and
3. requiring each practice to report employment related conduct findings.

Extending reporting obligations

If legal workplaces are more closely regulated, the Working Group recommends linking reporting obligations to legal practices, either by placing obligations on the practice itself to report, or on lawyers responsible for the practice. A practice could itself refer conduct to NZLS, and be found in breach of its obligations if it did not do so *[see "Rules of conduct – extending obligations and enforcement" on page 54 and "Defining the obligations of employers" on page 41]*.

Climate surveys

Relying on individuals to report improper conduct has not been an effective way to monitor and regulate sexual violence, sexual harassment, bullying and discrimination. For this reason, the Working Group considers that periodic climate surveys would be a useful tool to gauge how legal practices are conducting themselves and whether some form of intervention is required (most likely as educative orders).[168] This would require practices of a certain size to give their staff the opportunity to fill out a survey provided by NZLS, and to report those results to NZLS. The survey would be anonymous. It would ask all staff (including support staff) for feedback on sexual violence, sexual harassment, bullying and discrimination, but also on the workplace management they are experiencing and their views of the law practice's policies and processes. It is necessary to consider how such a survey could work in smaller firms, whose staff may find it hard to remain anonymous.

An alternative to making this a regulatory requirement is a voluntary climate survey. This survey could provide a tool for law practices to identify ways to proactively transform culture. This approach may be less onerous for law practices from a compliance cost perspective. However, a voluntary regime could result in less consistency and accountability than an enforceable requirement.

The Working Group acknowledges that care must be taken with this type of survey. There are legitimate concerns related to confidentiality for participants, survey fatigue and cost. The Task Force may be well placed to provide technical advice on this, which may include specific culture questions, confidentiality and anonymity protections and how often surveys should be conducted. The Working Group considers that NZLS would have a role in assisting the profession by designing and disseminating an effective tool for conducting climate surveys.

Notification when an employee or principal leaves

The Working Group proposes placing an obligation on legal practices, or lawyers responsible for these workplaces, to report to NZLS when an employee or principal (lawyer practising on their own account) leaves because of conduct issues. An example of this approach is found in the regulation of teaching professionals. A teacher's employer must notify the Teaching Council if the teacher is dismissed or if, within 12 months of a teacher's resignation, the employer had advised the teacher it was dissatisfied with or intended to investigate any aspect of the teacher's conduct or competence.[169] This obligation could be extended to legal practices as a means of identifying conduct concerns that might not otherwise come to the attention of NZLS as regulator.

The Working Group therefore proposes the following obligations to report should arise when an employee or principal leaves a legal workplace:

- where the lawyer is dismissed due to conduct issues relating to sexual violence or harassment, bullying or discrimination; and
- where a lawyer resigns and there has been an allegation of sexual violence or harassment, bullying or discrimination within the 12 months preceding the resignation.

Any notification requirement may need to be extended to those who leave a practice because they are affected by unacceptable conduct. This is because someone affected by this behaviour may also be "moved on" as a means of quietly resolving a workplace issue. Care is needed to adequately address any confidentiality or privacy concerns in such a case.

Reporting adverse employment findings

The Working Group also proposes that practices should be required to report any personal grievance or employment-related complaint relating to sexual violence, sexual harassment, bullying, discrimination or other unacceptable conduct in the workplace that results in an adverse finding against a lawyer.

Annual Reporting and Certification

Lawyers must provide a statutory declaration to NZLS to renew their practising certificate each year.[170] That declaration requires a lawyer to declare that:

> *During the period since my admission or receipt of my last practising certificate (whichever is more recent) I confirm that no matter has arisen that does or might affect my fitness to be issued with a practising certificate.*

One option is to require every legal practice to certify, at the same time as practising certificate renewals, whether any lawyer at the practice has potential conduct issues. These certifications could be matched against individual lawyer declarations to identify instances of lawyers failing to declare relevant matters.

The responsibility for the certification would rest with a designated principal. A false declaration would have disciplinary consequences for the practice and/or designated principal. Clear guidelines would be necessary to explain the types of matters that must be disclosed. This could be an adaption of the guidance published by NZLS for individual lawyer declarations.

Another option is to require lawyers responsible for a practice to certify annually that they are meeting their obligations under the Health and Safety at Work Act 2015 as a PCBU. This is a way to bring those obligations to 'front of mind' for every lawyer who is responsible for a legal workplace. There is precedent for this type of certification under the LCA regime: lawyers who are responsible for trust accounts must provide monthly certification, including certifying that they are complying with the regulations.[171] A failure to certify or providing a false declaration is a complaints and disciplinary matter and there have been a number of prosecutions of lawyers who have failed to meet these obligations.[172]

What happens to information collected through reporting and notification?

When reports and notifications are made to the NZLS under the LCA and Rules, this provides an opportunity to gather data. This data can be used to address culture issues within the legal community:

- Information collected will result in complaints and investigations into unacceptable conduct.
- The information may also provide invaluable intelligence in relation to regulatory "fit and proper" inquiries (for example, upon practising certificate renewal or when a lawyer applies to be a business owner through the practise on own account process). NZLS can check whether reports have been made about the lawyer concerned, and use this information to identify any concerns about the lawyer's fitness to practice.
- Information could be used to inform a risk-modelling framework for identifying practices for auditing and monitoring purposes *[see: "Strengthening the process by auditing and monitoring compliance" on page 60]*. NZLS could use the information to identify trends or concerns within a particular workplace.
- Data may be used to analyse broad trends and themes in this area, which may inform educative initiatives led by NZLS or work undertaken by the Task Force.

The Working Group understands that NZLS has triaging and data collection processes and systems in place. These could be adapted to deal with an increased flow of data and to map out the multiple pathways and uses for the information received.

Law firms could also be encouraged to use mandatory reporting and notification as an opportunity to undertake their own benchmarking for risk and compliance purposes. The NZLS Task Force may be able to assist firms with this.

7. Clarifying obligations when a client's conduct is unacceptable

Employed lawyers and law firm staff will often interact with clients and others outside the law firm who may pose a risk to those staff. The legal practice's obligations do not cease simply because the harasser is not also employed. The Employment Relations Act 2000 clearly recognises that an employee may be sexually harassed in the employer's employment if a customer engages in harassing behaviour.[173] Law firms have questioned their ability to stop acting for a client in this type of situation. The Rules must be clear enough to enable a law firm to sever ties with a client when there is a real risk to staff. Lawyers must take immediate and proactive steps to protect their staff from the unacceptable behaviour of clients and lawyers should not point to the Rules as an obstacle.

The rules in relation to termination of a client's retainer are strict (see Rule 4.2). A lawyer may only end the relationship by agreement with the client or if there is "good cause" to terminate the retainer. "Good cause" cannot include the "personal attributes" of the client.

"Good cause" is non-exhaustive and includes any situation in which a client's instructions "require the lawyer to breach any professional obligation" (Rule 4.2.1(a)). There are a number of ways this could amount to "good cause" to terminate the retainer (other than by agreement with the client):

- The lawyer may simply not be able to balance their responsibilities as an employer with their obligations to the client. This would create a conflict for the lawyer, who is unable to discharge their obligations to be independent and free from comprising influence or loyalties when providing services to his or her clients (Rule 5.1). The fundamental relationship of trust and confidence between lawyer and client is also likely to have broken down in this situation.

- If obligations are placed on legal practices or individual lawyers to prevent harassment, bullying or discrimination in the workplace for their employees or staff, the fact a client's behaviour is placing a lawyer or staff member/s at risk of harm may be "good cause" to end the retainer. If a lawyer is prevented from discharging their obligations to employees then this may well be within the scope of "good cause".

The Working Group proposes that the rule allowing lawyers to terminate retainers be made more explicit so there is no room for doubt. An appropriate amendment could be framed as:

> *R 4.2.1 Good cause includes—*
>
> *[...]*
>
> *(f) reasonable grounds to believe the client is engaging or has engaged in behaviour towards the lawyer or any contractor or employee of a practice or barrister instructed by a practice that is sexual violence or harassment, bullying or discrimination. A practice may try to take steps to mitigate the risk of harm posed by the client's behaviour but is not required to before terminating the relationship.*

The "good cause" rule requires a lawyer to give reasonable assistance to the client to find another lawyer. Lawyers need to be aware of this obligation. The Working Group acknowledges that this may be difficult in a situation involving unacceptable client behaviour. This is an area in which NZLS could provide guidance and assistance to lawyers.

Strengthening the process by auditing and monitoring compliance

The Working Group considers NZLS should be empowered under the legislation to monitor practices to better assess their compliance with professional obligations. This would enable the obligations identified above to be effectively enforced, and lawyers responsible for workplaces held to account.

The requirement to prepare and maintain an anti-bullying, harassment and discrimination compliance programme is an option. A compliance programme could incorporate a mandatory policy, training schedule, reporting requirements and data collection about unacceptable behaviour in the workplace (through climate surveys). A practice would then be measured against its own compliance programme.

The Working Group envisages that NZLS would have a role in assisting practices to create a compliance programme. For example, a Task Force set up by the Law Society of Ontario, Canada, is currently considering regulating entities by establishing tools, such as "practice management principles", and assisting lawyers to comply with their obligations.[174] The goal is to prevent misconduct occurring. The Ontario Task Force has created a Practice Assessment tool based on these practice management principles, which includes questions for firms on what they do to support the wellbeing of staff, including how the firm identifies and addresses gaps and barriers to equality and diversity.

The LCA currently provides a comprehensive framework for auditing law firms' compliance with the trust accounting Regulations. Consideration could be given to implementing a similar compliance auditing function in relation to sexual violence, sexual harassment, bullying and discrimination.

This function might sit within the general regulatory department of NZLS, as it is consistent with the broader regulatory functions of NZLS:

> *"to uphold the fundamental obligations imposed on lawyers who provide regulated services in New Zealand"*; and to *"monitor and enforce the provisions of this (LCA) Act"* [175]

There should be monitoring powers coupled with any audit function. An example of this type of power is found in the Legal Profession Uniform Law (New South Wales), which empowers regulatory authorities to issue management system directions: [176]

> *(2) A "management system direction" is a direction to a law practice or class of law practices—*
> *(a) to ensure that appropriate management systems are implemented and maintained to enable the provision of legal services by the law practice, or by a law practice of that class, in accordance with this Law, the Uniform Rules and other professional obligations; and*
> *(b) to provide periodic reports to the designated local regulatory authority on the systems and on compliance with the systems.*
> *(3) A law practice must comply with a management system direction given to it.*

Although the focus in the Australian legislation is on the provision of legal services, any New Zealand equivalent provision could be extended to include a requirement that a firm have effective policies and systems in place to prevent unacceptable workplace behaviour. A failure by a firm to comply with a management system direction would then become a disciplinary matter.

Auditing and monitoring would provide the opportunity for early intervention and engagement with NZLS as regulator. This creates the opportunity to educate any practice that is failing to measure up and to identify any practice requiring urgent disciplinary intervention.

Encouraging compliance – the "tick system"

The Working Group Terms of Reference are focused on regulatory change. However, it supports NZLS exploring the idea of creating a "tick system" that evaluates a legal practice's performance and efforts in terms of harassment, bullying and discrimination. A tick system could encompass gender equality, racial and ethnic diversity, and LGBTIQA inclusion. The tick system would be a form of encouragement, rather than a regulatory measure.

This type of initiative would be within the domain of the Task Force, and the Working Group comments further only by noting some considerations that it expects would form part of the evaluation. These considerations would include:

- gender equality;
- racial and ethnic diversity;
- LGBTIQA inclusion;
- recognition for long work hours (for example, as days in lieu or another sign of appreciation); [177]
- making a counselling service available to staff;
- mental health support for staff;
- caregiver support.

The Working Group cautions that any endorsement cannot be allowed to be used as 'window-dressing' but must signal a genuine commitment to inclusive and safe workplaces. External auditing, consistent standards and real consequences for a failure to meet standards may be effective in achieving this.

Preventing lawyers using non-disclosure agreements to conceal unacceptable conduct

Recent publicity has shone a spotlight on the inappropriate use of non-disclosure agreements (**NDAs**) to prevent disclosure of the improper conduct in legal workplaces. Concealing serious professional conduct issues by these means is not acceptable. The consequences of this are that perpetrators are not held to account and can simply "move on", potentially placing other people at risk.

The use of NDAs is a complex issue. The United Kingdom WEC report singled out NDAs for particular attention. In relation to the report, English lawyer Karon Monaghan QC observed: [178]

> *Practitioners know that while such agreements do indeed silence women, the issues are more nuanced than that short pen-picture may portray. Some women want to avoid legal proceedings and at the same time secure financial compensation for the wrong done to them in a way that allows them to move on. Many do not wish to disclose the fact that they have made a complaint of sexual harassment and/or that they have received a sum in settlement of such a complaint and they do not want others to do so either. Sometimes financial settlement is conditional upon non-disclosure and if NDAs are not available, employers may be less willing to compensate women without a tribunal hearing in circumstances where a woman would want to do so. There are many reasons why NDAs work for some people and if they were to become unlawful or generally unenforceable that may deprive women of a form of justice that suits them. [The House of Commons Women and Equalities Committee] express concern in their report, however, about the "unethical" use of NDAs. They recommend legislative change to require "plain English" drafting and action by the professional regulatory bodies where lawyers advise on agreements that are potentially unenforceable, among other things.*

Section 107 of the LCA provides that the practice rules are binding on all lawyers and incorporated law firms. That section says:

> *No partnership deed, employment agreement, or other legal arrangement governing the manner in which a practitioner is in practice, business, or employment may require a practitioner to act in breach of the practice rules and any part of a deed, condition of employment, agreement, or other legal arrangement that purports to require such conduct is void.*

The essential point is that a lawyer cannot contract out of the Rules.

Yet the Working Group considers that section 107 is not clear enough. While a NDA is almost certainly unenforceable in the regulatory context, it may still have the effect of discouraging or stifling complaints. For that reason, the legal position must be very clear.

The Working Group recommends that the LCA or Rules be amended to unambiguously state that a NDA is invalid as far as it purports to prohibit any person from reporting misconduct or unsatisfactory conduct to NZLS.

Non-disparagement clauses are becoming increasingly common[179] but should not be a bar to a party making a complaint to a regulator in good faith. The definition of NDA should be broad enough to also capture non-disparagement clauses.

Any lawyer that assists in the drafting of a NDA in this context may also face disciplinary consequences about the quality of their own advice and obligations in administering justice.[180]

As referred to above, the Working Group considers the legislation should also prohibit a person being victimised for making a complaint in good faith.

Sexual violence, sexual harassment, bullying and discrimination are a significant workplace problem in the New Zealand legal profession.

Closer regulation of workplace obligations is a way to achieve a safer environment and to mark out bullying, sexual violence, sexual harassment and discrimination as unacceptable within the legal profession.

The use of non-disclosure agreements to avoid reporting unacceptable behaviour to NZLS as regulator is inappropriate. A lawyer cannot contract out of their obligations under the Rules, and the legal profession must clearly understand this.

Proposals to introduce closer regulation of legal workplaces

- Undertake closer regulation of legal workplaces by:
  - defining which legal workplaces are captured under the LCA: one definition could be "practice", which incorporates law firms and barristers' chambers; and
  - adopting an entity regulation model; or
  - adopting a model focused on collective and individual responsibility;
  - enhancing and clarifying obligations related to operating a practice.
- Require practices to have policies about sexual violence and harassment, bullying, and discrimination.
- Require practices to ensure staff are educated about sexual violence and harassment, bullying and discrimination.
- Extend current reporting obligations to capture legal workplaces.
- Empower NZLS to monitor (including through a robust auditing process) legal workplaces in relation to sexual violence, harassment, bullying and discrimination.
- Amend the LCA and Rules to emphasise that any agreement is invalid to the extent that it purports to prohibit or restrict any person from reporting misconduct or unsatisfactory conduct to NZLS.

Improving the current complaints process

NZLS' Lawyers Complaints Service (**LCS**) deals with approximately 1,400 – 1,600 consumer-related complaints each year. These complaints are typically made by dissatisfied clients or complaints about the competence or conduct of a lawyer they have engaged. The LCA and LCS processes appear to be working effectively for these types of complaints. For example, the LCS Early Resolution Service (ERS) resolved 598 complaints in 2017 in an average time of 28 days.[181] The Working Group has not been tasked to consider the efficacy of the LCS to deal with these types of complaints. The Working Group's Terms of Reference concern complaints of sexual violence, harassment, bullying and discrimination and other related unacceptable behaviour that adversely reflects on the reputation of the legal profession.

People appear to lack confidence in the complaints process to deal with bullying, sexual harassment and violence, and discrimination. Before 2018, complaints of these types of behaviour were not being brought to NZLS, yet the surveys conducted within the profession demonstrate that these behavioural issues have long been widespread. Improvements to the current complaints process must make people more confident about making a complaint.

The 'complaints process' is the framework that deals with complaints and disciplinary matters under Part 7 of the LCA. The LCS, Legal Complaints Review Officer (**LCRO**) and LCDT are the moving parts of the process. The LCS is operated by NZLS. The Ministry of Justice administers the LCRO and the LCDT.

An effective complaints process must, at a minimum:[182]

- provide an accessible, fair and impartial mechanism for resolving complaints;
- respond to unacceptable behaviour in an effective way;
- 'do no harm'–the process must not re-traumatise any person affected by unacceptable behaviour;
- provide appropriate sanctions;
- provide measures to rehabilitate the person behaving unacceptably.

In this part of the report the Working Group introduces the idea of specialised processes for complaints about unacceptable behaviour. This section also suggests ways of improving other parts of

the complaints process for these types of complaint. The proposals are not intended to apply to the entire complaints process.

The proposals for improvement identified by the Working Group are intended to enable complaints about sexual violence and harassment, bullying and discrimination to be dealt with in a more effective way. The guiding principles underpinning any improvements are compassion and humanity, commitment to Te Tiriti principles, manaakitanga, aroha and āwhina (and including support and assistance), respect for confidentiality and privacy, and natural justice.

Making the Lawyers Complaints Service and Standards Committee process more flexible and responsive

There has been some criticism about the approach adopted by the LCS and Standards Committees in relation to complaints about sexual violence, harassment, bullying and discrimination as rigid and ill-equipped to deal with unacceptable conduct complaints. The processes are designed mainly to deal with consumer-related complaints instead of concerns about unacceptable conduct. The current processes are informed by the legislative provisions.

Standards Committees are at the heart of the complaints process. A Committee operates as both investigator and decision maker. Committees that deal with complaints of sexual violence, harassment, bullying and discrimination must have the depth and expertise to deal effectively with these issues.

The Working Group recommends:

- increasing depth and diversity in Standards Committees;
- adapting the current complaints process so it is fit for purpose; and
- creating greater transparency in the criteria for appointment.

Increasing depth and diversity within Committees

The NZLS Board has said it is committed to encouraging and improving diversity within the Standards Committees and this continues to be a focus.

Committee members must have practised for an aggregate period of not less than five years.[183] Committee members must be legally skilled to deal with technically complicated complaint matters and have the experience and judgement that comes with a significant period in legal practice. No formal criteria apply to lay members of the Committee.

Generally, lawyers must have more than 10 years' experience or be at associate or partner/director level to be on a Committee. Few in-house lawyers and no junior (1–5 years' experience) lawyers are on Committees.[184]

The Working Group strongly supports the NZLS Board's commitment to make Committee membership more diverse. The Working Group believes that the development of diversity must focus on a wider range of factors, such as gender, age, ethnicity, legal and life experience, and practice type.

The voice of young people, including young women, is currently missing from the process. This is in part due to the current restrictions relating to experience in legal practice. As the strong support for local "young lawyers" groups shows, many young lawyers could make a valuable contribution to the process – for example, by bringing different views on culture, acceptable behaviour, racism and sexism.[185]

It is important that a range of different ethnic and cultural backgrounds are represented on Standards Committees. The most recent survey of the profession found that lawyers from ethnic minority groups were more likely than European/Pākehā lawyers to have experienced bullying and harassment.[186] The Working Group agrees with Te Hunga Rōia Māori's view that complaints about racism or racial discrimination should be investigated and considered by people who have a deep understanding and experience of the cultural context which enables racism and racial discrimination.

Lay members (i.e. non-lawyer members) play an important part in the process and can bring a different perspective to the decision-making process. The Working Group considers that care is needed when choosing a range of lay members who have expertise in dealing with not only consumer issues, but also sexual harassment and violence, bullying and discrimination. Counsellors, human rights advocates, psychologists and social workers would be appropriate choices to become members of a Standards Committee.

To ensure people with the appropriate expertise are assigned to deal with a particular complaint, the Working Group considers a pool of suitable Committee members should be maintained. This is discussed below. The Working Group recommends that support similar to EAP (Employee Assistance Programmes) or professional supervision in the caring professions is made available to all Committee members. This is particularly pertinent for lawyers dealing with complaints about unacceptable conduct and Committee members who have limited years' experience in legal practice.

Relevant expertise, personal experience, openness and sensitivity are important traits in people dealing with complaints that are personal in nature. Broad diversity brings depth to the process. However, providing training and support for Committee members (and complaints officers assisting their work) can also develop depth.

Training and support for Committee members and LCS staff

Committee members receive training about professional and ethical rules. LCS staff also receive training in complaint handling and communication. They do not currently receive specific formal training or support in relation to unacceptable conduct complaints. The Working Group understands that NZLS is providing and developing appropriate training and support for a specialist Standards Committee designated to deal with unacceptable conduct complaints, which the Board of NZLS has recently established.[187]

All Committee members and complaints service staff need specific training and support to deal with complaints about sexual harassment and violence, bullying, racism and discrimination. The training should include established principles of victim support, unconscious bias, and issues around normalisation or rationalisation of conduct rooted in personal experience.

Ensuring the process is fit for purpose

The LCS is mainly focused on consumer complaints, and traditionally the vast majority of complaints have been consumer complaints.

The Working Group hopes that complaints about sexual violence, harassment, discrimination and bullying will increasingly be brought to the NZLS as regulator.

The process, however, is not currently fit for purpose to deal with these types of complaints. It must now adapt to effectively deal with these issues. The Working Group considers the following actions should be applied to complaints of unacceptable behaviour:

- reduce Committee sizes, and target potential members with the required expertise;
- provide more support for people in the process;
- use independent investigators;
- find and consider alternative methods of resolution;
- use the Standards Committee's powers in a more targeted way.

Reduce committee size, and target potential members with the required expertise

Complaints are primarily handled by Committees made up of between five and nine members of differing practice areas. A Committee will deal with a significant volume of complaints at each meeting.

The Working Group believes that reducing the number of Committee members who deal with individual complaints of sexual violence, harassment, bullying and discrimination should be considered. An option is to maintain a pool of Committee members from which individual members could be assigned to different complaints of these kind.

Smaller Committees specifically assigned to individual complaints carry the following advantages:

- A process that is less formal may reduce the potential negative impact on complainants or witnesses.
- A small Committee of two or three members, assigned to a complaint for their particular expertise and experience may be more effective than a large generalist Committee. This is particularly so for complaints relating to sexual violence, harassment, discrimination and bullying. The depth and expertise of individual Committee members could be targeted to different types of complaint. For example, a complaint of racial discrimination should be determined by a Committee that includes member(s) who understand(s) the cultural context of these behaviours.

Specifically assigning a small Committee to an individual complaint is the method used in other professions, such as social workers and doctors. While those professions do not receive the volume of consumer complaints that the legal profession does, the Working Group considers this process could be applied specifically within the legal regulatory framework for complaints of sexual violence and harassment, discrimination and bullying (as identified in the triaging process).

The Working Group wishes to acknowledge the valuable contribution many lawyers make on a voluntary basis to the regulation of the profession. However, consideration should be given to paying

Standards Committee members for their time. Other professional regulatory bodies pay their equivalent investigatory body's members. Remuneration may incentivise people to contribute their time to a Standards Committee. Currently, only lawyers with the resources available to contribute their time are able to participate in the disciplinary process. Payment would also acknowledge the contribution made by members of the Standards Committees. The feedback received by the Working Group was generally supportive of this proposal.

Provide more support for people in the process

Special considerations should apply to a LCS or Standards Committee process for a complaint of sexual violence, sexual harassment, bullying or discrimination. The unique experiences and perspectives of each person involved in the complaints process must be acknowledged. Witnesses and the targets of this conduct, in particular, may experience feelings such as whakamā, fear, shame, stress, distrust and grief. The LCS or Standards Committee's response to a complaint of conduct of this nature must attempt to avoid the secondary victimisation of the complainant.

Secondary victimisation is "intensification of primary victimization through negative reaction [in] the social environment and through inadequate or even inappropriate reaction of the agencies of justice (condemnation, misunderstanding, rejection or failure to respond)".[188] Harm in this form can occur when a person does not feel heard or believed, and where they believe their concerns are being "swept under the carpet".

The impact of a complaint can, of course, also be significant on the accused lawyer. For example, Australian research has identified potentially severe mental health impacts for those accused of bullying.[189] An accused lawyer may also experience distress and be fearful of the outcome.

Complainants, witnesses and accused people all require adequate support. Every person must feel that they have been heard, respected and provided with a fair process, whatever the outcome.

The Working Group recommends improving the process to make it more 'human' and supportive of the people involved. The Working Group recommends the following actions:

- Provide information proactively on other support avenues to everyone involved during first contact.[190] If established, the Specialist Complaints Unit (SCU) *[see: "Complaints about unacceptable behaviour need specialised processes" from page 75 onwards]* could facilitate this communication.
- Provide clear information to everyone involved in the process (including witnesses). Everyone should receive regular updates at each step about what they can expect and what is happening (written or by telephone).
- Encourage the involvement of support people for all parties (including witnesses) in complaints about bullying, sexual violence, harassment, racism and discrimination. This process should be informed by a clear understanding of the role and significance of support people in different cultures and groups. For example, there should be clear scope for involvement of whānau support.
- Improve communication through appropriate language and tone. Legalistic and technical language should be avoided, and emotion acknowledged appropriately.
- Incorporate alternative means of resolution in appropriate cases.

Responsiveness to cultural needs

Consideration must also be given to ways the complaints and disciplinary processes can be made more responsive to the cultural needs of participants. The Working Group urges NZLS and the Task Force to address the ways in which tikanga and other cultural practices can be incorporated into Standards Committee processes where appropriate.

The Working Group recommends that NZLS and the Task Force work closely with Te Hunga Rōia Māori, the Pacific Lawyers Association and external cultural consultants on this.

Concurrent processes

NZLS' obligation to complete an investigation into alleged misconduct continues even if the complaint is also being investigated by other bodies such as the Police, Human Rights Commission or Employment Relations Authority.

NZLS works with other regulators to ensure proper processes are followed but that does not affect NZLS' obligation to complete its investigation. For example, if there is a Police investigation and subsequent prosecution, normally that process will require completion before the NZLS investigation can be completed. However, upon completion of the criminal process the NZLS process must also be completed as quickly as possible, and appropriate action taken. Similarly, if there are concurrent complaints to NZLS and other agencies, consideration must be given to which of the processes should take precedence. If the NZLS investigation is put on hold for completion of another investigation, it will still be completed subsequently.

In cases involving concurrent processes, everyone involved should be provided with clear information and ongoing updates about the relationship between the two processes and what support may be available.

The Working Group has considered the support mechanisms that could be provided if a specialised process for complaints of unacceptable conduct is adopted *[see: "Complaints about unacceptable behaviour need specialised processes" from page 75 onwards]*.

Use independent investigators

Standards Committees are both investigators and decision-makers. If their decision is to refer the complaint or matter to the LCDT, then they will also act as prosecutor. People involved in the process may find the Committee's different roles hard to understand or reconcile. Separating the roles out to the extent possible may help to avoid confusion or uncertainty.

Further, the Committee may not have the expertise to properly investigate complaints about sexual violence, harassment, racism, bullying and discrimination. An independent investigator, experienced in conducting sensitive employment or criminal investigations, may be better placed to carry out investigations. As indicated above, in complaints of racism and racial discrimination, the involvement of investigators with experience of the cultural context will be vital.

There is already power within the LCA for Committees to appoint independent investigators with broad powers of investigation.[191] The Working Group encourages Standards Committees to use suitably experienced investigators for complaints about personal conduct.

Find and consider alternative methods of resolution

The Working Group considers there is scope to resolve some complaints about this type of conduct outside the disciplinary process. Negotiation, mediation and conciliation are currently part of the NZLS complaints process and work well with consumer-focused complaints.[192]

> **"The wishes and needs of victims are often diametrically opposed to the requirements of legal proceedings".**
> — *Judith Herman "Justice from the Victim's Perspective" (2005) 11 Violence Against Women 571 at 575.*

In some cases, a complainant will not want to go through the formal complaint and Standards Committee process. In particular, a complainant may not want to ultimately end up as a witness in the LCDT, which is an adversarial process where they are likely to be cross-examined.[193] An alternative dispute resolution (**ADR**) process, offered at an early stage, may achieve a meaningful outcome for some complainants and avoid the stress of going through the complaints process.

The New Zealand criminal justice system does not prevent the use of restorative justice processes in cases of sexual violence. However, the Ministry of Justice Best Practice document on restorative justice emphasises the need to consider carefully any use of restorative justice in these cases.[194] The Law Commission considered this in 2015 when it recommended an alternative justice mechanism for cases of sexual violence.[195] The Law Commission noted four main reasons why some limits might be imposed when a case of sexual violence is referred to an alternative process.[196]

- The perpetrator may pose an ongoing risk to the safety of the community.
- The public might consider the acts of sexual violence are of a type more properly dealt with in the criminal justice system.
- The alternative process might not be appropriate for cases involving violence against an intimate partner.
- The dynamics of some cases may make them unsuitable for the alternative process. Examples of such dynamics are where the person is at risk of secondary victimisation or further emotional harm from the perpetrator, where a significant power imbalance exists between the parties, or where the complainant or other party faces coercive pressure.

These considerations – or a modified version of them – may also apply in disciplinary proceedings. A primary purpose of regulating lawyers is to maintain public confidence in the provision of legal services. Would public confidence be maintained or eroded if lawyers were able to have sexual violence or harassment complaints resolved through alternative means?

In some exceptional cases, issues of wider public interest may be relevant to whether ADR is offered. Those cases might require referral to the LCDT, or some other sanction, despite a complainant wanting the matter resolved in some other way. The Law Commission in 2015 recommended developing a

framework to assess a risk of further offending, specifically for an alternative process for cases of sexual violence.[197] In the context of lawyers' disciplinary proceedings, the LCS or Special Complaints Unit *[see: "Complaints about unacceptable behaviour need specialised processes" from page 75 onwards]* would need to be responsible for assessing these risks, and the suitability of the complaint to go through an ADR process. This would require further training of those involved in the process. It would be vital to seek advice from experts in the area.

The Working Group considers that the perspective and wishes of the complainant should drive any ADR process about complaints of inappropriate conduct. ADR should never be forced on complainants, or used if there is any concern that a complainant will feel pressured by a power imbalance. However, complainants should be given the opportunity to consent to an ADR process. An ADR process may result in the accused lawyer agreeing to undertake education or training, apologise, or both.

Safety mechanisms, such as the use of specially trained mediators, pre-mediation assessment or conferences, and the involvement of support people, would be vital.

All participants should also understand that the outcome of an ADR process will not necessarily bind the Standards Committee from further action, but that the Standards Committee will take the outcome into account if it thinks this is appropriate. However, it should be made clear to all involved that no statements made in ADR proceedings can be used in disciplinary proceedings. This may encourage greater openness in the ADR process.

ADR of this type is an area that NZLS may need to seek specialist expertise to design an appropriate system.

The Working Group received a suggestion from Te Hunga Rōia Māori that a tikanga-led ADR be available where appropriate. The Working Group strongly supports this suggestion and encourages NZLS and the Task Force to work with Te Hunga Rōia Māori and external cultural consultants to develop this.

Use the Standards Committees' powers in a more targeted way

The powers of the Standards Committees are broad. The orders that a Committee can make are set out in the legislation, and include reprimand and censure, limited compensation, fines and apology.[198]

A Committee must be familiar with the broad toolbox available to address sexual violence, harassment, bullying and discrimination. The Working Group is concerned that Committees may be unaware of current mechanisms they could adapt to address bullying, harassment and discrimination complaints.

For example, Committees can make educative orders targeted at addressing a negative culture within a law firm or practice by an individual lawyer. The Committee could combine this with a direction that the lawyer make their practice available for inspection. Independent experts could undertake the inspections, and assess the steps the law firm has taken to address unacceptable workplace behaviour. This would improve the accountability of lawyers who are subject to educative orders.

The Working Group believes that the powers generally available to address lawyer conduct should be examined further to assess the most effective way to handle harassment, bullying and discrimination *[see for example publication orders similar to 'adverse publicity orders' under the Health and*

Safety at Work Act above at "Rules of conduct – extending obligations and enforcement" on page 54]. The Task Force may be well placed to provide guidance on this.

NZLS and the Task Force are encouraged to engage with experts at WorkSafe New Zealand to develop a workplace inspection scheme for Committees to consider as a remedial option. Committees should be educated about the mechanisms available to address negative culture.

Effective Deterrents

Education is not enough on its own. Deterrence is a key ingredient in any effective regulatory regime. Penalties must be significant to mark out behaviour as unacceptable and they must be visible. The maximum financial penalty a Standards Committee can impose is a fine of $15,000 and the maximum compensation available is $25,000.[199] A review of published decisions reveals that these upper limits of fine and compensation are rarely reached.[200]

The type of conduct the Working Group is examining has the potential to cause significant psychological, physical and emotional harm to people affected. This must be recognised by the imposition of the fines at the higher ends of the spectrum. In turn, significant financial consequences may have a real deterrent effect. This is an area in which strong guidance should be provided by NZLS to the Standards Committees.

Helping lawyers with health and competence issues

The Working Group acknowledges that in some cases unacceptable behaviour may be associated with other health related issues (for example, alcoholism or drug dependency). In such cases, treating the matter as purely disciplinary may be a missed opportunity to provide support and rehabilitation.

The Working Group recommends including an alternative pathway in the legislation to address concerns about a practitioner's health or competence issues related to their health. This pathway is found in regimes that regulate health practitioners and social workers.[201] NZLS should be empowered to require a lawyer to undergo a medical examination if the lawyer appears unable to perform the functions required for practice because of a health-related condition.

Similarly, if NZLS believes a lawyer is practising below acceptable standards of competence, it should be able to require the lawyer to undergo a competence assessment.

There should be provision in the LCA for people to report health or competence concerns about lawyers and receive the protections of the proposed non-victimisation provisions *[see: "Protecting people who make a report" on page 42]*. The Working Group also notes it may be appropriate for the Task Force to consider ways to encourage self-reporting of these issues. The process may also incorporate options for support and should be designed with expert advice to incorporate appropriate cultural responses and pathways.

NZLS is currently investigating the establishment of an impairment committee to work with lawyers affected by health conditions, and how such a committee might sit alongside the disciplinary process. The Working Group supports this initiative.

Increasing transparency to foster confidence and encourage complainants to come forward

A perceived lack of transparency surrounding the LCS process has been criticised. Transparency and openness foster confidence and encourage complainants to come forward. The Working Group considers that there should be greater information available about how the complaints process can deal with complaints of unacceptable conduct and about the appointment of Committee members.

Transparency when appointing committee members

Committee vacancies are advertised to the profession, and candidates provide referees and curriculum vitae. The local NZLS branch reviews potential candidates for local committees and senior NZLS regulatory staff review potential candidates for national committees. Preferred candidates are reviewed before the NZLS Board for appointment.

Greater transparency around Standards Committee membership is required. Once a year, NZLS' official Regulatory report should contain the membership list of every Committee. The Minister of Justice receives the Regulatory report, and the public are able to access it.

The appointment process should also be reviewed. The process might include advertising the names of people wishing to be appointed as part of a "fit and proper" check to ensure that there are no concerns about unacceptable conduct in relation to an applicant. Consideration could also be given to appointment powers outside NZLS but which still incorporate established "fit and proper" inquiries. For example, Te Hunga Rōia Māori o Aotearoa and the Pacific Lawyers Association could appoint a specified number of Standards Committee members each appointment round.

Transparency during the complaints process

Before a complaints process starts, all parties should receive the names of Committee members who will deal with the complaint. All parties should have an opportunity to raise any concerns. This occurs in other complaints processes, such as for social workers and health practitioners. In those processes, the complainant and respondent must receive written notice of the names of the intended members of the professional conduct committee and have the opportunity to object to any proposed member.[202]

Advising the parties early on about who will handle their complaint eliminates any concerns about potential conflict. For complaints of unacceptable behaviour, early notice could also reduce anxiety and stress in complainants concerned about colleagues knowing personal and intimate information about them.

The complaints process has suffered from a lack of trust and confidence in it. The process has not proved an effective pathway for handling sexual violence, harassment, bullying, discrimination and other unacceptable workplace behaviour.

Improvements can be made to ensure that people are encouraged to come forward confident in the knowledge that the process is effectively designed to deal with complaints about sexual violence, harassment, discrimination and bullying in a fair and appropriate way.

Proposals to create more diverse and transparent standards committees

- Fast track a broader diversity policy for Standards Committee membership to include gender, youth and experience, ethnicity and varied types of practice.
- Amend the LCA (LCS and Standards Committee) Regulations to remove the '5' years practice requirement.
- Reduce the size of Standards Committees and adapt the process so that complaints are assigned to individual Committee members based on expertise and experience.
- Review the current process to incorporate elements of support and reduce formality.
- Use more independent investigators, particularly for complaints of sexual violence, harassment, bullying or discrimination.
- Improve transparency around the process, such as "Fit and proper" inquiries for potential Committee members, publishing Standards Committee membership, notifying all parties about which members will consider their complaint and reviewing the appointment process.

Complaints about unacceptable behaviour need specialised processes

Complaints about sexual violence, harassment, bullying or discrimination are likely to involve particularly sensitive issues for complainants. Reporting this type of behaviour may be particularly distressing, embarrassing or stressful.

There are some systems for support of complainants currently in place. In early April 2018 NZLS established an 0800 phone line called the 'Law Care' line, dedicated to enabling people in the legal community to discuss sexual harassment, bullying and discrimination as well as the options and support available. The phone line was established in response to the need to provide support and assistance to people affected by harassment, bullying and discrimination in the legal profession. The staff who operate this phone line are specially trained to discuss personal and confidential issues. The staff provide callers with options about support services they can contact, including:

- registered counsellors or clinical psychologists;
- members of NZLS' National Friends Panel with specific expertise in this area;
- information about the online facility for making complaints about lawyer misconduct and for finding out about NZLS' complaints process;
- other formal or informal avenues for resolving the issues.

A section of NZLS' website is dedicated to information and practical guidance about bullying, harassment and discrimination.[203]

An online facility is also available for people to submit confidential reports, including formal reports. This includes reports focused on harassment and other unacceptable behaviour. A confidential report could lead to a Standards Committee undertaking its own investigation into the complaint (an "own motion investigation").

A Standards Committee can conduct an own motion investigation when concerns come to NZLS' attention about a lawyer's behaviour. NZLS may have received a confidential report, anonymous

complaint, media reports or referral from the Courts. The appropriate pathway to deal with conduct will depend on a number of factors, including the interests and views of those directly affected by the alleged conduct and what evidence is available to the Committee.

A small panel of senior NZLS regulatory staff review all reports received through the online facility to consider if there is enough information for the panel to refer the report to a Standards Committee for it to raise an own motion investigation into the conduct. If the lawyer is not identified, the conduct is already being investigated, or the report lacks any of the detail required to understand what the complaint is about, the matter may not be referred to a Standards Committee.

A Standards Committee must determine whether it can comply with natural justice obligations, if it decides to act on an anonymous or confidential report. Proceeding with a disciplinary investigation where the respondent does not know who complained about their conduct may be unfair to the respondent in some cases. A Standards Committee considers competing interests of confidentiality and natural justice before deciding whether to investigate a report in cases in which the reporter is anonymous or does not wish to be identified.

In the case of an anonymous report, a Committee may start an investigation if it is satisfied it can obtain credible independent evidence to investigate the matter without identifying the person who provided the report. For example, a Committee that is aware of repeated instances of unacceptable behaviour at a law firm could start an "own-motion" investigation into whether an incorporated law firm or an individual partner in it complies with their obligations. The Committee could direct the law firm to provide all records of any reported harassment, bullying or unacceptable conduct towards staff, using its authority under the LCA.[204] The Committee may direct the firm to anonymise this information before it decides whether the basis for the complaint is robust enough to investigate further. Any further investigation may rely on information or evidence from any person or witness, who consents to being involved in the process. In other words, the anonymous report may be the starting point from which further evidence is gathered.

A clear, robust and supportive process for complaints about sexual violence, harassment, bullying and discrimination is essential. Under the current system, people subjected to inappropriate behaviour are left in a difficult position. They may not wish to complain about the conduct for many reasons. Yet another lawyer who is aware of the conduct may be under a mandatory obligation to report the conduct. The complaint is then exposed to NZLS and the lawyer concerned, who must be informed of the complaint against them. Any person who wishes to support a complainant may also be under a conflicting duty to report the conduct (see 'Enhancing Lawyer Reporting Obligations').

The Working Group considers that the current system has not been designed to effectively respond to complaints about sexual violence, bullying, discrimination or harassment. *[See: "Improving the current complaints process" on page 64]*. An option for change which presents itself is a specialised pathway for complaints about sexual violence, bullying, harassment, discrimination and related personal conduct issues.

In considering whether to recommend implementing an alternative system, the Working Group has examined Operation Respect of the New Zealand Defence Force. Operation Respect was a response

to sexual violence within the Defence Force. This initiative saw the implementation of a two-track reporting system for sexual assault. Military personnel who wish to report sexual assault can report to a Sexual Assault Prevention and Response Advisor, and choose whether to make a restricted (that is, confidential) disclosure or an unrestricted disclosure. A restricted disclosure allows the complainant who suffered the sexual assault to have the alleged incident and conduct recorded, and to receive support, without the opening of an investigation. For an unrestricted disclosure, the complainant reports to their command and to the Royal New Zealand Military Police or the New Zealand Police. Only the complainant can make a restricted disclosure. A complainant can choose to convert a restricted disclosure to an unrestricted one. Under Armed Forces Law, all other military personnel who witness or become aware of a sexual assault must report it.

The Working Group has considered whether the legal disciplinary regime could offer a similar system. The potential for a specialised complaints process is explored below.

Using a specialist complaints unit as an alternative pathway for complaints

An alternative pathway for complaints about unacceptable behaviour is to create a *Specialist Complaints Unit* (**SCU**) to initially receive complaints and provide support. The Working Group envisages this Unit would be comprised of independent people with relevant expertise, for example in the area of sexual abuse. The SCU would:

- receive complaints (anonymously if desired) that the complainant considers to be sensitive;
- provide (non-legal) support to a complainant;
- provide information about making a formal complaint and allow the complainant to decide whether to make a formal complaint.

The proposal is to create two options for reporting: one for support (the SCU), and one for a regulatory process (the ordinary pathway). A report to the SCU would not go any further without the agreement of the complainant.

The Working Group received feedback that was generally supportive of the SCU proposal. One commenter observed that implementation of this type of process must be led by someone who is dynamic, creative and experienced at change management. The Working Group agrees with this comment.

The Working Group considers the guiding principles of āwhina, compassion and humanity, respect for confidentiality and privacy, competency and fairness are integral to the structure of any alternative pathway.

Receiving complaints

A SCU would allow a complainant to lodge their complaint anonymously. Under the current system, the regulations require that a Committee's procedures must comply with the rules of natural justice. Under the current system, once a complaint is received by the LCS it generally must be allocated to a Standards Committee to begin the disciplinary process. In turn, this generally creates a requirement to disclose the name of a complainant or witness as a matter of fairness to the accused lawyer.[205]

This requirement enables the accused lawyer to answer the charge against them. Under the proposed alternative system, no disciplinary process would start when the complainant first contacted the SCU with their complaint. The SCU would simply offer support and information.

The SCU's staff would have specialised training in dealing with complaints about personal issues. This could be an extension or reformulation of the Law Care phone line referred to above.

It is important to consider whether legislative change is needed before creating a SCU. While it is envisaged that the SCU members would be specialists in relevant areas, rather than lawyers, if any SCU staff were lawyers who held a current practising certificate, they would need to be made exempt from reporting obligations. *[See "Enhancing lawyer reporting obligations" on page 39]*.

Lawyers may not wish to use a hotline to make a complaint. Other evolving technology could encourage reluctant people to make a complaint.[206] As Damian Funnell recently outlined in his *LawTalk* article "Preventing workplace harassment: There's an app for that", a United States survey found that hotlines were the least popular mechanism for reporting harassment.[207] Workplaces are increasingly using apps to allow employees to report harassment. Apps such as Callisto, used in the United States, enable complainants to report harassment within the workplace in an easier and less confronting way.[208] Through these apps, employees can record instances of harassment in a workplace. If they choose to do so, they can simply record what has happened in the app without reporting it to their employer. If more than one instance is reported about the same person, the complainants can be linked to build a collective report of unacceptable behaviour. Chatbots are another type of technology being used in this area. For example, 'Talk to Spot' is a confidential service offered through a chatbot that is described as "a safe, anonymous way to document harassment and discrimination. Reporting is optional." [209]

The Working Group recommends NZLS consider technology options as a way to enable reporting of complaints of sexual violence, harassment, bullying, discrimination or other unacceptable behaviour.

Process on receiving complaint

On receiving a complaint, the SCU would offer support to the complainant. SCU staff would be specially trained to fulfil this role. Such support might include:

- a confidential listening service: this could offer a safe space for a complainant to talk to specially trained staff;
- information about organisations the complainant could contact, and the psychological support available to them (in line with information currently provided through NZLS' Law Care phone line);
- information about where to find employment advice and referral to the NZLS Panel of Friends members for advice and guidance. This should include reference to the Te Hunga Rōia Māori Ngā Hoa Aroha Panel;
- information about the complaints process.

The SCU would have no role in adjudicating a complaint. The complainant would decide whether to make a formal complaint. If the complainant did not want to make a formal complaint, the SCU would take no further action, beyond providing any ongoing support and assistance desired by the complainant.

The SCU would effectively be siloed from the rest of NZLS. Separation means the SCU would be under no obligation to further progress the complaint if the complainant chose not to do so. If the complainant decided to make a formal complaint, the SCU would cease involvement (except for offering further support and information to the complainant). The SCU could not pass the information it had collected to NZLS.

Isolating information and leaving the decision of whether to complain to the complainant means some serious conduct may go formally unreported. However, the advantages of this process may outweigh any concerns. A complainant who wants to make an informal rather than formal complaint may come forward only if they can access a confidential complaints service. Such a service will enable a complainant to access the support or information they need to make an informed decision about whether to complain formally.

The SCU may also have a function in providing anonymous data to NZLS about the types of complaints raised and actions taken. NZLS would then be able to identify concerning patterns and develop strategies to address these issues (for example, through the Task Force and education). The Equity Ombudsperson who sits alongside the Law Society of British Columbia has a similar reporting function.

A protocol for further complaints about the same person

The situation may arise where a complainant decides not to proceed with a formal complaint after contacting the SCU, but a further complaint of similar conduct by the same perpetrator is then made by a different complainant.

When complainants report to the SCU they could be asked whether they are willing to be contacted again if someone else makes a complaint against the same perpetrator. Apps such as Callisto enable this kind of linking of complaints by different people against the same person.

A process drawing on these new technologies would enable someone to make an informed decision about whether to make a complaint in the knowledge they would not be alone. If both complainants are willing, a formal complaints process would start.

Any protocol that is developed to contact complainants again must consider the privacy and confidentiality requirements of potential complainants and the accused lawyer. This protocol could be operated through a reporting app (as noted above).

Making a formal complaint

If a person chooses to make a formal complaint, the complaint would then proceed through the Standards Committee stage and to the LCDT if the Standards Committee files charges. The Working Group refers to the proposals outlined above for ways to improve the current complaints process and provide support and assistance to complainants. A proposal for a Specialist Committee to deal with complaints of sexual violence, harassment, bullying or discrimination is outlined below.

Assessing the option to create a specialist complaints unit

An assessment of the option of a SCU is required.

The Working Group believes that a separate SCU of this type provides a range of benefits. A SCU would:

- encourage people who might not otherwise make complaints to come forward and receive support;
- enable complaints to be dealt with from the first point of contact by specially trained and dedicated people;
- provide the information needed to enable people to make an informed decision about whether to make a formal complaint;
- give complainants greater autonomy and control over the process.

The Working Group cautions that a SCU has some drawbacks that need careful consideration:

- A separate body attached to NZLS may receive information about serious conduct, but have no power to start disciplinary proceedings or refer the matter to another competent authority to investigate.
- Establishing a separate body and its processes may require significant resources. At this stage, it is unclear how many people would use this pathway, and what resources would be required.

Assessing the option to create a "specialist" committee

The Working Group considers that a new separate specialised committee would be a suitable alternative to an ordinary Standards Committee for complaints of sexual violence, harassment, bullying or discrimination. Committee members would be people who are experienced and trained in dealing with complaints about sexual violence, harassment, bullying and discrimination, and related personal conduct.

The appropriateness of referring a complaint to the Specialist Committee would be assessed during the complaints triage process.

The Committee's process would differ in some respects from the ordinary process applying to consumer complaints.

The Working Group recommends that no more than three people act as members of a Specialist Committee on any investigation. A smaller committee could reduce the sense of exposure of the complainant, and the level of stress involved in talking with the Committee, should the complainant wish to do so. The Working Group recommends that two of the Committee members are non-lawyers with expertise in relevant areas. Payment of Standards Committee members has been discussed above *[See "Reduce committee size, and target potential members with required expertise" on page 67]*. The Working Group considers that if this proposal for a Specialist Committee is adopted, careful consideration should be given to payment of Committee members, due to the greater level of involvement that may be required.

Decisions of Standards Committees are normally made on the basis of a hearing on the papers, with written complaint documents and responses. The complainant and accused lawyer are not generally

entitled to make oral submissions to the Standards Committee.[210] However, it may be that there should be an entitlement for complainants and respondents to provide oral submissions to a Committee in cases of sexual violence, harassment, bullying or discrimination.

Special procedures should also apply if the complainant wishes to be interviewed orally. The Working Group suggests that an independent specialist (for example, a former police officer with experience conducting interviews of complainants) interview the complainant in private,[211] and that the interview be recorded for use at any later hearing at the Committee and/or LCDT stages. This would allow the complainant to give evidence with a greater degree of privacy, and avoid the complainant having to repeat their account multiple times in different fora. This process is commonly used in the criminal jurisdiction, particularly in cases of sexual offending.

Regulations and robust protocols would need to be established to cover the safe storage and use of a recording of the complainant.[212]

If the complainant did not wish to have their interview recorded in this way, they could elect to talk directly to the Committee (or do both). Appropriate support should be available to the complainant throughout either process.

NZLS has already established a new specialist Standards Committee. This Committee will operate as a pilot for 12 months, and if assessed as viable, may continue long term. The Standards Committee will specifically consider complaints that raise allegations of sexual harassment and other unacceptable behaviour. The Working Group suggests if this Committee continues that the Committee's composition and methodology should be carefully reviewed at the end of the pilot.

In the process proposed by the Working Group the Specialist Committee would receive targeted training, support, advice and guidance on the best practices to adopt when considering and deciding on complaints of this nature. The training would be from external bodies and expert advisors. The Working Group envisages that Committee members would be able to obtain support directly from an independent specialist provider with expertise in handling complaints of this type.

While a formal complaint is being processed, both the complainant and the accused lawyer must have access to available support. The SCU would continue to fill this role for the complainant. For accused lawyers, the current avenues of support available are the Complaints Advisory Panel and the Panel of Friends.[213] These are contact points through which a lawyer can listen and assist another lawyer to respond appropriately and effectively to a complaint.

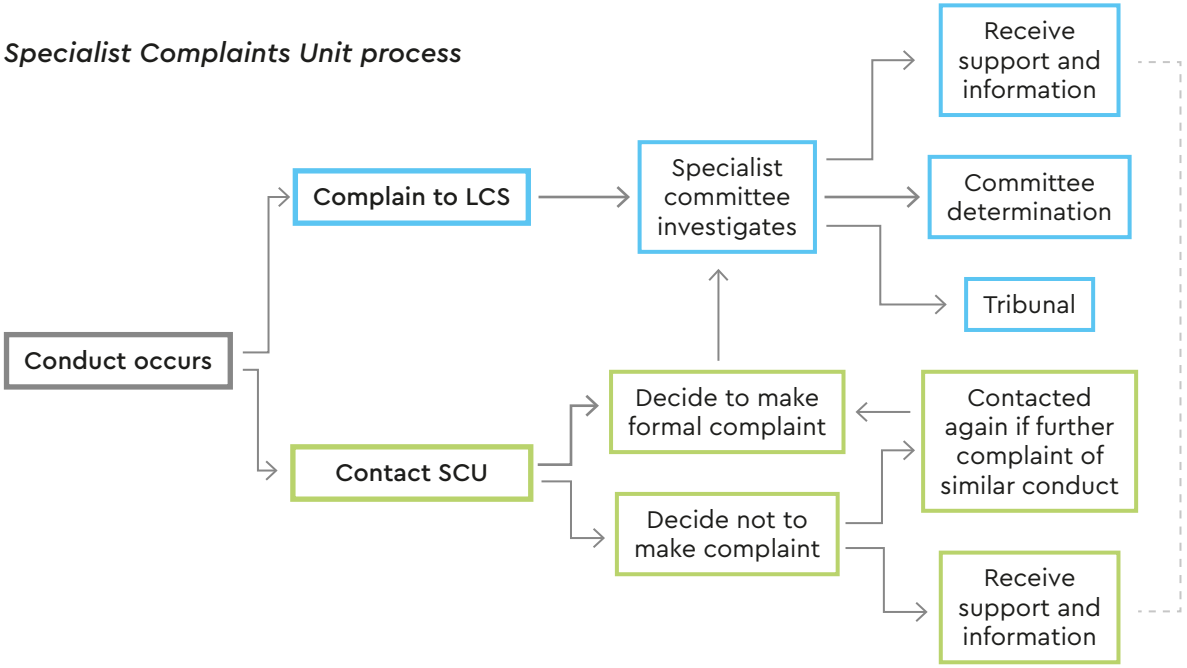
The Working Group is of the view that options for assistance should be extended to the Te Hunga Rōia Māori Ngā Hoa Aroha Panel of Friends. This is a sub-committee of Te Hunga Rōia Māori designed to provide tautoko and āwhina to members on a completely confidential basis.[214] The Working Group agrees with the view of Te Hunga Rōia Māori that this panel should be championed by NZLS.

Finding ways for the new unit and committee to work together

The SCU could work effectively in tandem with the Specialist Committee. A possible structure is one similar to the two-track system that formed part of Operation Respect. The SCU could filter a

complaint that is made to it straight to the Specialist Committee. The Working Group envisages the process as depicted below.

Specialist Complaints Unit process



Some complaints will involve issues such as sexual violence, bullying, discrimination, harassment and other inappropriate workplace behaviour. These types of behaviours require specialist expertise. The Working Group recommends creating a specialised process to handle them. This process would include a sub-process through which a complainant receives support as well as, or instead of, progressing their complaint through a formal complaints process.

Proposals to introduce specialised processes for handling complaints of sexual violence, harassment, bullying, or discrimination

- Create a Specialist Complaints Unit – which does not share information with the NZLS – to receive anonymous complaints about unacceptable behaviour.
- Create a Specialist Committee as the Standards Committee for complaints of unacceptable behaviour. The Committee should adopt specialist processes, and its members undergo specialised training.

Creating a flexible approach to confidentiality and suppression

The strict confidentiality restrictions are appropriate for dealing with consumer related complaints. However, in relation to sexual violence, harassment, bullying and discrimination the strict provisions have been problematic. In the context of complaints of this nature, the restrictions are inflexible and have contributed to concerns about a lack of transparency and accountability. The Working Group considers change is required.

Under the LCA, the confidentiality provisions are stringent. The decisions of Standards Committees must remain confidential to the parties unless the Committee directs they are published. The name of the lawyer can be published only if the Committee makes an order for censure and the NZLS Board has already approved the publication of the lawyer's identity.[215] As a consequence, in an 'own motion' inquiry, people affected by the behaviour of a lawyer technically have no automatic right to be advised of the outcome of the investigation. This is because they are not a party to the complaint, and this even includes witnesses who have participated in the inquiry.

In contrast, both the hearings and the decisions of the LCDT are presumed to be open to the public. The LCDT may make suppression orders if *'it is proper to do so, having regard to the interest of any person (including (without limitation) the complainant (if any)) and to the public interest'*.[216]

The rationale for the different approaches to confidentiality within the same regulatory regime is described in *New Zealand Law Society v B*: [217]

> *The different legislative approach on the issue of publication between the Disciplinary Tribunal and Standards Committees and the LCRO no doubt reflects the policy decision that it is the Disciplinary Committee that deals with the more serious matters, which in the public interest should be dealt with openly, whereas the lesser matters dealt with by Standards Committees and the LCRO may or may not justify publication after having been dealt with privately.*

The current confidentiality requirements in relation to Standards Committee and LCRO processes fit well with consumer driven complaints and issues of low level conduct relating to legal practice. However, in cases of sexual violence, harassment, bullying, discrimination and related conduct, the strict confidentiality provisions can be viewed as unjustly protecting perpetrators. It is notable that, unlike most equivalent bodies in the other professional disciplinary regimes in New Zealand,[218] Standards Committees can make findings of unsatisfactory conduct and impose significant penalties. As such, Standards Committees may be distinguishable from similar bodies in other professional disciplinary regimes in which the Committee process remains confidential. This should be kept in mind in considering change options.

Section 188 of the LCA places further confidentiality restrictions on people working within the NZLS' LCS. Section 188 of the LCA prohibits disclosure of any matter in relation to a complaint, inquiry or investigation, except for certain specified purposes. The exceptions are disclosure within the complaints and disciplinary process, to the Police, the Serious Fraud Office or Registrar General of Land, or in evidence in any court.

These restrictions have led the media to criticise NZLS' refusal to confirm or deny whether a particular matter is being considered as a complaint. NZLS received criticism because of not commenting to the media about whether complaints had been made about the incidents at Russell McVeagh. Following this, NZLS' culture was described as one in which "undue secrecy prevails".[219]

The Working Group received mixed submissions about the confidentiality provisions in the LCA. Some submitters expressed concern that the provisions are too strict and protect perpetrators. Other submissions indicated that the provisions do not provide enough confidentiality for complainants or others affected by this type of behaviour. The overarching theme appears to be that in respect of sexual violence, harassment, discrimination and bullying, the current confidentially provisions are not fit for purpose.

Striking a balance between confidentiality and the benefits of increased openness

The Working Group's view is that in cases of bullying, sexual violence and harassment, discrimination and related conduct a better balance needs to be struck between confidentiality and the benefits of greater transparency in the complaints process. The Working Group recognises that the impact from publishing the details of most complaints would be disproportionate to the behaviour being disciplined. However, there is a stronger interest in openness around complaints about sexual violence, harassment, bullying and discrimination. Greater openness is a way to achieve accountability, public protection and to mark this behaviour out as completely unacceptable within the legal community.

An option for change is a two-stage approach to confidentiality in cases in which a breach of the new r 10.1 and r 10.2 is found. These are the proposed new rules prohibiting sexual harassment, bullying and discrimination or any conduct that may adversely reflect on the legal profession. *[See: "The need for clear conduct and reporting standards" on page 33]*. The two stages are described below.

In cases in which a Committee is considering an alleged breach of these specific rules, a presumption of confidentiality would exist during the early stage of the process. The presumption in respect of the accused lawyer would then be removed at the decision stage of the process when either a finding of unsatisfactory conduct was made, or a Committee determined to lay charges before the LCDT. Appropriate safety mechanisms for varying the confidentiality restrictions, seeking suppression in appropriate cases and protecting the identity of complainants and witnesses would be built into the process:

Before the decision

Any matter related to a complaint (or potential complaint) remains confidential. Even so, any person may apply to the Standards Committee to lift confidentiality and permit disclosure of the fact of the complaint (and any other specific fact).[220]

At the Standards Committee decision stage

A finding of unsatisfactory conduct in respect of a breach of the new rules 10.1 and 10.2 would trigger removal of the presumption of confidentiality in relation to the lawyer's identity. Suppression of the lawyer's identity would no longer be a presumption, but the lawyer could apply to the Standards Committee for suppression.

In the case of a decision to lay charges in or refer the case to the LCDT, the Working Group recommends that the lawyer be given a set period of time following the laying of charges (perhaps 14 days or other time limit consistent with the ability to apply for review) to apply to the LCDT for suppression. If no such application is made, the suppression lapses.

The Working Group recommends that in both of the above situations, there is a legislative test for suppression that recognises the importance of the principle of open justice, and the public protection purpose of publication. A test that sets a threshold similar to the test in criminal proceedings would be an appropriate starting point, although some adaptation may be required to recognise the lower level nature of the conduct determined at the Standards Committee stage, and the different purposes of disciplinary proceedings (this is discussed further below).

In both cases, the complainant and any witnesses' identities would remain presumptively confidential.

New provisions could expressly provide that if the Standards Committee makes a finding of unsatisfactory conduct:

- Upon a finding of unsatisfactory conduct for a breach of rules 10 .1 and/or 10.2 or upon a determination that a complaint, matter or issue related to conduct captured under rules 10.1 and 10.2 be referred to the LCDT , the identity of the lawyer who is subject of the finding or determination will be published, subject to the ability of the lawyer to apply for suppression to the Standards Committee (in the case of unsatisfactory conduct) or to the LCDT (in the case of a charge being laid or referral made) for suppression.
- The identity of any other person (including (but not limited to) the complainant or a potential witness) or any matter tending to identify any other person will remain confidential;

- The Standards Committee may, however, make any 1 or more of the following orders, of its own motion or upon application by any person:
  - an order prohibiting the publication of the Standards Committee decision or any part or matter related to the decision or complaint;
  - an order prohibiting the publication of the name of the lawyer or the affairs of the lawyer or any other person or organisation;
  - an order prohibiting the publication of any fact or matter which may tend to identify the lawyer in the event the lawyer's name is suppressed; or
  - if a lawyer's name is suppressed, an order permitting limited publication of the decision to any specified person or organisation, or class of organisation or person (e.g. any future employer).

If the Standards Committee lays a charge or otherwise refers the matter to the LCDT, then any application for suppression in the LCDT by the lawyer would be dealt with in that forum following an application within a specified period of time.

In drafting the legislative test for making of suppression orders by Standards Committees and the LCDT, guidance should be obtained from the test set out in s 200 of the Criminal Procedure Act 2011 (and related provisions) and relevant case law. For example, the Committee could consider whether the publication is likely to:

- cause extreme hardship to the lawyer or any other person connected with the lawyer;
- cast suspicion on another person that may cause undue hardship to that person;
- cause undue hardship to the person who has been affected by or who is a witness to the conduct; or
- endanger the safety or physical or mental wellbeing of any person (including the lawyer).

In respect of a finding of unsatisfactory conduct by a Committee, the Working Group acknowledges that 'extreme hardship' is a high threshold to meet and it may need to be tempered by allowing the Committee a residual discretion to grant suppression even if the 'extreme hardship' threshold is not met if the Committee considers publication would be out of all proportion to the gravity of the conduct in an individual case. This is because the conduct that a Standards Committee is able to determine is unsatisfactory conduct and will only ever be at the less serious end of the spectrum. More serious conduct which may amount to 'misconduct' must be dealt with by the LCDT and the case will be made public in that forum unless the LCDT exercises its own powers of suppression.[221] On the other hand, as is the case in the criminal jurisdiction, consideration should be given to vesting a residual discretion in Committees and the LCDT to allow publication even if the standard for suppression is not met, if publication is still in the overall public interest.

However, as indicated above, it is the Working Group's view that the statutory test for suppression once charges have been laid in, or matters referred to, the LCDT should be set at a level similar to the test for suppression in the context of criminal proceedings.

The Working Group recognises that in drafting these provisions careful consideration would need to be given to the right of review a lawyer has to the LCRO and the expiration of the review period which is 30 working days (see: s198 of the LCA).

Any suppression order made by a Standards Committee should not limit the ability of the different arms of the LCA regulatory framework to communicate with each other about an appropriate matter or prevent any person from reporting a related matter to the Police or other law enforcement agency.

The need to improve protections for complainants and potential witnesses must be at the front of mind in making any changes to the confidentiality provisions in the LCA. The Working Group considers name suppression of complainants and potential witnesses should be automatic at both the Standards Committee and LCDT stages, in respect of all complaints. This presumption would be rebuttable if there is some strong public interest reason for publication or the complainant or witness sought removal of suppression.

Any new confidentiality and suppression provisions should be consistent across the LCS and Standards Committee process and the LCRO's jurisdiction.

The Working Group considers that a more flexible and staged approach to confidentiality in cases involving sexual violence, harassment, bullying and discrimination and similar conduct would create greater transparency in the disciplinary process. Greater transparency can lead to greater public confidence in the profession and the LCS process. Any approach adopted must strike a more realistic balance between a right to confidentiality and greater openness.

Proposal to create a flexible approach to confidentiality and name suppression

- Adopt a more flexible, two-staged approach to confidentiality for complaints and decisions about bullying, sexual violence and harassment, discrimination and related conduct involving:
  - a presumption of confidentiality during the early stage of the process;
  - removal of the presumption of confidentiality in respect of the lawyer's identity at the decision stage of the process;
  - appropriate safety mechanisms must be built into the process to allow for varying the confidentiality restrictions, seeking suppression in appropriate cases, and protecting the identity of complainants and witnesses.

Reducing delays in the review process

Certain people involved in a Standards Committee process can apply to have the Committee's decision reviewed by a LCRO. This is the only right of appeal from a Committee's decision. The Minister of Justice appoints each LCRO who must not be a lawyer or conveyancing practitioner. The following people are entitled to seek a review of the decisions of a Standards Committee: [222]

- the complainant;
- the accused person (including the respondent to an inquiry);
- a related person or entity to the accused person; and
- the New Zealand Law Society[223]

Unless all interested parties consent, the LCRO must conduct their review by a hearing in the presence of those parties. In contrast, a hearing in front of a Standards Committee is predominantly held "on the papers" (that is, without an in- person hearing). The LCRO may direct a Standards Committee to reconsider its decision, or confirm, modify, or reverse any decision.[224] The LCRO may exercise any powers that the Standards Committee could have exercised.[225]

The level of delay affecting the LCRO process is a problem. For example, 28 per cent of LCRO applications are over two years old. As at 30 June 2017, 532 applications for review were active.[226] Delay is a significant concern for the complainant. The longer a formal process takes to complete, the longer parties experience the stress inherent in such a process. This has the potential to exacerbate distress and feelings of powerlessness in the process. For everyone involved in a complaints process, the need to be able to move forward is vital. That need is not met when the process 'drags on'.

The LCRO was intended to act as a 'legal ombudsman', by independently reviewing the decisions of Standards Committee in a less formal and more efficient consumer-focused way. However, the current delays mean that the process does not operate efficiently. Changes to the LCRO process are contained in the Tribunals Powers and Procedures Legislation Bill, which received Royal Assent on 13 November 2018.[227] These include:

- allowing the LCRO to hold hearings on the papers rather than in person, without requiring the consent of the parties;
- introducing a new summary dismissal power for the LCRO so that unmeritorious applications to review the decisions of Standards Committees can be struck out summarily;
- ensuring the LCRO is responsible for making such arrangements as are practicable so they can perform their functions in an orderly and efficient manner;
- enabling hearings to be conducted by telephone or audio-visual link.

The Working Group hopes that these changes make significant inroads into delays. If these delays cannot be urgently addressed, however, an alternative approach should be considered. That may be a review conducted on the papers by a LCDT member with specialist expertise in these types of complaints. Those members may be well placed to review the decisions of Standards Committees. They will have considerable expertise and judgement in assessing these decisions.

The delays involved in the LCRO process should be monitored. If delays are not meaningfully addressed, change should be considered by the Ministry of Justice.

Specialist training for LCROs should also be considered to deal with reviews of complaints alleging sexual violence, harassment, bullying, or discrimination. This is consistent with the approach proposed in this report for Standards Committee members and other people dealing with these types of complaints within the LCS process.

Improving the Lawyers and Conveyancers Disciplinary Tribunal process

The LCDT is established under the LCA. Its role is to hear and determine any charge against a lawyer filed by a Standards Committee or the LCRO. In any proceedings before it, the LCDT is made up of no fewer than five members, one being the Chairperson.[228] Half the members (other than the Chairperson) must be non-lawyer members, and half must be lawyers.[229]

If a charge is proved, the LCDT has a wide range of powers, including to strike the lawyer off the Roll of Barristers and Solicitors (Roll) or suspend them from practising.

NZLS has no control over the LCDT, which the Ministry of Justice oversees. As such, the Ministry must take up any reform in this area.

The Working Group is concerned that the LCDT process is perceived as formal and combative. This perception may deter complainants from reporting complaints. The Working Group has identified options to change the LCDT process to offer greater protections to complainants, and to make the process less intimidating for those who participate in it. These options specifically relate to complaints about sexual harassment, bullying and discrimination.

Making the Tribunal's membership more diverse

Not all professional disciplinary tribunals in New Zealand require five members to sit as a panel. For real estate agents and teachers, only three members are required. For doctors and social workers, as with lawyers, five members are required.

There are concerns that the current process is perceived as too adversarial and formal. An option to address these concerns is to amend the legislation to provide that a hearing before the LCDT requires only three members to determine the charge. This may make the process less intimidating for complainants and lawyers. Provision could be made for convening a larger 'bench' in complex or difficult cases (for example, complicated fraud or defalcation cases).

The Working Group considers the legislation about the criteria for appointment to the LCDT should be amended to reflect the need for broad diversity.[230] For example, only nine of the current 29 LCDT members are women. The benefits of greater diversity on an adjudicating panel have been discussed above in the context of Standards Committees. The same considerations apply in the Tribunal context. The Working Group considers thought should be given to amending the legislation to reflect the desirability of broad diversity on the panel of decision makers.

Providing for greater case management early on to resolve issues

The Regulations for the LCDT currently provide that an issues conference must be held as soon as is reasonable after a charge is laid in the LCDT. The purpose is the "just, efficient and expeditious conduct of proceedings".[231] The directions the Chairperson may make at the issues conference include directing a party to file affidavits, directing a party charged to file a schedule of admissions or denials, directing evidence be given by affidavit or orally, for example.

The Working Group sees benefit in the LCDT becoming more involved at the early stages of a proceeding. A case management conference could be used to clarify the issues in dispute and to identify any issues that may need to be decided before the hearing. This could be achieved by a legislative direction that the conference chair must make all directions necessary for the fair, efficient and quick conduct of proceedings. The wording of the current regulation covering the conference provides for the Chair to exercise a wide discretion in making such directions. A more directive regulation would be better.

In addition to a case management conference, the equivalent of a judicial settlement conference could be offered to the parties (being the Standards Committee that filed the charge and the lawyer) at this stage. This would provide an avenue for parties to reach agreement, with the assistance of a judge – in this case, the LCDT Chair who would be a current or former judge – acting as a referee. Such a conference may help to resolve more charges without the need for a full hearing with evidence. While resolution may be rare at this stage, it should not be discounted as an option in appropriate situations. It is expected the Standards Committee would consult with the complainant on any resolution.

Of course, no complainant should ever feel pressured into participating in this process. Nor would all cases be suitable for such a process *[see: "Find and consider alternative modes of resolution" on page 70]*. Both the complainant and lawyer should be advised that they do not need to attend this conference in person. A judicial settlement conference could take place with only the lawyers acting for both the Standards Committee and the lawyer who is charged. The complainant and lawyer would not need to be present in person. A complainant should also be able to have a support person or lawyer attend on their behalf, if they wish to attend.

Tailoring confidentiality and suppression at the Tribunal stage to each case

Decisions of the LCDT are generally published, and, subject to certain exceptions, every hearing of the LCDT is held in public.[232] *[See: "Creating a Flexible approach to Confidentiality and Suppression" from page 83 onwards]*. Those exceptions include the interests of any person, including the complainant.

The LCDT has the power to prohibit publication of a person's identity, or any evidence, or any part of the proceedings before it if it considers it proper to do so. In deciding whether to order name suppression of any person, the LCDT considers the interest of any person (including the privacy of the complainant) and the public interest.

Even if name suppression of a practitioner is ordered by the LCDT, there are exceptions: the LCDT cannot prevent publication of the lawyer's name in the *Gazette* in a notice of order for strike-off, suspension, or restoration to the Roll.

The Working Group recognises that the New Zealand legal profession is relatively small. There are likely to be many cases in which publication of the name of the practitioner may readily identify the complainant also. Consideration should be given to the complainant's wishes in determining whether to order name suppression of the lawyer on this ground.

Confidentiality and suppression should generally be tailored to the individual case before the Tribunal. However, to the extent possible it should also be made clearer, so that participants in the process can have an idea of what to expect. This is discussed above at "Creating a flexible approach to confidentiality and suppression" *[from page 83 onwards]*. The Working Group has proposed a statutory test for name suppression in cases of unacceptable conduct in that section similar to that in criminal proceedings with appropriate adaptation to reflect the disciplinary context.

In a case involving an allegation of sexual harassment or violence, bullying, or discrimination, supression of the complainant's identity should be automatic. This is a significant way to remove a disincentive to a complainant participating in the Tribunal process. The Working Group considers the legislation should be amended to create a rebuttable presumption that the identity of a complainant will be suppressed in the Tribunal *[see: "Creating a flexible approach to confidentiality and suppression" from page 83 onwards]*.

Protecting people during the evidential process of a Tribunal hearing

The Working Group considers that witnesses who give evidence before the LCDT need more protection in the case of a complaint of unacceptable behaviour.

How people give evidence in different legal settings

Hearings before the LCDT are generally held in public. The LCDT can require a person to attend the hearing and give evidence.

In some professional disciplinary regimes, certain witnesses and vulnerable people receive special protections when giving evidence.[233] These people are given a right under the legislation to give evidence before the relevant tribunal in private, and the tribunal may arrange for the person to give evidence by way of video link or any other alternative means. These protections apply if a hearing relates to or involves a sexual matter or, in the tribunal's opinion, if a hearing relates to or involves some other matter that may require the witness to give intimate or distressing evidence.

In criminal cases, child witnesses are entitled to give evidence in one or more alternative ways (including by evidential video interview). Adult witnesses can apply to give evidence in an alternative way, and the courts routinely allow this as a way to reduce stress on a witness.

Under the Evidence Act 2006, alternative ways of giving evidence are:[234]

- while present in the room in which the hearing is taking place, but with screens in place so the witness cannot see the respondent;
- from an appropriate place outside the hearing room by audio-visual link;
- by a video record made before the hearing of the proceeding.

In all of these cases, the respondent (the person charged) can see the witness. This is important to ensure fairness in the process.

Subject to the LCDT's ability to regulate its own procedure and determine what evidence it receives, the Evidence Act 2006 applies to the Tribunal as if it were a Court.[235] Therefore any party may apply to give evidence by one of the alternative means above. However, there is no *right* to give evidence by an alternative means, and people giving evidence before the LCDT may not be aware they can apply to give their evidence in alternative ways.

The Working Group proposes the following options for amendment to the legislation:

- in sexual cases the hearing is automatically closed to the public when a complainant gives evidence. For other cases, the parties may apply for a closed hearing. It is expected counsel for the Standards Committee would consult with a complainant about this; and
- in sexual cases the complainant has the right to give evidence by alternative means. For other cases, the parties may apply to the LCDT for an order that the complainant give evidence by alternative means.

The nature of proceedings before the LCDT may mean that respondents are more likely to represent themselves. By virtue of application of the Evidence Act 2006 to Tribunal proceedings,[236] the Tribunal may, on application or its own initiative, order that a party not personally cross-examine a witness.[237] By comparison, in a sexual case or criminal or civil proceedings concerning domestic violence or harassment, the defendant is prohibited from personally cross-examining the complainant.[238] The Working Group recommends the LCA be amended to provide that a respondent is prohibited from personally cross-examining a complainant in cases involving sexual violence, harassment, bullying or discrimination.

Nature of Tribunal inquiry

The LCDT operates under an adversarial model. Adversarial models of criminal justice are commonly criticised for promoting aggressive behaviour that may cause harm to witnesses and not necessarily correspond to achieving justice. In 2015 the New Zealand Law Commission considered inquisitorial systems in the context of reform of the justice response to sexual violence. The question of an inquisitorial system has been aired again in the context of Frances Joychild QC's inquiry in the New Zealand Defence Force's response to sexual offending.[239]

The Working Group considers that thought should also be given to whether incorporating distinct features of an inquisitorial justice system would improve the LCDT's approach to sexual cases. This may include the LCDT directing further lines of investigation for the parties, deciding which witnesses should be called, and conducting most of the questioning at the hearing.[240]

Evidence in sexual cases

In criminal proceedings relating to sexual offending, what evidence is able to be called about a complainant's sexual experience is limited by the Evidence Act 2006.[241] A question relating to the complainant's sexual experience with any person other than the defendant can only be asked with permission of the judge and only after a high statutory threshold has been met. No evidence can be given about the reputation of the complainant in sexual matters.

The Working Group recommends an equivalent provision be included in the LCA, or that the LCA provide that the relevant section of the Evidence Act applies as if the proceeding before the LCDT were a criminal proceeding.[242]

Support people

By virtue of the application of the Evidence Act 2006 to Tribunal proceedings,[243] any witness may, with permission of the Tribunal, have one or more support persons near them when giving evidence.[244] However, there is no presumptive right to do so, and, as with alternative means of giving evidence, a witness may not be aware they can ask for this.

The Working Group considers the legislation should be amended to provide explicitly that complainants and respondents are *entitled* to have support people present throughout Tribunal hearings. Any limitations on the number of or particular support people should be left in the control of the Tribunal in the circumstances of the particular case. Particular regard should be had to the cultural needs of the people involved.

Use of findings made in other proceedings as evidence

A complaint about unacceptable behaviour may of course be able to be brought in different venues: for example, a complaint of discrimination could be brought in the LCDT, the Human Rights Review Tribunal, or the Employment Relations Authority. This means witnesses may be required to give evidence more than once in more than one forum. It also increases the risk of secondary victimisation, and everyone involved is placed under periods of prolonged stress. Questions of resourcing and the efficient administration of justice also arise.

Currently, the courts have held that the LCDT can consider findings made in other courts or tribunals.[245] The weight to be given to the finding of another body is a matter for the LCDT. This can be contrasted with section 50 of the Evidence Act 2006, which provides that evidence of a judgment or a finding of fact by a tribunal is not admissible in any proceeding to prove the existence of a fact that was in issue in the matter before the tribunal. However, the LCA says that the LCDT may consider any evidence

that may help it deal effectively with the matters before it, no matter whether that evidence would be admissible in a court of law.[246]

The Working Group recommends making the exemption from section 50 of the Evidence Act clear and providing for a presumption that a finding that the relevant conduct occurred by another Tribunal can be conclusive proof in the LCDT that the conduct occurred.[247] A forum (such as the Human Rights Review Tribunal or Employment Relations Authority) may have already made a finding of discrimination or harassment. In these instances, the LCDT should be able to rely on those findings as conclusive proof of misconduct without the complainant and witnesses being required to give evidence again. This rule should also apply to findings made by the LCDT if those findings are relevant to a proceeding before the Employment Relations Authority or Human Rights Review Tribunal.[248] An exception to this rule should be available if the respondent can satisfy the LCDT it is required.[249]

Increasing penalties and orders available to the Tribunal and how to approach compensation

If the LCDT finds a charge proved it can make the following orders:

- the practitioner's name be struck off the Roll
- the practitioner be suspended from practice for a period not exceeding three years
- the practitioner be prohibited from practising on their own account
- compensation not exceeding $25,000
- a penalty not exceeding $30,000
- censure or reprimand
- apology
- the practitioner undergo practical training or education.

Interim orders

Interim suspension can be ordered under the LCA if a charge is filed in the Tribunal.[250] There is currently no scope for interim conditions to be placed on practice, such as interim conditions that a practitioner does not undertake a certain type of work, or be involved in management of staff, until the charge is determined. Other professions, such as health practitioners, allow the imposition of suspension or conditions or restrictions on practice at various stages: health or competence assessment,[251] when an investigation into conduct is underway,[252] and when a charge is filed in the Tribunal.[253]

The Working Group proposes that amendments to the LCA are made so that interim suspension can be ordered at health or competence assessment stages *[see: "Helping lawyers with health and competence issues" on page 72]*, pending investigation, and when a charge is filed in the Tribunal. At each stage, there should also be the power to impose interim conditions on practice.

Automatic consequences for certain criminal conduct

The Working Group received feedback suggesting that instant strike-off should result for certain serious criminal convictions. The Working Group has considered this proposal, but acknowledges that criminal

convictions are likely to be fast-tracked through the disciplinary process. Further, a serious criminal conviction is likely to attract interim suspension. The protections of interim suspension would be increased if it could be imposed at the investigation stage (as proposed above).

The Working Group considers these protections will be sufficient, and is cautious about restricting the ability of the Tribunal to impose the penalty it considers appropriate in all the circumstances. However, this is an area that may require further consideration in the course of framing amendments to the LCA.

Educative orders

It appears that educative or training orders are relatively rare. The Working Group considers that greater use could be made of these types of orders. This also applies at the Standards Committee level.

Orders, financial penalties and compensation

As indicated earlier in this report, real deterrents are a key ingredient in any effective regulatory regime. There are a number of levers within the LCDT process that can be used and enhanced to deter unacceptable conduct by lawyers.

Strike-off and suspension are the most severe penalties, depriving a person of their status as a lawyer and their ability to earn income in their chosen profession. The Working Group recommends that, as a priority, the Ministry of Justice review the historical approach taken by the LCDT in this area and that research is undertaken into how sexual violence, harassment, bullying and discrimination can be addressed most effectively through these types of orders. Legislative amendment providing guidance on the circumstances where a deterrent penalty might be required could be the outcome of this process, although it would be rare for such guidance to be provided in statute rather than being developed by a profession's disciplinary tribunal.

Financial penalties can also have a deterrent effect and should be carefully considered. If the regulation of legal workplaces as 'entities' is adopted, then the penalties and compensation orders available to the LCDT (and possibly Standards Committees) will need to increase. A maximum fine of $30,000 will be inadequate to mark a serious breach by a large law firm. This issue is recognised in penalties in similar regulatory contexts. For example, under the Health and Safety at Work Act 2015 the maximum penalty for the most serious charge is $3,000,000 for a PCBU and five years' imprisonment or $600,000 for an officer of the PCBU,[254] or for a less serious charge $1,500,000 and $300,000 respectively.[255]

The Working Group suggests considering whether penalties and compensation available should be equivalent to those available in the Employment Relations Authority and Human Rights Review Tribunal. In the Employment Relations Authority, compensation can be awarded for humiliation, loss of dignity and injury to feelings.[256] In the Authority there are no limits on awards for loss of dignity. The Authority can order a penalty of a $100,000 or more for a company. The Human Rights Review Tribunal can order up to $350,000 in compensation.[257]

The Working Group observes that the penalties for individuals should also increase in line with other jurisdictions in the event a collective and individual responsibility model is adopted *[see: "Closer regulation of workplace obligations from page 48 onwards]*.

The LCDT currently takes the view that its function in ensuring fair, efficient and quick conduct of disciplinary proceedings makes it an inappropriate forum to deal with complex issues of causation and loss that could be pursued in other fora. If that approach is taken to allegations of sexual violence, harassment, bullying and discrimination, the person affected will be forced to go through the stress, cost and delay of another hearing to be properly compensated. This is clearly undesirable. However, if it is considered that assessment of full compensation is better left to the Employment Relations Authority or Human Rights Review Tribunal, reliance on a liability finding as conclusive proof of the misconduct (as suggested above) may ensure that the affected person will not be required to give evidence twice in relation to the same misconduct. Any hearing before the Human Rights Review Tribunal and Employment Relations Act could then be solely focused on the issue of compensation.

People view the LCDT as too adversarial and formal, and not providing sufficient safeguards for complainants, particularly in complaints of sexual violence, harassment, bullying, or discrimination. The Working Group has therefore examined reforming the processes of the LCDT. This reform is for the Ministry of Justice to consider.

The Working Group has considered:

- the make-up of the LCDT;
- opportunities for case management at early stages;
- confidentiality and suppression;
- procedures for giving evidence;
- penalties and orders.

Proposals for reforming the Lawyers and Conveyancers Disciplinary Tribunal

- Reduce the number of LCDT members required for a hearing to three members.
- Provide in legislation the desirability of diversity in LCDT members.
- Provide for greater case management at an early stage.
- Create specific rights and abilities in legislation for witnesses to give evidence by alternative means and in closed court.
- Consider the benefits of introducing inquisitorial features into the LCDT processes.
- Provide in legislation for the ability to have support people present.
- Give special protections from questions about sexual experience and reputation to complainants in cases of a sexual nature.
- Prohibit the respondent personally cross-examining the complainant in a case of sexual violence, sexual harassment, bullying or discrimination.
- Increase the use of educative orders in the LCDT by clarifying the penalties the LCDT may order.
- Increase the penalties and compensation the Tribunal may order.

Mandatory training can transform culture and standards in the workplace

The inefficacy of traditional sexual harassment training and over-reliance on paper-based compliance policies is now recognised.[258] Yet meaningful educational programming may play an important role in transforming negative work environments.[259]

Regulation offers three opportunities to expose the legal profession to effective educational programmes. The first is through CPD requirements; the second is when lawyers are preparing to practise on their own account; and the third is training members of Standards Committees.

Research into the components of an effective educational programme is beyond the scope of this paper. The Task Force established by NZLS may be well placed to lead this issue. The Working Group observes that minimum requirements are needed if any programme is to make inroads into changing a negative culture. Such requirements include mechanisms such as anonymous employee climate surveys, an ongoing commitment to research effective strategies for education, and a diverse and varied education (including "by-stander" training).[260]

Providing more opportunities to undertake continuing professional development

The CPD requirements apply to all lawyers. The Rules require a lawyer to be responsible for developing and implementing their CPD plan. This includes undertaking, recording, documenting and reflecting on a minimum of 10 hours of CPD activities each CPD year.[261]

The CPD that lawyers must undertake has no prescriptive content. The Working Group recommends a change to the CPD requirements to include a compulsory component devoted to anti-bullying, discrimination and harassment, and to include related training (such as diversity and inclusion-related education). This requirement could be satisfied by the compulsory workplace training required if the approach to closer regulation of legal workplaces is adopted. NZLS may require expert advice about

structuring an appropriate component to ensure it is effective and the risk of "training fatigue" or cynicism amongst participants is avoided. This may be an area in which the Task Force can assist.

NZLS, through its New Zealand Continuing Legal Education (**NZCLE**) arm, should provide opportunities for legal workplaces and individual lawyers to engage in ongoing training to improve culture in the workplace.

Extending the Stepping Up course to better prepare lawyers to practise on their own account

All lawyers wishing to practise on their own account, whether alone or in partnership or in an incorporated practice, as well as in-house counsel, must complete the Stepping Up course. To complete the course, a lawyer must do approximately 50 hours of self-directed distance learning and workshop preparation. Then they must attend a workshop lasting two and a half days.

The *Stepping Up* course covers a range of topics focused on preparing a lawyer to practise unsupervised and operate a business. Applicants must complete the NZCLE courses on *Unconscious Bias* and *Preventing and dealing with harassment and bullying*.

Lawyers entering practice on their own account will be operating a workplace and may be responsible for employees while operating their practice. Lawyers must have the awareness and skills to provide a safe environment for staff and clients. The *Stepping Up* course provides a vital opportunity to impart those skills at the gateway to practising on their own account.

The Working Group's view is that management training and the knowledge and expertise to prevent and appropriately address unacceptable behaviour in the workplace are fundamental skills for any lawyer starting their own practice. For this reason, significant resources (including time) must be committed to help lawyers obtain these key fundamental skills. At least an entire module of the *Stepping Up* course should be devoted to training in these skills.

Training the members of standards committees

Training is provided to Committee members in relation to professional and ethical rules. Currently, Committee members receive no specific formal training or support in relation to complaints about unacceptable conduct in the workplace. NZLS has recently established a Standards Committee to deal with these types of conduct complaints. All LCS staff and Committee members must receive relevant training so they can deal with concerns about unacceptable conduct in the workplace appropriately. Training should also be extended to other decision makers (within the LCA complaints and disciplinary framework) who will deal with these complaints. Such decisions makers include the LCRO and LCDT members.

Extending values and ethics training for people entering the legal profession

The legal profession has a keen interest in attracting and retaining the brightest talent. Talent is not limited to academic ability or achievement. The brightest talent are those people who exemplify and

value the virtues traditionally associated with the legal profession: independent thinking, fairness and, above all, integrity. Ingraining those values at an early stage will place the future legal profession in good stead to provide a safe and inclusive environment for everyone who chooses a career focused on the law.

Although outside the current scope of LCA regulation, the Working Group urges University Law Schools and providers of the Professionals course to consider extending their current ethics education programmes to include comprehensive training on harassment, bullying and discrimination issues.

Effective education can be an important mechanism in preventing and reporting sexual violence, harassment, bullying, discrimination and other types of unacceptable behaviour. The regulatory framework provides opportunities to integrate education in to every lawyer's professional life.

Proposals for mandatory training

- Make changes to the CPD rules for lawyers requiring a mandatory component of CPD to include training related to safe workplace culture, diversity and equality.
- Deepen the offering of the Stepping Up course and require lawyers to complete an entire module on workplace management, culture, equality and diversity.
- Put in place formal training and support for all Committee members (and LCS staff) to deal with specialised conduct issues, including established principles of victim support, unconscious bias, and issues related to normalisation/rationalisation rooted in personal experience.
- Extend training to LCRO and LCDT members as decision makers who will deal with complaints about unacceptable behaviour.

The Working Group recommends that the NZLS Task Force consider including research into effective educational programmes in its work, with a view to disseminating guidance to the legal profession about this.

An effective monitoring programme creates a measurable pathway for the future

For change to be meaningful it must be enduring. The Working Group wishes to ensure that the recommendations made are implemented effectively and that positive changes within the culture of the legal profession continue to develop for the future.

Complacency must not erode the progress already made in addressing sexual violence, harassment, bullying and discrimination. Nor should complacency undermine the required culture shift in the legal profession.

An effective monitoring programme will guard against complacency. Such a programme would monitor and assess how NZLS implements the specific recommendations adopted from this report.[262] The Working Group could provide a limited monitoring function during the initial implementation stage, and then transfer responsibility to another entity on an ongoing basis.

Broader oversight of regulation of the legal profession in this area may also be a valuable tool for change.

Following stories in the media about sexual violence, harassment, bullying and discrimination, some people no longer trust NZLS to effectively address these issues. A limited independent oversight of the LCS process is also a way to regain confidence in the complaints process. Such oversight may include greater and more in-depth reporting to the Minister of Justice to include information about:

- the implementation of recommendations in this report;
- further initiatives focused on unacceptable behaviour in law firms;
- the number and type of complaints received that relate to unacceptable behaviour by lawyers in their workplace.

Further limited oversight might also include the Ministry of Justice or other body outside NZLS to periodically review current processes, including the make-up of Committees and the results of confidential surveys of people involved in the complaints process.

An effective monitoring mechanism is also a way to ensure that the regulatory framework continues to adapt to the changing environment and new developments focused on unacceptable conduct.

Proposals for implementing the recommendations and monitoring progress

- Approval of an ongoing monitoring programme by the Working Group.
- Monitor the implementation of recommendations adopted from this report for two years.
- Have a suitably qualified body continue to implement and monitor the recommendations in this report and regulatory initiatives in this area once the initial implementation phase is completed.
- NZLS should report each year to the Minister of Justice about the implementation and ongoing work in this area, including a report from any body tasked with monitoring.

Conclusion

This report comes at a defining moment in the culture of the New Zealand legal profession. Unacceptable behaviour by lawyers in the form of sexual violence, harassment, discrimination and bullying has remained unchecked.

The first section of this report examined the historical and cultural context of sexual violence, harassment, discrimination and bullying in the legal profession. A key aspect of this has been a lack of confidence in the regulatory framework and complaints process to effectively deal with complaints about this behaviour.

A clear call for change has been heard and must be answered. The legal community must be a safe and inclusive place for everyone. An important part of the change required is the existence of a responsive regulatory framework and complaints process. This Working Group has examined how this can be achieved. It has focused on ensuring it is beyond doubt that this behaviour is a regulatory issue, people are able to come forward and are supported in the process and that levers in the regulatory framework are effectively used to prevent and deter all forms of this behaviour. The specific proposals for reform it has identified are:

- providing clearer conduct and reporting standards;
- closer regulation of workplace obligations;
- improving the current Lawyers Complaints Service and Standards Committee processes;
- creation of a specialised process for dealing with complaints of unacceptable behaviour;
- reform of the procedures around confidentiality and suppression;
- reducing delays in the review process;
- changes to the procedures of the New Zealand Lawyers & Conveyancers Disciplinary Tribunal (LCDT);
- imposition of mandatory training;
- a programme for implementation and monitoring regulatory change.

Far-reaching and enduring change is required urgently to address sexual violence, harassment, discrimination and bullying in the legal profession. The Working Group's vision for the future is that the voices of people who are affected by this behaviour will be heard and people will be supported to come forward, if they wish to. People who are involved in the regulatory process must also feel included and supported. The Working Group is hopeful that the proposals in this report provide a valuable contribution to this process.

Appendix 1 – Terms of Reference

New Zealand Law Society Working Group to enable better reporting, prevention, detection, and support in respect of sexual harassment, bullying, discrimination and other inappropriate workplace behaviour within the legal profession

Terms of Reference

Introduction

Background

1. In February 2018 media outlets in Aotearoa New Zealand reported allegations of sexual harassment, bullying, discrimination and other inappropriate workplace behaviour occurring within the legal profession of this country. These allegations related to conduct both recent and historic.

2. Such behaviour is unacceptable in the legal profession.

3. These allegations raise questions about:

3.1 the legal profession's current regulatory framework, and in particular —

(a) whether the regulatory policies, processes and framework enable adequate prevention, detection and reporting of sexual harassment, bullying, discrimination or other inappropriate workplace behaviour within the profession;

(b) whether the regulatory policies, processes and framework provide adequate support for those affected by sexual harassment, bullying, discrimination or other inappropriate workplace behaviour; and

(c) the adequacy of the regulatory policies, processes and framework to enable effective action to be taken where such conduct is alleged.

4. As the main regulator of the legal profession, the New Zealand Law Society acknowledges there is a problem within the profession with respect to sexual harassment, bullying, discrimination and other inappropriate workplace behaviour, and that a fundamental aspect of that problem is under-reporting of such behaviour.

5. The New Zealand Law Society acknowledges its role in working to prevent sexual harassment, bullying, discrimination and other inappropriate behaviour in the legal profession — it has commenced a plan of action that will be undertaken over the coming months.

6. Where sexual harassment, bullying, discrimination or other such inappropriate behaviour occurs in the legal profession it must be dealt with and the New Zealand Law Society is committed to upholding the fundamental obligations imposed on lawyers, and monitoring and enforcing the provisions of the profession's regulatory framework.

7. The New Zealand Law Society has established a working group to consider what improvements can be made to enable better reporting, prevention, detection, and support in respect of sexual harassment, bullying, discrimination and other inappropriate workplace behaviour within the legal profession.

Purpose of this document

8. By this document the New Zealand Law Society establishes the Working Group to enable better reporting, prevention, detection, and support in respect of sexual harassment, bullying, discrimination, and other inappropriate workplace behaviour within the legal profession (the Working Group).

9. The Working Group will operate in accordance with the terms of this document to fulfil its purpose and functions.

Objective of the Working Group

Purpose

10. The Working Group will report to the New Zealand Law Society, but will operate independently.

11. The Working Group aims to inquire into and report on the following matters in relation to the reporting, prevention, and detection of and support in respect of sexual harassment, bullying, discrimination and other inappropriate workplace behaviour:

    11.1 the effectiveness of the legal profession's current regulatory framework;

    11.2 what, if any, improvements should be made to the current regulatory framework;

    11.3 the adequacy of the current policies and processes that support the regulatory framework;

    11.4 the adequacy of the current regulatory framework in respect of continuing professional development requirements.

12. The work done by the Working Group will be complemented by a Task Force that will be established by the New Zealand Law Society which, in conjunction with an external expert, will develop a strategy and action plan to achieve culture and systems change in the legal profession and guide and drive that change to provide safer legal working environments

Functions

13. The Working Group is established to inquire into and report upon:

13.1 The current regulatory framework, including but not limited to—

(a) whether the current disciplinary and complaints framework and processes enable adequate reporting and investigation of sexual harassment, bullying, discrimination and other inappropriate workplace behaviour;

(b) whether the current disciplinary and complaints framework and processes provide adequate support for persons affected by sexual harassment, bullying, discrimination and other inappropriate workplace behaviour; and

(c) whether the current disciplinary and complaints framework and processes enable effective action to be taken in response to sexual harassment, bullying, discrimination and other inappropriate workplace behaviour.

13.2 What changes, if any, are required to the current regulatory framework and processes to enable better reporting, prevention, detection, and support in respect of sexual harassment, bullying, discrimination or other inappropriate workplace behaviour.

13.3 If changes are required, the method of improving the current regulatory framework, including but not limited to—

(a) whether legislative or regulatory change is required; and

(b) whether improvements to the regulatory framework can be guided or informed by the practices or systems of other national and international bodies.

13.4 What changes, if any, are required to improve the way in which the regulatory framework is implemented by the New Zealand Law Society, including but not limited to whether changes to the Lawyers Complaints Service are required.

13.5 What changes, if any, are required to the legal profession's current continuing professional development requirements.

13.6 The impact of any changes to the regulatory framework and processes on the ability of those affected by sexual harassment, bullying, discrimination or other inappropriate workplace behaviour to seek or obtain other forms of redress.

13.7 Any other matter that may be thought by the Working Group to be relevant to the general or particular objects of the inquiry.

and to make any recommendations it considers appropriate.

14. The Working Group is not established to inquire into or investigate specific incidents of alleged misconduct.

Accountability and relationships

15. The Working Group is accountable to the New Zealand Law Society for the quality and timeliness of its advice and reports.

16. The Working Group's task will be conducted from May 2018 and the preliminary outcomes reported to the Board of the New Zealand Law Society at its meeting in October 2018.

Conduct of business

Working Group's intent and values

17. In carrying out its responsibilities, the Working Group will at all times act honestly, fairly, diligently, and in accordance with the law. Members will undertake their duties with care and diligence at all times, giving proper time and attention to matters before them.

18. All Working Group members will participate fully and constructively in Working Group discussions, contributing the benefit of their particular knowledge, skills and abilities to discussions.

Conduct of business

19. The Working Group will meet at such times and operate in such way as determined by the Working Group.

20. The Working Group will:

    20.1 Provide free and frank advice to the New Zealand Law Society;

    20.2 Provide advice that takes into account the sensitive nature of the issues under analysis; and

    20.3 Create and maintain full records of all information received, and shall ensure the confidentiality of that information is maintained where required or otherwise appropriate.

21. The New Zealand Law Society will support the Working Group by providing such information, assistance and advice requested by the Working Group in order to fulfil its functions in a timely manner.

22. The Working Group may otherwise regulate its own procedures.

Membership

23. The Working Group comprises 5 members, including the Chair.

24. The Chair of the Working Group is Dame Silvia Cartwright. In the event the Chair cannot attend, Joy Liddicoat, barrister and solicitor will chair the meeting.

25. The New Zealand Law Society appoints 4 other members:

    25.1 Professor Elisabeth McDonald, University of Canterbury;

    25.2 Jane Drumm, General Manager of Shine;

    25.3 Joy Liddicoat, barrister and solicitor; and

    25.4 Philip Hamlin, barrister.

26. The members of the Working Group are appointed by the New Zealand Law Society and will be appointed for the duration of the period required to fulfil their functions above, with the option to extend for such further periods as required.

27. Any member of the Working Group may tender their resignation from the Working Group at any time by way of letter addressed to the Chair.

28. Members of the Working Group are not employees of the Working Group, the New Zealand Law Society, or the Crown.

Roles and responsibilities of Working Group

Role of Working Group Chair

29. The Chair of the Working Group's responsibilities include:

    29.1 Leadership of the Working Group;

    29.2 Ensuring the efficient organisation and conduct of the Working Group;

    29.3 Setting the agenda for each meeting, with input from other members of the Working Group;

    29.4 Chairing Working Group meetings;

    29.5 Ensuring all Working Group members are briefed on material matters arising at or between Working Group meetings;

    29.6 Promoting an environment of trust, respect and openness to ensure consultative and constructive relationships between Working Group members and between the Working Group and the New Zealand Law Society;

    29.7 Ensuring the Working Group functions in accordance with its purpose and mandate.

General responsibilities of Working Group members

30. Working Group members have a responsibility to exercise independent judgement, courage, and respect.

Review

31. These Terms of Reference may be amended by the New Zealand Law Society and by the Working Group in consultation with the New Zealand Law Society.

Members' interests and conflicts

32. Prior to appointment, members of the Working Group are expected to identify and disclose any conflicts of interest, and any other relevant matters.

33. If any conflict of interest or other relevant matters arise during the tenure of a member of the Working Group it will be disclosed to the Chair in order for a decision to be made about that member's continued membership of the Working Group.

Disclosure of information

34. All members of the Working Group will be required to sign an individual Confidentiality Agreement. This will enable the disclosure of confidential information gathered by the New Zealand Law Society to the members of the Working Group for the purpose of enabling the Working Group to fulfil its functions.

35. The discussions of the Working Group are confidential to its members.

36. Where specific instances of sexual harassment, bullying, discrimination or other inappropriate workplace behaviour are reported on by the Working Group, the Working Group must not use individual names of persons directly involved, unless such information is publicly available or the individual expressly consents to such use.

37. Where any information about individual instances of sexual harassment, bullying, discrimination or other inappropriate workplace behaviour is directly received by the Working Group, the ordinary procedures of the New Zealand Law Society upon receiving confidential reports shall apply, and no inquiry will be instigated by the New Zealand Law Society without consultation with the complainant.

38. All information disclosed to the Working Group is New Zealand Law Society information.

Appendix 2 – Regulatory landscape

To identify options for change, it is important to understand what underpins the current framework for lawyers. A comparative analysis is also useful to understand what has worked well in other contexts, and what has not. A brief overview of the regulatory framework in relation to complaints and discipline is included in this appendix.

Overview of current regulatory framework

Lawyers in New Zealand are regulated under the Lawyers and Conveyancers Act 2006 (LCA). The Act came into force in 2008 and has a strong consumer protection focus.[263] A lawyer is the holder of a current practising certificate issued by the New Zealand Law Society (NZLS).[264]

The Hon. Phil Goff described the change to the regulation of lawyers at the time:

> *The new occupational framework for lawyers and conveyancers combines the benefit of industry self-regulation, flexibility, innovation and industry buy-in with sufficient regulatory oversight to maintain consumer confidence.*[265]

The legal profession is often characterised as 'self-regulating' through the NZLS.[266] Yet this situation incorporates elements of co-regulation through the supervision of the Minister of Justice. Also, the two highest tiers of the disciplinary framework are separate entities independent from NZLS and overseen by the Ministry of Justice.

Te Kōti Matua O Aotearoa, the High Court of New Zealand, retains an inherent supervisory jurisdiction over lawyers.[267]

Lawyers are subject to the regulatory provisions of the LCA and must also comply with professional and ethical obligations. These obligations are codified in the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 ('Rules').[268] They include:

- to uphold the rule of law and facilitate the administration of justice
- to be independent in providing regulated services to clients

- to act in line with all fiduciary duties and duties of care that lawyers owe to their clients
- to protect, subject to overriding duties to the Court or any other enactment, the interests of clients.

The Rules "set the minimum standards that lawyers must observe and are a reference point for discipline".[269]

The regulatory framework has a very strong consumer emphasis. Obligations are primarily linked to the 'lawyer client' relationship.

Overview of current complaints processes

Lawyers who do not adhere to their obligations are subject to the disciplinary and complaints regime established under the LCA.

For a lawyer to be subject to discipline they must have engaged in 'unsatisfactory conduct' or 'misconduct'. The definitions of these terms (as noted in the LCA) are set out below.

Misconduct (s 7(1)) Conduct occurring at a time when the lawyer or incorporated law firm is providing regulated services that:

(a) would reasonably be regarded by lawyers of good standing as **disgraceful or dishonourable**; or
(b) consists of a **wilful or reckless contravention of any provision of the LCA or practice rules** apply to the lawyer or incorporated law firm or of any other Act relating to the provision of regulated services; or
(c) consists of a wilful or reckless failure on the part of the lawyer, or in the case of an incorporated law firm, on the part of a lawyer who is actively involved in the provision by the incorporated law firm of regulated services, to **comply a condition or restriction placed on their practising certificate**; or
(d) consists of the charging of **grossly excessive costs** for legal work carried out by the lawyer or incorporated law firm.

Misconduct (s 7(2)) Knowingly **employing or permitting to act as a clerk** or otherwise a person who, to the knowledge of the lawyer or incorporated law firm:

(a) is suspended from practice; or
(b) has been struck off; or
(c) has had his or her registration as a conveyancing practitioner cancelled; or
(d) is disqualified from employment in connection with a practitioner's or incorporated firm's practice.

Misconduct (s 7(3)) **Sharing, with any person other than another lawyer or incorporated law firm, the income from any business** involving the provision of regulated services to the public.

Unsatisfactory conduct (s 12(a))	Conduct that occurs at a time when the lawyer or incorporated law firm is providing regulated services and falls short of the standard of **competence and diligence** that a member of the public is entitled to expect of a reasonably competent lawyer.
Unsatisfactory conduct (s 12(b))	Conduct that occurs at a time when the lawyer or incorporated law firm is providing regulated services and would be regarded by lawyers of good standing as being unacceptable, including– **(a) conduct unbecoming** a lawyer or an incorporated law firm; or **(b) unprofessional conduct**.
Unsatisfactory conduct (s 12(c))	Conduct consisting of a **contravention of the LCA or of any regulations or practice rules** made under the Act that apply to the lawyer or incorporated law firm or of any other Act relating to the provision of regulated services (that doesn't amount to misconduct).
Unsatisfactory conduct (s 12(d))	Conduct consisting of a failure on the part of the lawyer, or in the case of an incorporated law firm, on the part of a lawyer who is actively involved in the provision by the incorporated law firm of regulated services, to **comply with a condition or restriction on their practising certificate** (not being a failure that amounts to misconduct).

The regime has several tiers. The first layer is operated by NZLS through the Lawyers Complaints Services (LCS) and Standards Committees. Legislation prescribes the operation and powers of the Committees and LCS. Currently, 23 operational Committees are comprised of lawyer volunteers.

The Legal Complaints Review Officer (LCRO) has the power to independently review determinations of a Standards Committee. The Ministry of Justice oversees the LCRO.

The highest tier is the New Zealand Lawyers & Conveyancers Disciplinary Tribunal (LCDT). The Ministry of Justice also oversees the LCDT. Only the LCDT has the power to make a finding of 'misconduct', suspend any lawyer, or strike an individual from the Roll of Barristers and Solicitors (except for the High Court exercising its supervisory jurisdiction).

Lawyers complaints service and standards committees

The LCS is established under s 121 of the LCA (and r 6 of the LCA (Lawyers: Complaints Service and Standards Committees) Regulations (SC Regs). The LCS must deal with complaints in a fair, efficient and effective manner (r 10). The primary focus of the legislation is consumer protection. This focus has informed the design of the process.

The LCS supports the operations of the Standards Committees. These Committees are established to:

- inquire into and investigate complaints against lawyers
- promote in appropriate cases, the resolution of complaints by negotiation, conciliation or mediation

- investigate of their own motion any act, omission, allegation, practice or other matter that appears to indicate that a lawyer may be guilty of misconduct or unsatisfactory conduct
- intervene in the affairs of lawyers, former lawyers or Incorporated law firm
- make final determinations in relation to complaints
- lay and prosecute charges in the LCDT.

The Committee process is the gateway through which every prosecution before the LCDT must proceed.

Standards Committee members are lawyers and lay members (non-lawyer members) appointed by the NZLS Board for a period of three years (with reappointment up to a maximum of nine years).

An operational Standards Committee must have at least two and up to seven lawyer members and at least one but not more than two lay members (r.13). A quorum requires at least one lay member. The local Branch Council must be consulted before the Board appoints the member.

Operation and powers of the Standards Committees

The process and approach adopted by Standards Committees is not designed to effectively address personal or unacceptable conduct issues and has been criticised as rigid in respect of complaints of these type.

The powers and operations of the LCS and Committees are largely prescribed by the technical provisions of the legislation which are briefly summarised below.

When it receives a complaint, the LCS must refer it as soon as practicable to a Standards Committee and notify the lawyer or firm involved, providing both with a copy of the complaint. The Committee's procedures must be in line with the legislative provisions and the rules of natural justice (SC Reg 26).

An Own Motion Investigation by a Committee is possible when concerns are raised about a lawyer's behaviour. Whether that is the appropriate pathway to deal with conduct will depend on a number of things in an individual situation. This includes both the interests of those directly affected by the alleged misconduct and the evidence available to the Committee.

When it receives a complaint, the Standards Committee has three options. It can:

- inquire into the complaint
- direct the parties to explore the possibility of mediation, negotiation or conciliation
- take no further action (s138).

After inquiring into a complaint, a Committee may take no further action at any time. However, to impose any order it must first make a finding of unsatisfactory conduct after a hearing. Hearings are to be on the papers unless otherwise directed (hearings in person are extremely rare). Yet a Committee can require a person to appear before it to explain an aspect of the complaint or matter (s141(b) LCA).

The orders that a Committee can make are set out in s156. These include reprimand and censure, limited compensation, fines, rectification of work, and apology. Section 156 also provides the power to compel a lawyer to make their practice available for inspection and to undergo practical training and education.

The nature of a Standards Committee is investigative and adjudicative. The statutory functions of a Committee currently do not incorporate scope for a pastoral care role or focus on capacity or impairment issues. Nor do they give a Committee the power to place restrictions or conditions on a lawyer's practising certificate.

The current gender breakdown of the Standards Committees is set out below.

Table 1: Gender breakdown of the Standards Committee

		Men		Women	Total
All SC members at 12 April 2018	102	62%	62	38%	164
New appointments 1 July 2015 – 30 June 2016	15	58%	11	42%	27
New appointments 1 July 2016 – 30 June 2017	22	65%	12	35%	34
New appointments 1 July 2017 – 12 April 2018	16	46%	19	54%	35
Total new appointments 1 July 2015 – April 2018	53	56%	42	44%	95

Endnotes

1 See Appendix 1: the Terms of Reference.

2 The Working Group was not established to inquire into or investigate specific incidents of alleged misconduct. Nor was it established to identify ways to improve workplace cultures, except to the extent that the proposed reforms are intended to impact on changing a culture.

3 These principles are inspired by the principles adopted by Universities Australia in its *Guidelines for University Responses to Sexual Assault and Sexual Harassment* (Universities Australia, 20 July 2018) at 4.

4 Law Council of Australia *Australian Solicitors Conduct Rules* (24 August 2015) at [42.1]; Legal Profession Uniform Conduct (Barristers) Rules 2015 (NSW), rule 123.

5 Bar Standards Board *Handbook* (3rd ed, November 2018) at r C69 at <www.barstandardsboard.org.nz>.

6 Law Society of British Columbia "Equity Ombudsperson" < www.lawsociety.bc.ca/support-and-resources-for-lawyers/lawyer-wellness-personal-support/equity-ombudsperson/>; Law Society of Saskatchewan "Equity" <www.lawsociety.sk.ca/for-lawyers-and-students/equity-office/ombudsperson>.

7 Law Society of Ontario "Discrimination and Harassment Counsel" <www.lso.ca/protecting-the-public/information-for-licensees/discrimination-and-harassment-counsel>.

8 Legal Services Regulation Act 2015 (Ireland); Law Society of Ireland "Complaints Procedure" <www.lawsociety.ie/Public/Complaints-against-solicitors/Resolution-Procedure/>.

9 The Bar Council "Ethical Enquiries Service" <https://www.barcouncil.org.uk/supporting-the-bar/ethical-enquiries-service/>.

10 Education Council Rules 2016, r 9.

11 Health Practitioners Competence Assurance Act 2003, s 97; Education Council Rules 2016, r 34; Social Workers Registration Act 2003, s 80.

12 Health Practitioners Competence Assurance Act 2003, s 95; Education Act 1989, s 405; Social Workers Registration Act 2003, s 80.

13 Dame Margaret Bazley *Independent Review of Russell McVeagh: March – June 2018* (5 July 2018) at 25.

14 The issue of whether a report should have been made is the subject of a complaint (see: Dame Margaret Bazley *Independent Review of Russell McVeagh: March – June 2018* (5 July 2018) at 31) and the Working Group does not intend to comment further.

15 Dame Margaret Bazley *Independent Review of Russell McVeagh: March – June 2018* (5 July 2018) at 24, 30-31 and 32.

16 See, for example: Sasha Borissenko "Did the Law Society do Enough?" (16 June 2018) Newsroom < https://www.newsroom.co.nz/2018/06/05/112498/did-the-law-society-do-enough>; and Linda Clark "How the legal profession has excused and minimised the Russell McVeagh Scandal" (27 February 2018) The Spinoff <https://thespinoff.co.nz/society/27-02-2018/how-the-legal-profession-has-excused-and-enabled-the-russell-mcveagh-scandal/>.

17 See for example, *New Zealand Women's Law Journal* (Volume II 2018): Bridget Sinclair 'Speaking for me' [2018] NZWLJ 18; Kate Tarawhiti and Bernadette Arapere 'Me aro koe ki te hā o Hineahuone – Pay heed to the mana and dignity of Māori women' [2018] NZWLJ 22

18 See: Zoe Lawton "#MeToo blog" <https://www.zoelawton.com/metoo-blog.html>.

19 Campbell Gibson "Bell Gully confirms 'incident'" (14 October 2016) National Business Review < https://www.nbr.co.nz/article/bell-gully-confirms-incident-cg-p-195494>.

20 Victoria Young "DLA Piper confirms incident referred to NZ Law Society" (6 April 2018) National Business Review <https://www.nbr.co.nz/article/dla-piper-confirms-incident-referred-nz-law-society-vy-214457>.

21 Anonymous "Sexual Harassment in the NZ Legal Workplace" *LawTalk* (online ed, New Zealand, 30 November 2017).

22 Colmar Brunton *Legal Workplace Environment Survey 2018* (New Zealand Law Society, 28 May 2018).

23 New Zealand Criminal Bar Association "Bullying and Harassment Survey" (March 2018).

24 Dame Margaret Bazley *Independent Review of Russell McVeagh: March – June 2018* (5 July 2018).

25 Analysis in this section of the report was provided to the Working Group by Gill Gatfield, human rights advocate, writer and international artist who is the author of *Without Prejudice: Women in the Law 1896–1996* (Brooker's 1996, Brooker's Heritage Title 2011, Gatfield 2016, Thomson Reuters 2018). See also: Gill Gatfield "Be Just and Fear Not"(2018) 2NZWLJ 43.

26 Gill Gatfield *Without Prejudice: Women in the Law 1896–1996* (Brooker's 1996, Brooker's Heritage Title 2011, Gatfield 2016, Thomson Reuters 2018) at Part I and Chapter 11.

27 *Women in the Profession Full Report* (Wellington District Law Society, 1983): A 1982 survey of all women members of the Wellington District Law Society and an equal number of men lawyers practising in Wellington. There was a 60.5 per cent response rate (women 64.5 per cent; men 57.5 per cent).

28 Gill Gatfield and Alison Gray *Women Lawyers in New Zealand: A Survey of the Legal Profession* (Equity Works, Wellington, 1993). This was a September 1992 postal survey of all women holding practising certificates and a corresponding number of male practitioners, with 53 per cent response rate.

29 Gill Gatfield *Without Prejudice: Women in the Law 1896–1996* (Brooker's 1996, Brooker's Heritage Title 2011, Gatfield 2016, Thomson Reuters 2018) at Part II and Part III.

30 Gill Gatfield *Without Prejudice: Women in the Law 1896–1996* (Brooker's 1996, Brooker's Heritage Title 2011, Gatfield 2016, Thomson Reuters 2018 at 156-157.

31 Natalya King *Raising the Bar: Women in Law and Business* (Thomson Reuters, Wellington, 2014) at 125

32 Natalya King *Raising the Bar: Women in Law and Business* (Thomson Reuters, Wellington, 2014) at 126-127, Figure 7.5.

33 Law Commission *Women's Access to Legal Services* (NZLC SP1, 1999) at 173.

34 Law Commission *Women's Access to Legal Services* (NZLC SP1, 1999) at 174.

35 Rebecca Michalak *Causes and Consequences of Work-Related Psychosocial Risk Exposure: A Comparative Investigation of Organisational Context, Employee Attitudes, Job Performance and Wellbeing in Lawyers and Non-Lawyer Professionals* (PsychSafe Pty Ltd, 2015) at 36–51.

36 See also Geoff Adlam "The 2018 Legal Workplace Environment Survey" *LawTalk* (online ed, New Zealand, 29 June 2018).

37 Rebecca Michalak *Causes and Consequences of Work-Related Psychosocial Risk Exposure: A Comparative Investigation of Organisational Context, Employee Attitudes, Job Performance and Wellbeing in Lawyers and Non-Lawyer Professionals* (PsychSafe Pty Ltd, 2015) at ii.

38 See, for example, The New Zealand Law Society Legal Workplace Environment Survey: Colmar Brunton *Legal Workplace Environment Survey 2018* (New Zealand Law Society, 28 May 2018).

39 Colmar Brunton *Legal Workplace Environment Survey 2018* (New Zealand Law Society, 28 May 2018).

40 See *Daniels v Complaints Committee 2 of Wellington District Law* [2011] 3 NZLR 850 (HC) and *Canterbury Westland Standards Committee v Horsley* [2014] NZLCDT 9.

41 Colmar Brunton *Legal Workplace Environment Survey 2018* (New Zealand Law Society, 28 May 2018). This was an online survey from 5 April 2018 to 1 May 2018 emailed to 13,662 lawyers, with 26 per cent response rate (women 61.3 per cent, men 38.3 per cent, gender diverse 0.4 per cent).

42 New Zealand Law Society "Charge-out rates for employed solicitors, June 2016" (27 July 2016) < https://www.lawsociety.org.nz/practice-resources/the-business-of-law/human-resources-and-remuneration/charge-out-rates-for-employed-solicitors,-june-2016>; New Zealand Law Society "Gender Pay Audits" <https://www.lawsociety.org.nz/law-society-services/women-in-the-legal-profession/gender-pay-audits>.

43 Colmar Brunton *Legal Workplace Environment Survey 2018* (New Zealand Law Society, 28 May 2018) at 24. See also: a study in 2018 found that sexual harassment was included among the main structural barriers holding women back from top leadership positions in business – 80% said that sexual harassment makes it harder for women to succeed: Pew Research Center "Views on the State of Gender and Leadership and Obstacles for Women" (14 September 2018) <http://www.pewsocialtrends.org/2018/09/20/1-views-on-the-state-of-gender-and-leadership-and-obstacles-for-women/pst-09-20-18_gender-leadership-additional-02/>.

44 See further: Gill Gatfield "Be Just and Fear Not" [2018] NZWLJ 42 at 76 and 77.

45 Gill Gatfield *Without Prejudice: Women in the Law 1896–1996* (Brooker's 1996, Heritage Title 2011, Gatfield 2016, Thomson Reuters 2018) at 366. Prior to 1996, there were individual reports of racism and sexual harassment. For example, in 1990 when a Maori woman lawyer complained of racism and sexual harassment, it was 'treated as a joke': at 243.

46 Gill Gatfield and Alison Gray *Women Lawyers in New Zealand: A Survey of the Legal Profession* (Equity Works, Wellington, 1993) at [8.2].

47 Natalya King *Raising the Bar: Women in Law and Business* (Thomson Reuters, Wellington, 2014) at Figure 7.5, and 126-127. The 1992 survey also had nominal difference between women and men's perception of racial discrimination.

48 Ngaroma Tahana "Changing law firm culture – be the change" (paper presented to New Zealand Law Society Women in the Law – Career by Design conference, 11 April 2016).

49 See Caren Fox "Mana wāhine – strategies for survival – Māori perspectives" (October 2015) Māori LR (available < http://maorilawreview.co.nz/2015/10/mana-wahine-strategies-for-survival-maori-perspectives-deputy-chief-judge-caren-fox/>. See also Kate Tarawhiti and Bernadette Arapere "Me aro koe ki te hā o Hineahuone – Pay heed to the mana and dignity of Māori women" (2018) 2 NZWLJ 22.

50 Colmar Brunton *Legal Workplace Environment Survey 2018* (New Zealand Law Society, 28 May 2018) at 39. For most ethnic groups, small sample sizes have precluded detailed sub analysis by ethnicity.

51 Colmar Brunton *Legal Workplace Environment Survey 2018* (New Zealand Law Society, 28 May 2018) at 39.

52 Colmar Brunton *Legal Workplace Environment Survey 2018* (New Zealand Law Society, 28 May 2018) at 39.

53 WorkSafe New Zealand "Definition of bullying" <https://worksafe.govt.nz/topic-and-industry/bullying-prevention-toolbox/>

Workplace bullying is:

- Repeated and unreasonable behaviour directed towards a worker or a group of workers that can lead to physical or psychological harm.
- Repeated behaviour is persistent (occurs more than once) and can involve a range of actions over time.
- Unreasonable behaviour means actions that a reasonable person in the same circumstances would see as unreasonable. It includes victimising, humiliating, intimidating or threatening a person.

Bullying may also include harassment, discrimination or violence.

Workplace bullying is not:

- One-off or occasional instances of forgetfulness, rudeness or tactlessness.
- Setting high performance standards.
- Constructive feedback and legitimate advice or peer review.
- A manager requiring reasonable verbal or written work instructions to be carried out.
- Warning or disciplining workers in line with the business or undertaking's code of conduct.
- A single incident of unreasonable behaviour.
- Reasonable management actions delivered in a reasonable way.
- Differences in opinion or personality clashes that do not escalate into bullying, harassment or violence.

Note: The bullying definition is adapted from Safe Work Australia's definition.

54 The Negative Acts Questionnaire (NAQ; © Einarsen, Raknes, Matthiesen & Hellesøy, 1994; Hoel, 1999) is a research inventory developed for measuring perceived exposure to bullying and victimisation at work see: Bergen Bullying Research Group "NAQ" <https://www.uib.no/en/rg/bbrg/44045/naq>.

55 Colmar Brunton *Legal Workplace Environment Survey 2018* (New Zealand Law Society, 28 May 2018) at 39.

56 Anna Hood and Julia Tolmie *Auckland Law School Gender Report* (Research Report, University of Auckland, 2016) at 6.

57 "The Pacific Lawyers Associations Viewpoint" *LawTalk* (online ed, New Zealand, 31 August 2018).

58 Geoff Adlam "Lawyer ethnicity differs from New Zealand population" *LawTalk* (online ed,3 August 2018).

59 Geoff Adlam "Lawyer ethnicity differs from New Zealand population" *LawTalk* (online ed,3 August 2018).

60 For example, Anna Hood and Julia Tolmie *Auckland Law School Gender Report* (University of Auckland, 2016); Judith Pringle *Women's Career Progression in Auckland Law Firms; Views from the Top, Views from Below* (Gender & Diversity Research Group AUT University, 2014) at 73; Josh Pemberton *First Steps: The Experiences and Retention of New Zealand's Junior Lawyers* (New Zealand Law Foundation, 2016) at 4.

61 For example New Zealand Law Society "Gender Pay Audits" <https://www.lawsociety.org.nz/law-society-services/women-in-the-legal-profession/gender-pay-audits>.

62 In respect of long hours, see Dame Margaret Bazley *Independent Review of Russell McVeagh: March – June 2018* (5 July 2018) at 57 onwards;see also the comments on the effects of hierarchical law firm business models in Judith Pringle *Women's Career Progression in Auckland Law Firms; Views from the Top, Views from Below* (Gender & Diversity Research Group AUT University, 2014).

63 Laissez-faire leadership, for example, was found to have a greater negative impact on lawyers' wellbeing: Rebecca Michalak *Causes and Consequences of Work-Related Psychosocial Risk Exposure: A Comparative Investigation of Organisational Context, Employee Attitudes, Job Performance and Wellbeing in Lawyers and Non-Lawyer Professionals* (PsychSafe Pty Ltd, 2015) at 36. Further research is needed to quantify impact of different leadership models on the occurrence of negative workplace behaviours, such as sexual and racial harassment.

64 "Precarious work arrangements" can heighten the risk of sexual harassment through the separate spheres of work and leisure being blurred: Elizabeth Thomas *Treating the Rot at the Root of Sexual Harassment in the Legal Profession: Why Sexual Harassment Occurs and Possible Solutions* (LLB(Hons) Dissertation, University of Auckland, 2018) at 23-24.

65 For example, top-down, consultative or collaborative.

66 Adversarial processes are often referred to by New Zealand lawyers as a barrier to raising and addressing complaints.

67 Luke Kirkness ''Jelly wrestling and naked drinking games' claimed at University of Otago law school camp' (4 March 2018) New Zealand Herald<https://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=12005929>; NZME "Claims of naked, drunken hijinks at Auckland University law camp"(6 March 2018) Otago Daily Times <https://www.odt.co.nz/news/national/claims-naked-drunken-hijinks-auckland-university-law-camp>.

68 Dame Margaret Bazley *Independent Review of Russell McVeagh: March – June 2018* (5 July 2018) at 3, 21 and 74.

69 See, for example, Dame Margaret Bazley *Independent Review of Russell McVeagh: March – June 2018* (5 July 2018) at29–30.

70 Colmar Brunton *Legal Workplace Environment Survey 2018* (New Zealand Law Society, 28 May 2018) at 18.

71 Colmar Brunton *Legal Workplace Environment Survey 2018* (New Zealand Law Society, 28 May 2018) at 25.

72 See the WorkSafe New Zealand definition of "bullying", above n [ ].

73 Geoff Adlam "The 2018 Legal Workplace Environment Survey" *LawTalk* (online ed, New Zealand, 29 June 2018).

74 NZLS *Legal Workplace Environment Survey – Findings Suggest Specific Groups are More Vulnerable* Sept. 2018 p3.(internal document prepared for NZLS).

75 Colmar Brunton *Legal Workplace Environment Survey 2018* (New Zealand Law Society, 28 May 2018) at 26.

76 Colmar Brunton *Legal Workplace Environment Survey 2018* (New Zealand Law Society, 28 May 2018) at 25. There is no gender breakdown of the data on harassment by manager, supervisor, partner or director in the 2018 NZLS Survey.

77 Colmar Brunton *Legal Workplace Environment Survey 2018* (New Zealand Law Society, 28 May 2018) at 26.

78 Summarised in Gill Gatfield and Alison Gray *Women Lawyers in New Zealand: A Survey of the Legal Profession* (Equity Works, Wellington, 1993) at 35.

79 Gill Gatfield and Alison Gray *Women Lawyers in New Zealand: A Survey of the Legal Profession* (Equity Works, Wellington, 1993) at Table 30.

80 Colmar Brunton *Legal Workplace Environment Survey 2018* (New Zealand Law Society, 28 May 2018) at 40.

81 See, for example, Zoë Lawton "#MeToo blog" <https://www.zoelawton.com/metoo-blog.html>.

82 New Zealand Criminal Bar Association "Bullying and Harassment Survey" (March 2018).

83 See Josh Pemberton *First Steps: the Experiences and Retention of New Zealand's Junior Lawyers* (New Zealand Law Foundation, 2016) at 16.

84 See, for example, Sasha Borissenko "Did the Law Society do Enough?" (16 June 2018) Newsroom < https://www.newsroom.co.nz/2018/06/05/112498/did-the-law-society-do-enough>;

85 Ibid.

86 Colmar Brunton *Legal Workplace Environment Survey 2018* (New Zealand Law Society, 28 May 2018) at 29. There is no gender breakdown of this data in the 2018 NZLS survey

87 "A lawyer must at all times treat a client with respect and courtesy and must not act in a discriminatory manner in controvention of s 21 of the Human Rights Act 1993." (r 3.1)

88 For example, rr 2, 10, 10.1, 11, 11.3 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008

89 Rules 42 and 123 of the Australian Solicitors Conduct Rules and Legal Profession Uniform Conduct (Barristers') Rules.

90 These terms would be defined in the Rules with reference to the Human Rights Act 1993, Employment Relations Act 2000 and WorkSafe New Zealand *Preventing and responding to bullying at work-for persons conducting a business or undertaking: (PCBU) Guidelines* (March 2017).

91 Lawyers and Conveyancers Act 2006, ss 7 and 12.

92 "Regulated services" are defined in s 6 of the Lawyers and Conveyancers Act 2006.

93 Lawyers and Conveyancers Act 2006, s 12(1)(b).

94 Committees have applied the reasoning in the High Court in the decision of *Orlov v New Zealand Lawyers and Conveyancers Disciplinary Tribunal* [2014] NZHC 1987, [2015] 2 NZLR 606 at [111]-[112]. That case held that the meaning of 'regulated services' should be interpreted broadly to include conduct connected with providing regulated services. While this reasoning was in the context of "misconduct" under s7 of the Act, the wording of s 7(1)(a) of the LCA is expressed in similar terms to s 12(a) and 12(b).

95 *EA v ABO (Ms VY)* [2011] LCRO 237/2010.

96 Lawyers and Conveyancers Act 2006, s 7(b)(ii); *Orlov v New Zealand Lawyers and Conveyancers Disciplinary Tribunal* [2014] NZHC 1987, [2015] 2 NZLR 606 at [9].

97 New Zealand Police *Code of Conduct* (May 2015) at 3; Social Workers Registration Board *Code of Conduct* (14 March 2016) at Principle 9; Nursing Council of New Zealand *Code of Conduct* (June 2012) at Principle 8; State Services Commission *Standards of Integrity and Conduct* (June 2007).

98 Colmar Brunton *Legal Workplace Environment Survey 2018* (New Zealand Law Society, 28 May 2018) at 17.

99 *Legal Workplace Environment Survey – Summary of Findings Relating to Māori Lawyers* (NZLS 2018).

100 See r 2.8 and r 2.9 of the Lawyers and Conveyancers (Lawyers: Conduct and Client Care) Rules 2008, lawyers 'may' report suspected 'unsatisfactory conduct'.

101 See: Lawyers and Conveyancers (Lawyers: Conduct and Client Care) Rules 2009, r 2.8.

102 *Attorney U v Mississippi Bar* (1999) 678 So 2d 963 at 976 cited in GE Dal Pont *Lawyers' Professional Responsibility* (5th ed, Thomson Reuters, New South Wales, 2013) at 774.

103 Colmar Brunton *Legal Workplace Environment Survey 2018* (New Zealand Law Society, 28 May 2018) at 29. There is no gender breakdown of this data in the 2018 NZLS survey.

104 Anna Hood and Julia Tolmie *Auckland Law School Gender Report* (Research REport, University of Auckland, 2016) at 47.

105 For example, the process may fail to appropriately respond to whakamā as experienced by someone who has been affected by sexual violence, harassment, bullying or discrimination.

106 Under-reporting continues, as evidenced in the 2018 NZLS survey. Of lawyers who had been sexually harassed at any time in their career under the behavioural definition, only seven per cent had formally reported or made a complaint. The number increased under the Human Rights Commission definition to 12 per cent. Of those who did report 68 per cent reported it to their manager, supervisor, partner or director at work, with around half that number reporting it to a human resources manager at work and eight per cent to a co-worker. Five per cent reported it to an outside lawyer or legal advice service, five per cent to the New Zealand Law Society and four per cent to the Police: Colmar Brunton *Legal Workplace Environment Survey 2018* (New Zealand Law Society, 28 May 2018) at 28. See, for example, Farah Hancock, Melanie Reid, Sasha Borissenko 'Why wasn't the Law Society told?" (24 February 2018) Newsroom <https://www.newsroom.co.nz/2018/02/21/90108/why-wasnt-the-law-society-told>.

107 See GE Dal Pont *Lawyers' Professional Responsibility* (5th ed, Thomson Reuters, New South Wales, 2013) at 775.

108 For example, NZLS's LawCare phone line or through the Special Complaints unit proposed in this report *[see: "Complaints about behaviour need specliased processes on page 75]*.

109 Bar Standards Board *Bar Standards Board Handbook* (November 2018) at r C68.4.

110 Fear of consequences is the most common reason for not reporting harassment or seeking support, affecting 65% of those who personally experienced harassment and took no action. Nearly half of those expressing fear are concerned about the impact reporting the issue would have on their career, and 38% are concerned that reporting would make the situation worse. Fifteen percent were too scared, frightened or worried and 10% said the person they would normally report the issue to was the perpetrator. Whilst Māori lawyers' overall reasons for not seeking support or making a complaint tend to mirror those given by other lawyers, Māori lawyers were almost twice as likely to have been too scared, frightened or worried (*Legal Workplace Environment Survey – Summary of Findings Relating to Māori Lawyers* (NZLS 2018)).

111 See *EA v FC* (2013) LCRO 91/2011, which was a complaint against a lawyer who made a confidential report. The LCRO said "There is a sound policy reason for not subjecting a lawyer to disciplinary proceedings for having sent a Confidential Report to the NZLS pursuant to Rule 2.8, 2.9 or 2.11, regardless of the outcome. To do otherwise would very likely discourage lawyers from complying with the duty to report, and obstruct the main objectives of the Act, which is to protect consumers of legal services and to regulate the professional conduct of lawyers".

112 See: http://www.maorilawsociety.co.nz/nga-hoa-aroha-panel/

113 New Zealand Law Society "Make a confidential report" <https://www.lawsociety.org.nz/for-lawyers/confidential-report/make-a-confidential-report>.

114 To date, lawyers appear to have been reluctant to use confidential hotlines to make complaints, consistent with the findings of a United States survey that hotlines are the least popular mechanism for reporting harassment: see Damian Funnell "Preventing workplace harassment: There's an app for that" (*LawTalk* (online ed ,New Zealand, 3 August 2018).

115 DR Richmond "the Duty to Report Professional Misconduct: A Practical Analysis of Lawyer Self-Regulation" (1999) 12 Geo J Legal Ethics 175 at 202, cited in GE Dal Pont *Lawyers' Professional Responsibility* (5th ed, Thomson Reuters, New South Wales, 2013) at 776.

116 For example, Dal Pont indicates that not until 1988 was a lawyer ever disciplined in the United States for not making a report, despite the American Bar Association having identified the reluctance of lawyers to report as a 'major problem' with lawyer discipline in 1970: GE Dal Pont *Lawyers' Professional Responsibility* (5th ed, Thomson Reuters, New South Wales, 2013) at 775 (fn 17 and 18).

117 Lawyers and Conveyancers Act 2006, ss 41 and 55.

118 See Lawyers and Conveyancers Act (Lawyers: Practice Rules) Regulations 2008.

119 See Lawyers and Conveyancers Act (Lawyers: Practice Rules) Regulations 2008.

120 See Lawyers and Conveyancers Act 2006, s 31.

121 See New Zealand Law Society "Certificate of Character" <http://www.lawsociety.org.nz/for-lawyers/joining-the-legal-profession/certificate-of-character>.

122 Health Practitioners Competence Assurance Act 2003, s 67; Social Workers Registration Act 2003, s 63; Education Act 1989, s 397.

123 See: Health and Safety at Work Act 2015 and the obligations placed on Persons Conducting a Business or Undertaking (PCBU).

124 See Dame Margaret Bazley *Independent Review of Russell McVeagh: March – June 2018* (5 July 2018) at 42.

125 For examples, see Zoë Lawton "#MeToo blog" <https://www.zoelawton.com/metoo-blog.html>.

126 See House of Commons, Women and Equalities Committee, Sexual Harassment in the Workplace (Fifth Report of Session 2017-2019) HC 275 (July 2018), p. 14.

127 See NZLS, Legal Workplace Environment Survey 2018. Available at https://www.lawsociety.org.nz/practice-resources/the-business-of-law/human-resources-and-remuneration/legal-workplace-environment-survey-2018

128 The Working Groups recognises that regulation of some other places where lawyers work, such as the courts and corporate or government agencies, are beyond the reach of the LCA regime.

129 Women and Equalities Committee *Sexual Harassment in the Workplace* (Fifth Report of Session 2017-2019, HC 275, July 2018).

130 Women and Equalities Committee *Sexual Harassment in the Workplace* (Fifth Report of Session 2017-2019, HC 275, July 2018) at 19 and 21.

131 Women and Equalities Committee *Sexual Harassment in the Workplace* (Fifth Report of Session 2017-2019, HC 275, July 2018) at 22.

132 See (generally) the Partnership Act 1908.

133 Data provided by NZLS Registry as at 4 September 2018.

134 For more information, see https://www.lawsociety.org.nz/for-lawyers/legal-practice.

135 The misconduct and unsatisfactory conduct provisions apply to "a lawyer or an incorporated law firm": Lawyers and Conveyancers Act 2006, ss7 and 12.

136 For example, in the year July 2017-June 2018 there were only 14 complaints against Incorporated law firms (out of a total 1581 complaints).

137 See: Chapter 11 of the Rules (e.g. r11.3)

138 Lawyers and Conveyancers Act (Trust Account) Regulations 2008.

139 Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 11.

140 Ibid.

141 Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 11.3.

142 The Australian Prudential Regulation Authority *Prudential Inquiry into the Commonwealth Bank of Australia* (April 2018) <https://www.apra.gov.au/sites/default/files/CBA-Prudential-Inquiry_Final-Report_30042018.pdf>.

143 See for example, the definition of 'law firm' in section 5 of the Anti-Money Laundering and Countering of Financing of Terrorism Act 2009.

144 Legal Profession Act (Nova Scotia), s 27.

145 Consolidated Nova Scotia Regulations, reg 4.8.

146 Ibid. reg 4.7.

147 Ibid. reg 4.9.

148 Health and Safety at Work Act 2015, s 44(1).

149 Legal Profession Uniform Law (NSW).

150 Legal Profession Uniform Law (NSW), ss 34 and 35.

151 Legal Profession Uniform Law (NSW), ss 35 and 470.

152 As at 1 February 2018 See: https://www.lawsociety.org.nz/__data/assets/pdf_file/0020/119270/Snapshot-of-the-Profession-2018.pdf

153 Lawyers and Conveyancers Act (Lawyers: Practice Rules) Regulations 2008, reg 16.

154 Health and Safety at Work Act 2015, s 153.

155 See https://www.barstandardsboard.org.uk/about-bar-standards-board/equality-and-diversity/equality-and-diversity-rules-of-the-bsb-handbook/

156 The New Zealand Bar Association (NZBA) has also prepared a useful 'Model Conduct and Values Policy' for chambers- see : https://www.nzbar.org.nz/news/nzba-conduct-and-values-policy-may-2018

157 Dame Margaret Bazley recommended this in her report in the context of Russell McVeagh. Currently, NZLS has a resource titled Template Sexual Harassment Prevention Policy – Legal Profession Prevention and Response to Sexual Harassment Policy Guideline'' This guideline is based on the State Services Commission template and adapted for the legal context by Steph Dyhrberg.

158 The practice should make clear it has a "give nothing to racism" culture: Human Rights Commission "Give nothing to racism" <https://givenothing.co.nz/>.

159 See Women and Equalities Committee *Sexual Harassment in the Workplace* (Fifth Report of Session 2017-2019, HC 275, July 2018) at 50.

160 See Susan Bisom-Rapp "Sexual harassment training must change: The case for legal incentives for transformative education and prevention" (2018) 71 Stan.L.Rev. 62.

161 Ibid.

162 See, for example, The Australian Prudential Regulation Authority *Prudential Inquiry into the Commonwealth Bank of Australia* (Sydney, 30April 2018) at 102.

163 Employment Relations Act 2000, s 142G.

164 Health and Safety at Work Act 2015, s 47(3)(c).

165 Health and Safety at Work Act 2015, s 48(2)(c).

166 Health and Safety at Work Act 2015, s 47(3)(b).

167 Health and Safety at Work act 2015, s 48(2)(b).

168 The task force or external expert may be well placed to provide advice and guidance on survey design and implementation.

169 Education Act 1989, s 392.

170 LCA (Lawyers: Practice Rules) Regulations 2008 r 5.

171 Lawyers and Conveyancers Act (Trust Account) Regulations 2008, reg 17.

172 See for example: *Auckland Standards Committee 5 v Low* [2018] NZLCDT 7 and *Wellington Standards Committee v Manktelow* [2012] NZLCDT 30.

173 Employment Relations Act 2000, s 117.

174 See generally: Law Society of Ontario "Compliance-Based Entity Regulation" <https://lso.ca/about-lso/initiatives/compliance-based-entity-regulation>.

175 Lawyers and Conveyancers Act 2006, s 65.

176 Legal Profession Uniform Law (NSW), s 257.

177 Dame Margaret Bazley *Independent Review of Russell McVeagh: March – June 2018* (5 July 2018) at 57.

178 Karon Monaghan "#YouToo: The Sexual Harassment in the Workplace Report of the House of Commons Women and Equalities Committee" (6 August 2018) UK Labour Law Blog <https://wordpress.com/view/uklabourlawblog.com>.

179 As an example of the use of these clauses in employment settlements, see: *Lumsden v Sky City Management* [2017] NZEmpC 30.

180 See Women and Equalities Committee *Sexual Harassment in the Workplace* (Fifth Report of Session 2017-2019, HC 275, July 2018) at 44 and 45.

181 See New Zealand Law Society *Report on Regulatory Activities for the year to 30 June 2017* (Wellington, 2017).

182 See New Zealand Government *Government Expectations for Good Regulatory Practice* (The Treasury, Wellington, 2017).

183 Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008, reg 15.

184 See Appendix 2 of this report for gender breakdown of the Standards Committees as at April 2018.

185 New Zealand Law Society "Young Lawyers" <https://www.lawsociety.org.nz/law-society-services/young-lawyers>.

186 Colmar Brunton *Legal Workplace Environment Survey 2018* (New Zealand Law Society, 28 May 2018).

187 This is a virtual committee that is being piloted for 12 months.

188 UNDP Regional Centre for Europe and the CIS *Development of a witness and victim support system. Croatian experience: good practices and lessons learned* (United Nations Development Programme, 2014) at 7.

189 Moira Jenkins, Helen Winefield and Aspa Sarris "Consequences of being accused of bullying" (2011) 4(1) International Journal of Workplace Health Management 33.

190 These avenues might include NZLS's National Friends Panel, the LawCare Line, services offered by non-governmental organisations and other counselling services,and the NZLS Complaints Advisory Panel.

191 Lawyers and Conveyancers Act 2006, ss 144 – 150.

192 See New Zealand Law Society "Early Resolution Service Proves Very Successful" *LawTalk* (online ed,New Zealand, 28 March 2014).

193 Law Commission *The Justice Response to Victims of Sexual Violence* (NZLC R136, 2015) at 126.

194 Ministry of Justice *Restorative justice standards for sexual offending cases* (Wellington, June 2013) at 19.

195 Ministry of Justice *Restorative justice standards for sexual offending cases* (Wellington, June 2013).

196 Law Commission *The Justice Response to Victims of Sexual Violence* (NZLC R136, 2015) at 139.

197 Law Commission *The Justice Response to Victims of Sexual Violence* (NZLC R136, 2015) at 14.

198 Lawyers and Conveyancers Act 2006, s 156.

199 Lawyers and Conveyancers Act 2006, s 156(1)(d) and (i); Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008, reg 32.

200 For example, a review of 2017-2018 published Standards Committee decisions revealed a range of fines between $1000-10,000. The majority of published fines in that period were between $1000-$3000. See: https://www.lawsociety.org.nz/for-the-community/lawyers-standards-committee-decisions

201 Health Practitioners Competence Assurance Act 2003, ss 34–51; Social Workers Registration Act 2003, ss 38–58.

202 Social Workers Registration Act 2003, ss 69 and 70; Health Practitioners Competence Assurance Act 2003, ss 74 and 75.

203 See New Zealand Law Society "Bullying and harassment in the legal profession" (4 April 2018) <http://www.lawsociety.org.nz/practice-resources/the-business-of-law/workplace-environment/bullying-and-harassment>.

204 Lawyers and Conveyancers Act 2006, s 147.

205 Lawyers and conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008 reg 26(1).

206 Damian Funnell "Preventing workplace harassment: There's an app for that" (*LawTalk* (online ed ,New Zealand, 3 August 2018).

207 Ibid.

208 See: Callisto "Tech to combat sexual assault & harassment" <https://www.projectcallisto.org/>.

209 See: Spot "Experienced inappropriate moments at work?" <https://talktospot.com/>.

210 Lawyers and Conveyancers Act 2006, s 153.

211 The interviewer should not be a member of the Standards Committee but someone with expertise in interviewing people affected by the harmful behaviours of others.

212 See: Evidence Regulations 2007.

213 See Complaints Advisory Panel: http://www.lawsociety.org.nz/practice-resources/practising-well/complaints-advisory-panel; and the NZLS' National Friends Panel: *http://www.lawsociety.org.nz/practice-resources/practising-well/national-friends-panel.*

214 SeeTe Hunga Rōia Māori "Ngā Hoa Aroha Panel" (8 December 2018) < http://www.maorilawsociety.co.nz/nga-hoa-aroha-panel/>.

215 See *New Zealand Law Society v B* [2013] NZCA 156, [2013] NZAR 970.

216 Lawyers and Conveyancers Act 2006, s 240.

217 See *New Zealand Law Society v B* [2013] NZCA 156, [2013] NZAR 970 at [47].

218 The Working Group notes that under the Education Act 1989, a Complaints Assessment Committee can impose penalties with the agreement of the teacher: s 401(2)(d).

219 Tom Hunt "Critics seek review of Law Society'' *The Dominion Post* (Wellington, 7 August 2018); Alison Mau and Jonathan Milne "Law Society super-injunction overturned, allowing disclosure of sexual harassment case" (3 August 2018) Stuff.co.nz <https://www.stuff.co.nz/national/105975362/law-society-superinjunction-overturned-allowing-disclosure-of-sexual-harassment-case>.

220 The Standards Committee could be guided by the *public interest and, if appropriate, the impact of publication on the interests and privacy of the complainant and their family, the lawyer, the lawyer's family, clients of the lawyer, and partners, employers, employees and associates of the lawyer.* This is consistent with the established criteria for identity publication found in r 30(2) of the Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008.

221 Lawyers and Conveyancers Act 2006, s 240.

222 Lawyers and Conveyancers Act 2006, s 194 – 195.

223 Also the New Zealand Society of Conveyancers, if relevant.

224 Lawyers and Conveyancers Act 2006, s 211.

225 Lawyers and Conveyancers Act 2006, s 211.

226 New Zealand Law Society "28% of outstanding LCRO applications over two years old" (17 April 2018) <https://www.lawsociety.org.nz/news-and-communications/latest-news/news/28-of-outstanding-lcro-applications-over-two-years-old>.

227 Tribunals Powers and Procedures Legislation Bill (2017) 286-3.

228 Lawyers and Conveyancers Act 2006, s 234.

229 Or conveyancers, where relevant.

230 Lawyers and Conveyancers Act 2006, ss 228–233.

231 Lawyers and Conveyancers (Disciplinary Tribunal) Regulations 2008, reg 32.

232 Lawyers and Conveyancers Act 2006, ss 238 and 240.

233 For teachers under the Education Council Rules 2016, r 34; for doctors under the Health Practitioners Competence Assurance Act 2003, s 97; for social workers under the Social Workers Registration Act 2003, s 80.

234 Evidence Act 2006, s 103.

235 Lawyers and Conveyancers Act 2006, s 239.

236 Lawyers and Conveyancers Act 2006, s 239(4).

237 Evidence Act 2006, s 95(2).

238 Evidence Act 2006, s 95(1).

239 Alison Mau and Kirsty Lawrence "Air Force inquiry head slates courts' treatment of sex attack victims" (18 November 2018) Stuff.co.nz <https://www.stuff.co.nz/national/108679800/air-force-inquiry-head-slates-courts-treatment-of-sex-attack-victims>.

240 Law Commission *Alternative Pre-Trial and Trial Processes: Possible Reforms* (NZLC IP30, 2012) at 8; Law Commission *The Justice Response to Victims of Sexual Violence* (NZLC R136, 2015) at 48 – 49; Elisabeth McDonald and Yvette Tinsley (eds) *From "Real Rape" to Real Justice: Prosecuting Rape in New Zealand* (Victoria University Press, Wellington, 2011).

241 Evidence Act 2006, s 44.

242 The Working Group notes the question of whether s 44 of the Evidence Act 2006 should be extended to civil cases is under consideration by the Law Commission: Law Commission *Second Review of the Evidence Act 2006* (NZLC IP42, 2018) at 54.

243 Lawyers and Conveyancers Act 2006, s 239(4).

244 Evidence Act 2006, s 79(2).

245 *Orlov v New Zealand Lawyers and Conveyancers Disciplinary Tribunal* [2014] NZHC 1987, [2015] 2 NZLR 606 at [80].

246 Lawyers and Conveyancers Act 2006, s 239(1).

247 Section 49 of the Evidence Act 2006 already provides for such a presumption in respect of a criminal finding of guilt. This provision applies to the LCDT by virtue of s 239(4) of the Lawyers and Conveyancers Act 2006.

248 But this should not allow a finding of the LCDT to be admissible in a criminal court, due to the different standard of proof.

249 Section 49 of the Evidence Act 2006 is a model for such a provision.

250 Lawyers and Conveyancers Act 2006, s 245.

251 Health Practitioners Competence Assurance Act 2003, ss 39 and 48.

252 Health Practitioners Competence Assurance Act 2003, s 69.

253 Health Practitioners Competence Assurance Act 2003, s 93.

254 Health and Safety at Work Act 2015, s 47.

255 Health and Safety at Work Act 2015, s 48.

256 Employment Relations Act 2000, s 123.

257 Human Rights Act 1993, s 92Q.

258 Susan Bisom-Rapp "Sexual harassment training must change: The case for legal incentives for transformative education and prevention" (2018) 71 Stan.L.Rev. 62. See also: "Training, not policies effective in reducing workplace sexual harassment, research finds" (NZLS website, 29 November 2018) <www.lawsociety.org.nz/news-and-communications/latest-news/news/training,-not-policies-effective-in-reducing-workplace-sexual-harassment,-research-finds>

259 Ibid Bisom-Rapp.

260 Ibid.

261 Lawyers and Conveyancers Act (Lawyers: Ongoing Legal Education 'Continuing Professional Development' Rules) 2013.

262 See, for example, *Report of the Commission of Inquiry into Police Conduct* (Wellington, 2007) at 146.

263 See Lawyers and Conveyancers Act 2006, s 3: two purposes of the LCA are to maintain public confidence in the provision of legal services; and to protect the consumers of legal services.

264 Lawyers and Conveyancers Act 2006, s 6.

265 (8 March 2005) 624 NZPD 19018.

266 See: Matthew Palmer (ed) *Professional Responsibility in New Zealand* (online looseleaf ed, Lexis Nexis) at [50,010.5].

267 Lawyers and Conveyancers Act 2006, s 268.

268 NZLS made these Rules and the Minister of Justice approved them, as required under the LCA.

269 Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 at Preface.