Executive summary

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

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

Context for Independent Review

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

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

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

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

Terms of Reference

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

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

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

The Panel was asked to reflect on the changing environment and to examine the need for changes to better protect consumers of legal services, ensure fair competition, enable innovation within the profession, and honour Te Tiriti o Waitangi and the bicultural foundations of Aotearoa New Zealand.

The review process

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

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

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

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

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

Overall conclusion: the current regulatory model is not working

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

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

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

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

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

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

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

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

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

There is a strong case for a new independent regulator

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

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

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

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

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

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

The Law Society as a new membership body

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

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

New statutory objectives and obligations

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

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

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

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

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

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

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

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

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

A new 'freelance lawyer' model

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

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

Permitting employed lawyers to provide pro bono services

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

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

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

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

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

Permitting new business structures and encouraging innovation

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

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

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

Regulating law firms as well as lawyers

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

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

Quality care, information and competence assurance

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

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

New regulatory tools

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

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

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

Continuing professional development

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

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

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

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

A reformed complaints system

The complaints system is not working

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

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

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

Putting in place a more effective complaints system

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

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

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

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

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

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

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

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

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

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

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