

Independent review of
the statutory framework
for legal services in
Aotearoa New Zealand

Draft Terms of Reference

APRIL 2021

COMMISSIONED BY



Purpose of this document

This document proposes terms of reference for an independent review, commissioned by the New Zealand Law Society | Te Kāhui Ture o Aotearoa, of the framework for the regulation and representation of legal services in Aotearoa New Zealand, including the structure and functions of the Law Society.

This document has been developed by a seven-member steering group appointed by the Law Society's Board. Members of this steering group are:

- **Whaimutu Dewes** (Steering Group Chair) of Ngāti Porou and Ngāti Rangitīhi descent. He has worked as a lawyer in the Ministry of Justice and is now a professional director. He is a member of the Board of Contact Energy and the Chairman of Ngāti Porou Forests, Aotearoa Fisheries and Sealord Group and Ngāti Porou Seafoods
- **Sue Chetwin**, former Consumer New Zealand Chief Executive and current Board member of the Financial Markets Authority and Food Standards Australia New Zealand
- **Selene Mize**, Associate Professor of Law at the University of Otago
- **Ann Brennan**, Chief Legal Advisor at the Ministry of Business, Innovation and Employment
- **Paul Collins**, barrister
- **Kerensa Johnston**, Ngāruahine, Ngāti Tama ki te Tau Ihu, Ngāti Whāwhakia, Wakatū Incorporation Chief Executive and General Counsel
- **Jason Pemberton**, Independent Observer to the NZ Law Society Board, Social Entrepreneur

The steering group has been charged with providing comprehensive, forward-looking terms of reference that identify the main issues to be addressed in the review.

These proposed terms of reference form the basis for consultation with the legal profession and other stakeholders on the purpose, scope and process for the review.

Background and context

Regulation and representation of the legal profession in Aotearoa New Zealand

The legal profession in Aotearoa New Zealand is regulated by the Lawyers and Conveyancers Act 2006 (the Act) and associated rules and regulations. The Act sets out a co-regulatory model in which responsibility for regulatory functions is shared between independent entities,¹ the government and the Law Society. The Act also sets out the representative functions of the Law Society. All functions of the Law Society are either regulatory or representative.

¹ Lawyers and Conveyancers Disciplinary Tribunal and the Legal Complaints Review Officer.

The Lawyers and Conveyancers Act 2006

The purposes of the Lawyers and Conveyancers Act 2006 are to maintain public confidence in the provision of legal and conveyancing services, to protect consumers of those services, and to recognise the status of the legal profession and establish the profession of conveyancing practitioner.

The Act covers:

- admission and enrolment of barristers and solicitors
- rules and regulations to be made governing the practice and the conduct of practitioners
- a consumer complaints process and a disciplinary framework
- who can provide legal and conveyancing services
- the powers and functions of the Law Society, providing for both regulatory and representative functions
- the powers and functions of the New Zealand Society of Conveyancers
- the New Zealand Council of Legal Education, the Lawyers and Conveyancers Special Fund, and Fidelity Funds.

The co-regulatory model for lawyers

Co-regulation, as it relates to the regulation of the legal profession in Aotearoa New Zealand, means the government, the Law Society and the Lawyers and Conveyancers Disciplinary Tribunal and Legal Complaints Review Officers (which are independent entities) each have responsibility for defined regulatory functions, including the protection of consumers of legal services.

The Law Society is required to regulate the legal profession and is given powers to achieve its regulatory functions to:

- control and regulate the practice of the profession of law
- uphold the fundamental obligations imposed on lawyers
- monitor and enforce the provisions of the Act and regulations and rules made under it
- assist and promote the reform of the law.

Anyone who wants to be a lawyer or to practise in reserved areas of law in Aotearoa New Zealand must obtain a practising certificate issued by the Law Society and be regulated by the Law Society.

The Minister of Justice approves the rules and regulations made under the Act. In the area of complaints and discipline the Law Society administers one aspect of the process, the Lawyers Complaints Service. This involves the establishment of independent standards committees comprising lawyers and lay people to consider complaints or commence own motion investigations.

Decisions of Standards Committees can be reviewed by the Legal Complaints Review Officer (LCRO). The LCRO is an independent body supported by the Ministry of Justice.

For the most serious matters where strike off or suspension are potential outcomes, Standards Committees can lay charges before the Lawyers and Conveyancers Disciplinary Tribunal. The Tribunal is an independent body that operates like a Court with hearings ordinarily open to the public and is supported by the Ministry of Justice.

The High Court (Te Kōti Matua o Aotearoa) retains its inherent jurisdiction over lawyers.

Representative services

The Act specifies the Law Society can provide representative services to its members. These include professional development, collegial and networking events, and support and guidance.

The Law Society is required to account separately for representative and regulatory functions.

Governance of the Law Society

The Law Society has a two-tier governance structure, with a Council delegating a range of functions to an executive Board. The Law Society President chairs both the Council and the Executive Board.

The Council comprises the Law Society President and four Vice-Presidents, one member from each of the 13 regional branches of the Law Society, the Chair or President of each of the Law Society's sections, the Chair or President of the New Zealand Bar Association, and a representative of the Large Law Firms Group. In October 2020, Te Hunga Rōia Māori o Aotearoa and the Pacific Lawyers Association joined the Council. There is also an observer representative from the New Zealand Institute of Legal Executives.

The Board consists of the President, four Vice-Presidents and has provision for observers. The Board is the executive body elected by the Council to govern the affairs of the Law Society. Under delegation from the Council, it carries most of the Law Society's governance and oversight responsibilities.

The President, vice-presidents and members of the Council are all members of the legal profession. Law Society members elect branch councils and section committees. Branches elect vice-presidents. Members of the Council elect the Law Society President.

Drivers for the review

The Law Society's decision to commission an Independent Review has been driven by:

- the constraints the current Lawyers and Conveyancers Act 2006 places on the Law Society's ability to be transparent about its complaints process, and to deal with a broad range of unacceptable behaviour, including complaints of sexual harassment and bullying within the profession
- the importance of ensuring the statutory framework, particularly those areas for which the Law Society is responsible, is fit for purpose now that the Act is over a decade old.

- the opportunity to look ahead at what is needed to ensure competition and innovation in the legal profession and strengthen the profession’s commitment to the bi-cultural foundations of Aotearoa New Zealand.

The Law Society notes not all options raised through an Independent Review will fall within its control. For example, recommendations for legislative change will need to be agreed by the Minister of Justice.

1. Constrained ability to respond to unacceptable conduct by lawyers

In 2018, the legal profession was confronted by the disclosure of reports of sexual harassment of young lawyers and summer clerks.

At the time, the Law Society conducted a comprehensive Legal Workplace Environment Survey which found nearly one-third of female lawyers had been sexually harassed during their working life and more than half of all lawyers had been bullied at some time in their working lives. Women, younger lawyers, law firm employees, and those practising in criminal and family law, as well as Māori, Pacific and Asian lawyers were particularly vulnerable.

These events tested the effectiveness of the regulatory framework and the ability of the Law Society to respond to unacceptable conduct. Dissatisfaction with the rigid confidentiality prescribed by the Act in relation to complaint investigations and outcomes was, and continues to be, damaging to public confidence in the disciplinary processes.

The Law Society asked an Independent Working Group led by Hon Dame Silvia Cartwright to identify and propose improvements to the legal profession’s regulatory framework, systems and processes to enable better reporting, prevention, detection and support of victims of sexual harassment, bullying, discrimination and any other unacceptable behaviour.

Following the report of the Independent Working Group, in 2019 the Law Society proposed amendments to the Act to enable sexual harassment and other unacceptable conduct to be dealt with more effectively. The Government said it would not be possible to make any legislative changes at that time and noted that in overseas jurisdictions the role of regulator had been separated from the role of representing the profession.

The Law Society is proceeding with changes to the Rules for Conduct and Client Care (RCCC) and Continuing Professional Development (CPD) which do not require changes to the Act. The changes will mean:

- discrimination, bullying, harassment, sexual harassment and other unacceptable conduct will be clearly defined for the first time
- the threshold for reporting unacceptable conduct to the Law Society will be made clearer
- rules will clarify that no one who makes a report or complaint will be victimised
- those who manage and operate law practices will be required to provide a report each year declaring these issues are managed appropriately.

The proposed RCCC and CPD rules changes are a significant step, but there remain constraints in the Act that do not allow the rules to go as far as the Independent Working Group recommended. Amendments to the current definitions of “misconduct” and “unsatisfactory

conduct” in the Act would be required if the rules were to be expanded further. This is because currently the definition of “unsatisfactory conduct” only captures conduct that is connected with the provision of regulated services, while the definition of “misconduct” is wider and can capture conduct *not* connected with the provision of regulated services.

2. Ensuring the regulatory framework is fit for purpose

Good regulatory practice requires a review of regulatory systems at appropriate intervals to ensure they remain fit for purpose.²

The Lawyers and Conveyancers Act 2006 came into force in 2008 and is now over 12 years old. The then Justice Minister, 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.

Over the past 12 years, the Law Society and the legal profession have been able to monitor and build an understanding of how effectively the Act is working in practice, particularly given the changes in the legal sector. These include an increase in legal services provided by non-lawyers, who are not regulated in the same way as lawyers and conveyancers, the use of technology to deliver legal services and a significant growth in the number of in-house lawyers employed by the private and public sector.

The Act is prescriptive and the Independent Review provides the opportunity to reflect on what is working well and what needs to change to ensure regulation that is appropriately responsive to dynamic realities of legal work and that there is timely and efficient resolution of complaints.

3. Positioning the legal profession for the future

As well as reflecting on the current performance of the regulatory framework the Independent Review provides an opportunity to look ahead at what is needed to:

- ensure competition and innovation in the legal profession (for example ensuring regulation does not unnecessarily restrict competition and innovation) and
- strengthen the profession’s commitment to the bi-cultural foundations of Aotearoa New Zealand. As well Te Tiriti o Waitangi this also encompasses tikanga and traditional legal frameworks.

² Treasury (April 2017), “Government expectations for good regulatory practice”, <https://www.treasury.govt.nz/sites/default/files/2015-09/good-reg-practice.pdf>

Proposed Terms of Reference

Review objectives

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

- public trust and confidence in the provision of legal services
- the protection of consumers receiving legal services
- innovation and a well-functioning market for legal services
- the health and wellbeing of legal professionals
- the rule of law and access to and the administration of justice in Aotearoa New Zealand.

The Independent Review will recommend regulatory, organisational and governance frameworks appropriate for an Aotearoa New Zealand context, which includes consideration of:

- commitment to Te Tiriti o Waitangi, tikanga and traditional legal frameworks
- diversity and inclusion, including reflecting Aotearoa New Zealand’s multi-cultural society and bi-cultural foundations (based on Te Tiriti o Waitangi)
- proportionality and the cost of the regulatory framework
- the tradition of the volunteer model where lawyers contribute their time to the regulation of the profession
- values held by the legal profession, including the commitment to uphold the rule of law and the administration of justice
- flexibility and the ability of the regulatory framework to be adaptable to the context in which it operates, circumstances such as part time and flexible working, and to changes and developments in the provision of legal services.

Proposed scope

The Independent Review will undertake a targeted review of the following aspects of the regulatory framework. These have been identified as potential barriers to a modern and well-functioning regulatory framework:

- 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.

The Independent Review will also consider optimal organisational and governance arrangements for the Law Society and potentially recommend changes to the New Zealand Law Society Constitution, the Lawyers and Conveyancers Act 2006, and associated rules and regulations, as appropriate.

This scope is set out in more detail in the following sections.

Aspects of the regulatory framework

The review will focus on the following aspects of the regulatory framework.

1. Conduct

The Working Group Report found unclear definitions and a lack of specific reference within the Act constrained options for addressing inappropriate conduct when this related to sexual violence, sexual harassment, bullying and discrimination. There were also limited mechanisms for regulated legal practices to uphold high standards of professional conduct. Some of the Working Group's recommendations are being implemented through amendments to rules. The Independent Review will examine what changes could be made in addition to the proposed rule changes including:

- how should inappropriate conduct (including unsatisfactory conduct and misconduct) be defined and regulated? – particularly in relation to conduct involving sexual violence, sexual harassment, bullying and discrimination in personal and professional contexts.
- what is necessary to ensure a balanced focus on prevention and promotion of good conduct? – including the roles and responsibilities of the New Zealand Law Society, individual lawyers and legal workplace employers in relation to continuing professional development.

2. Complaints and discipline

The Working Group Report identified multiple issues with the current process for responding to complaints about lawyers made under the Act, with a focus on complaints in relation to sexual violence, sexual harassment, bullying and discrimination. The Independent Review will examine the following issues:

- how effective is the complaints process for different types of complaints? – including those made by consumers and by other legal professionals, and in cases of conduct occurring in the boundary between conduct directly connected with regulated services and personal conduct
- how should complaints be handled and responded to? – particularly in relation to the process, efficiency and timeliness, the level of transparency, who should be involved, and what alternative dispute resolution models could be utilised
- what is necessary to ensure a balanced focus on discipline to address legitimate public and professional expectations, while also employing more therapeutic and restorative approaches?

3. Regulated services

The Law Society regulates lawyers. Legal services can also be delivered by non-lawyers, except for the reserved areas set out by the Act (e.g. “legal advice to any other person in relation to the direction or management of any proceedings that the other person is considering bringing, or has decided to bring, before any New Zealand court or New Zealand tribunal”). This is not always well understood by consumers and the Law Society has no

role in protecting consumers when they have received legal advice from non-lawyers (who are not employed by law firms). The Independent Review will examine:

- the definition of regulated services and whether it continues to be fit for purpose
- the regulatory framework and how it responds to and incorporates the delivery of legal services by non-lawyers.

4. Appropriate separation of interests/roles

In addition to regulating legal services, the Law Society represents its members and serves their interests. Lawyers access member services in different ways, including through local branches of the Law Society. The Independent Review will examine:

- whether representative functions of the Law Society should be separated from all or some regulatory functions
- whether the entities charged with dealing with complaints against members of the legal profession are sufficiently independent.

Aspects of the organisational and governance framework

The review will consider optimal organisational and governance arrangements for supporting the delivery of regulatory and representative functions. This will be informed by the findings on separation of interests and good practice arrangements for a modern, well-functioning regulatory and/or representative organisation.

1. New Zealand Law Society

Founded in 1869, the Law Society has a history of change. In 2008, it became directly responsible for regulating all lawyers in the country when all but one of the 14 district law societies disbanded and joined into a national body. The Independent Review will examine:

- how regulatory and representative functions should be delivered
- what would be an appropriate modern organisational structure to support the delivery of these functions.

2. Governance

The Law Society currently has a two-tier governance structure, with a Council delegating a range of functions to an executive Board. The review will examine:

- what does fit for purpose governance look like for regulatory and for representative functions? – including diversity, required competencies, and the extent which regulatory functions should be governed by elected members.

Out of scope

The Independent Review will not examine:

- issues and aspects of the statutory framework not related to those set out in the proposed scope
- conveyancers and issues relating to conveyancing (noting recommendations may have implications for conveyancers)
- whether the government should directly regulate the legal profession, as the continued independence of the legal profession is a necessary part of upholding the rule of law and facilitating the administration of justice
- changes to provisions in the Act that relate to the New Zealand Council of Legal Education, the Lawyers and Conveyancers Special Fund, Fidelity Funds, as well as miscellaneous provisions*
- changes to legal education pertaining to the formal training of lawyers as this is the responsibility of the Council of Legal Education
- minor or technical amendments required to the Act.*

* *Any changes to the Act resulting from the Independent Review may create a vehicle or opportunity for other changes outside of the scope of the Independent Review. If this is the case, the Law Society will liaise with the Minister of Justice and the Ministry about the opportunities for further change.*

Review process

The reviewer will undertake a process of inquiry and deliver a comprehensive report incorporating recommendations that will be made publicly available.

Guiding principles

Guiding principles underpinning the methodology of the review must include:

- commitment to Te Tiriti o Waitangi
- ease of participation – providing options and choices, and seeking out unheard voices
- confidentiality and anonymity by the reviewer of individual views and information where requested
- transparency of process
- fairness and respect.

Engaging with stakeholders

The reviewer must also consult with appropriate stakeholders and the wider community, taking reasonable care to ensure engagement and input reflects the diversity of the profession and the community.

Those consulted include, but are not limited to:

- the legal profession, including:
 - the Board of the Law Society
 - the Council of New Zealand Law Society (which includes Te Hunga Rōia Māori o Aotearoa and the Pacific Lawyers Association who have recently joined the Council)
 - groups such as women and young lawyer groups, NZ Asian Lawyers (a subgroup of New Zealand Asian Leaders), the Government Legal Network, Aotearoa Legal Workers Union
- Judiciary
- policy makers, including the Minister of Justice, Ministry of Justice officials, Treasury and the Ministry of Business Innovation and Employment
- other providers of legal services, including the Society of Conveyancers, New Zealand Institute of Legal Executives
- Treaty Partners
- other groups that reflect the composition of contemporary Aotearoa New Zealand
- consumer advocates.

Key sources for the review

The reviewer will draw on the following key sources:

- the New Zealand Law Society Working Group Report (December 2018) led by Dame Silvia Cartwright
- other models and reviews of regulatory and membership frameworks, and related legislation, domestically and internationally but within a Aotearoa New Zealand context
- any other information from the Law Society relevant to the review.

Managing the review

The reviewer will be expected to:

- run a well-managed process, to time and to agreed quality standards including robust evidence-based recommendations
- undertake regular engagement with the Law Society Board and management to ensure no surprises
- share a provisional draft of the review with the Law Society Board, providing the Board with an opportunity to comment on accuracy and fit with scope.

The Review should be undertaken over six to nine months, balancing the need for the review to be completed without undue delay, the need to consult widely and to make careful consideration of the findings before making recommendations.