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The Regulation of Lawyers and Legal Services in Aotearoa New Zealand | Te Pae Whiritahi it e Korowai Rato Ture o Aotearoa - Independent Review

Introduction

On behalf of the In-house Lawyers Association of New Zealand (ILANZ), thank you for the opportunity to submit on matters ILANZ considers to be of importance to in-house lawyers in Aotearoa NZ within the ambit of the Independent Review and Discussion Document dated June 2022. Our submission answers the questions posed by the Discussion Document.

ILANZ is one of three sections of the New Zealand Law Society. Previously called the Corporate Lawyers Association of New Zealand, it was established in 1987 to meet the professional needs of in-house lawyers, including practice-sharing, networking and professional development.

It recognises the distinct needs and concerns of lawyers providing professional legal services to their employers. ILANZ members are New Zealand lawyers working in the private sector, public sector, not-for-profit and other organisations. ILANZ has approximately 3,400 members who make up nearly 30% of the legal profession in New Zealand.

ILANZ works to connect, support and lead the in-house community. We value being:

- Member focused
- Collaborative
- Quality driven, and
- Innovative

1. Is there a need for a new purpose statement for the Act? What might the purpose statement include?

The need for a new or amended purpose statement for the Act will be influenced by decisions on other aspects of this Review which will feed into the framework and purpose of the Act.

ILANZ supports the need for the legal profession to serve the needs of the multi-cultural and diverse New Zealand society and supports appropriate representation of Māori lawyers (and/or people with tikanga expertise) within NZLS governance and management structures. ILANZ acknowledges that Te Tiriti o Waitangi is a foundational document between the Crown and Māori, but it is unclear what is proposed in terms of how Te Tiriti might be incorporated in the purpose of the Act.

2. How should Te Tiriti o Waitangi be incorporated into the Act?

As above, ILANZ is not clear on how the Te Tiriti o Waitangi could be incorporated into the Act which regulates and represents members of a profession. ILANZ supports culturally appropriate service provision whilst maintaining public confidence in the provision of legal services. For example, ILANZ agrees that the complaints processes should actively encourage consideration of the role of tikanga in resolving disputes and have a greater ability to support non-Pakeha voices to be heard, such as Māori, Pacifica and other cultures.

Clarity is required on how applying a Te Tiriti o Waitangi lens will change service provision for in-house lawyers. ILANZ would require more information on this proposal and the likely impact and implications for in-house lawyers in practice before being able to provide further comment.

3. Should the statutory framework set out objectives for the regulator? If so, what should those objectives include?

As above, any amendments to the purpose statement of the Act will ultimately be influenced by decisions on other aspects of the Review which will feed into the framework and purpose of the Act.

ILANZ considers that the Act could set out objectives and considers the examples from the UK Legal Services Act 2007 model could be tailored for Aotearoa New Zealand. There is also scope to incorporate tikanga into the regulatory objectives. ILANZ supports incorporation of restorative and tikanga based complaints processes and to allow for other cultures and/or cultural considerations for resolution processes. For example, an objective such as *“protecting and promoting the cultural identity and values of clients in the regulation of legal services”* could be considered.

4. Are the reserved areas for lawyers appropriately defined?

As above, any amendments to the definition of “reserved areas of work” in the Act will be influenced and informed by the findings of this Review.

ILANZ considers that all lawyers, including in-house lawyers, should be subject to the same professional standards and obligations for regulated services. The standards have been developed for the benefit of the client and there should be no distinction for in-house lawyers simply because they have only one client.

Obligations of independence and due care ensure our clients can, and do, obtain free and frank legal advice so they can make informed decisions. Similarly, legal professional privilege should continue to apply to the provision of legal advice from in-house lawyers as such privilege exists for the benefit of the client. The client should not be disadvantaged simply because it decides to seek its legal advice from, or be represented by, in-house counsel as opposed to external counsel. Indeed, any move to distinguish the protections afforded through the provision of legal advice by in-house lawyers, as opposed to external lawyers, or the obligations imposed on lawyers, could have implications for access to justice, particularly for not-for-profits who have adopted an in-house model on a cost-benefit assessment.

5. Are there instances where consumers are likely to suffer adverse outcomes from using unregulated providers of legal services?

ILANZ supports consideration of whether particular services should be regulated to prevent non-legal advocates from providing services where consumers and/or the public do not have the benefit of regulations to protect them from unsatisfactory conduct or misconduct from non-

lawyers. As a section of NZLS, ILANZ has no particular examples of such instances, but we are aware of general concerns with the quality of service provided by non-lawyers. This would need to be balanced against other considerations, particularly access to justice issues.

6. Should the focus of the Act on regulating the activities of lawyers be broadened to include providers of legal services more generally?

As submitted above, ILANZ considers that all lawyers, including in-house lawyers, should be subject to the same professional standards and obligations for regulated services.

ILANZ considers it is important that the public are able to distinguish between regulated and unregulated providers of legal services. Any broadening of the Act to include non-lawyers provision of legal services should carefully consider access to justice concerns.

Provision of pro-bono services by in-house lawyers

ILANZ would support any consideration the Review Panel might give to how (including through regulatory safeguards and requirements) in-house lawyers might provide pro-bono services. ILANZ is mindful that there are a number of barriers to access to justice and the ability for in-house lawyers to provide legal services could assist to partially address those barriers. ILANZ acknowledges that changes to the regulation of pro-bono services may be required to provide adequate protection for clients and the public in such situations and supports exploring such options. ILANZ provided comments to NZLS on the issue of in-house lawyers providing pro-bono services as part of the submission on the Lawyers & Conveyancers Amendment Bill in 2021. These can be provided upon request.

Consideration of provision for locum lawyers

ILANZ supports consideration of expanding how legal services are provided by lawyers on temporary contracts. For example, short-term contract or locum arrangements to provide back-fill for parental leave, support short-term projects or address temporary recruitment gaps. The current rules do not readily allow for a lawyer holding a practising certificate to work as a contractor under supervision of a senior in-house lawyer, say Chief Legal or General Counsel to provide temporary legal services. In contrast, lawyers can be seconded from a law firm to provide such services and yet the lawyer is effectively supervised by the same senior in-house lawyer at the home agency.

ILANZ submits that more effectively enabling contract or locum work would support the development of new ways of working and potentially enable greater inclusion within the profession.

7. Should regulatory obligations vary depending on the degree of risk from the type of legal service?

Regulatory standards

As stated above ILANZ considers that all lawyers, including in-house lawyers, should be subject to the same professional standards and obligations for regulated services. ILANZ would support consideration of a complaints process that is better tailored to the likely degree of risk. Such factors should take into account the degree of harm to the public, potentially vulnerable clients, and restorative objectives (refer to response to question 21 below).

Practising fees

ILANZ considers it important that practising fees are set in a manner that is fair and reflects the fundamentally different nature and risk profile of in-house lawyers from a regulatory, complaints and consumer protection perspective.

ILANZ raised the issue of lower practising fees for in-house lawyers with the NZLS Board, who advised that they consider this matter is best looked at by the Review Panel. This is consistent with the Panel's objective of considering proportionality and the cost of the regulatory framework, as well as the potential issue relating to this directly raised by the Panel in the Discussion Document.

ILANZ proposes that:

- practising fees for in-house lawyers should be reviewed (having regard to the nature of in-house legal practice, the restrictions applicable to in-house lawyers and the relative level of regulatory complaints/enforcement activity required for in-house lawyers when compared to all other lawyers); and
- in-house lawyers should be subject to a lower practising fee as a class of lawyers contemplated by section 73(4) of the Lawyers and Conveyancers Act 2006, with effect from 1 July 2023.

In-house lawyers comprise a special class of lawyers engaging in a significantly different mode of practice when compared to barristers and lawyers in private practice. We do not have clients other than our employer, and are unable to provide regulated services to the public. This reality is already reflected in the approach to setting practising certificate fees jurisdictions like Victoria¹, Tasmania² and Australian Capital Territory³.

With in-house lawyers representing nearly 30% of the legal profession, but only generating approximately 4% of the regulatory complaints, the risk profile and nature of in-house practice is significantly different to other classes of lawyers. We consider that the current practising fee for in-house lawyers does not fairly reflect the cost to NZLS of providing regulatory services in respect of in-house lawyers relative to other classes of lawyers, and presents a disproportionate and unfair burden on the in-house legal community, and employers of in-house lawyers.

Although it is possible to dissect the legal community in many different ways, and we are generally supportive of a cross-subsidisation model, we consider that the position of in-house lawyers vis-à-vis private practice is – and will remain – very different from other distinctions which could be drawn e.g. between different areas of private practice.

The main reason for this distinction is that many complaints raised against lawyers relate to either performance or behaviour. For in-house lawyers the client is the employer so mechanisms exist within the employer organisations to deal with these issues which are not available in a private practice setting. This means that the frequency and nature of regulatory action against in-house lawyers will always be less than against those in private practice.

We appreciate that any reduction in practising fees for in-house lawyers will have the effect of increasing the relative fee payable by lawyers in other modes of practice.

¹ <https://lsbc.vic.gov.au/lawyers/practising-law/practising-certificates/practising-certificate-fees>

² <https://www.lst.org.au/wp-content/uploads/2022/06/Fee-Guide-2022-2023-v4.pdf>

³ <https://www.actlawsociety.asn.au/practising-law/practising-in-act/practising-certificates>

8. Should the Act allow law firms to use alternative business structures that permit ownership, management and investment by persons other than lawyers?

ILANZ is generally supportive of more innovative and flexible ways for lawyers to practice the law. Questions related to legal private practice are not directly relevant to the in-house community and so ILANZ has not provided comments apart from noting that any such change in ownership structure should not prejudice the regulation of legal services by those organisations, and should be carefully managed to ensure that lawyers' duties to clients and avoidance of conflicts is remain properly managed in the context of the diversified interest groups lawyers employed by such structures will serve.

9. Should the Act permit multidisciplinary practices, where lawyers can enter into a partnership with non-lawyers?

As above

10. Should entities providing legal services be directly regulated, in addition to individual lawyers?

As above

11. What additional regulatory tools should be available to the regulator?

ILANZ is not able to suggest particular additional regulatory tools as ILANZ is not aware of the full scope of the current regulator's toolkit, but ILANZ would support additional regulatory tools being available to ensure lawyers can continue practising law after lower-level concerns in a way that is safe for the consumer and for the lawyer. There could be a variety of measures which supported a safe return to practice for lawyers who have experienced difficulties due to personal issues or poor professional supervision. This could enhance diversity in the profession.

12. What steps are needed to improve diversity and promote a culture of inclusion within the legal profession?

ILANZ supports the Review Panel consulting widely on this issue as the best ideas may come from those who have left the profession due to lack of inclusion. We require a wide-range of measures from working with schools and communities to address public perceptions of the profession through to individual support. One step of particular relevance to in-house lawyers is providing consideration to how the regulatory regime can better provide for lawyers who work part-time or flexibly in other ways. For example adapting the number of CPD hours and practising fees for part time workers or those working part years (such as due to parental leave). Flexible arrangements are likely to help enhance diversity in the workforce.

13. Does the regulator need additional tools to help improve diversity (e.g., the ability to require firms over a certain size to publicly report on the gender and ethnicity of partners)?

ILANZ doesn't have a particular position on whether the regulator needs additional tools to improve diversity, as ILANZ is not aware of the full scope of the current regulator's toolkit in this space. ILANZ would say that any initiatives or tools undertaken or used by a regulator must be within the remit of the regulator's powers and if such additional powers are introduced then this should be clearly articulated as being within the scope of the regulator to do so.

ILANZ supports regular research being undertaken by the regulator into diversity within the profession and publication of any results so that NZLS Sections and other groups within the profession might undertake their own member initiatives (within their remit) to support diversity. For example local branch support connected to Law Schools, addition of the benefits of diversity to the Stepping Up programme and the continuation of the Practising Well programme. Measures such as public reporting on law firm diversity should only be adopted if there is sound research findings that such measures will support diversity. Support and coordination from the regulator to do so should be provided.

We also support wellbeing as an important consideration in the complaint process for all parties involved.

14. What steps are needed to promote positive culture change, health, and wellbeing, and help to ensure lawyers are safe within their workplaces?

Workload leading to fatigue and burn-out are common issues in the profession across all sectors. Some in-house lawyers have the benefit of working within organisations which have reduced working weeks and flexible working policies for their employees. For many the improved work-life balance of working in-house is one of the main attractions to making the move in-house from private practice.

Courses on workload management, personal proficiency, and ways to discuss flexible working environments with employers (either private practice or in-house) will be of on-ongoing relevance. Successful wellness programmes at the branch or local level should be supported nationally.

As above at question 13, initiatives to improve working culture within the profession (for example, by NZLS Sections) should be supported by the regulator. For, example ILANZ is exploring how it can promote better instruction giving and support better working environments between in-house legal lawyers/teams and their external counsel so that the wellbeing of private practice lawyers is supported by their in-house colleagues.

15. Are the current CPD requirements fit for purpose?

In principle, ILANZ supports mandatory CPD requirements across the profession. ILANZ holds the view that mandatory CPD provides a benefit to in-house lawyers who might otherwise, due to internal budgetary considerations or other reasons, not have the support of their employer to undertake CPD if CPD was voluntary. However, ILANZ would be interested in whether there is any research into whether or not mandatory CPD increases the quality of the services provided and/or the wellbeing of lawyers.

ILANZ supports the regulator being able to direct from time to time and as the need arises (for example, if there are a large number of complaints to the NZLS, or an inquiry is undertaken regarding a particular behavioural issue) that CPD requirements for any one particular year should include CPD on a particular area of development e.g., bullying and harassment, or climate change. The format, coverage and amount of CPD allocated to such CPD would need to be determined by each lawyer as they saw fit so to make sure that they identify and undertaken the most relevant CPD to their situation. Given the range of legal work and practice areas it seems

like such direction would likely cover soft skills more than hard but there may be instances where the regulator changes particular rules, or there is an issue of defining importance for the profession, of which all those in legal practice would benefit from some form of training. Climate change in particular is an example of an issue that fundamentally affects the entire profession. ILANZ would support NZLS facilitating the education of lawyers about climate change concepts likely to be relevant to their practice so that they are well-positioned to identify and advise on climate-related risks. NZLS should also facilitate/encourage the profession to reflect on the climate implications of its work.

16. Should it be mandatory for lawyers to undergo training in anti-bullying and discrimination as part of their CPD requirements?

As above.

ILANZ fully supports improved awareness and knowledge within the profession of this area and acknowledges the profession and society as a whole is more open and has higher expectations regarding behaviour than in the past.

ILANZ would be interested in research on whether mandatory training in this area is productive as it could be difficult to truly influence those in the profession who could most benefit from such training. ILANZ's preference is for each lawyer to determine the relevant CPD for them even within mandatory areas.

ILANZ would like such training to also be formally part of Law School and professional education teaching to ensure that everyone entering the profession has a good understanding of these issues.

17. Should it be mandatory for lawyers to undergo cultural competency training as part of their CPD requirements?

As above in questions 15 and 16.

ILANZ does note that many of those practising in-house in the state or public sector may have increased access to cultural competency training, and/or are required to by their employer to attend internally arranged training which increases their cultural competency. While the public and state sectors are increasing the cultural capability and competency of their staff, the same emphasis and focus on cultural competency may not exist out of these sectors.

Where such training is supported, the extent of such support and relevance to the employer's organisation and business activities, will vary substantially. Those working in-house already have to balance what CPD they undertake which helps them be better lawyers with the relevance of such CPD to the services that they provide to their employer in order for that CPD to be supported. The support and flexibility of CPD varies between organisations as well. So, any mandatory CPD requirements will need to be broad and flexible enough to ensure that the under-taking of such CPD does not cause unnecessary friction between the lawyer and their employer. Any mandatory requirements should also be consistent with the research findings regarding effectiveness of such mandatory CPD.

18. How might the statutory framework and the regulator facilitate and encourage pro bono services?

ILANZ provided comments with respect to in-house lawyers providing pro-bono services in answer to question 6 above.

19. Is there a need to update the definition of ‘unsatisfactory conduct’ and ‘misconduct’?

ILANZ does not have sufficient experience with these definitions to express a view on a need to update these definitions. ILANZ would always welcome improved clarity.

20. Is the current complaints model fit for purpose? What are the key issues?

ILANZ would support a more efficient and cost-effective complaints model particularly considering the high percentage of low-level concerns. As mentioned above in-house lawyers generate a very small proportion of complaints. Accordingly, ILANZ has limited feedback on these questions.

21. Is there a need for structural changes to the complaints model?

ILANZ supports consideration of whether the existing or a re-developed complaints model is consumer-centred and has a restorative focus wherever that is appropriate. It appears the current model is not particularly adaptive to the nature and scale of the complaint and that a more flexible and adaptive complaints system is needed to ensure an efficient system is available which the public and lawyers can have confidence in. ILANZ encourages consideration of a system that allows better and quicker triage of minor complaints, and a less adversarial approach to resolving complaints in their entirety.

As submitted above, ILANZ agrees that the complaints process should actively encourage consideration of the role of tikanga in resolving disputes and have greater ability to support all voices to be heard, including from Pasifika and Māori.

22. Is there a need to establish an independent entity to investigate and resolve complaints?

In considering whether to separate out the regulatory function to govern lawyers and the representative function, ILANZ submits that the following guiding principles should be considered by the Review Panel:

- The need for the public to have confidence in the legal profession in upholding high standards and providing protection for poor quality legal advice or representation or poor professional behaviour.
- The need for any regulatory body to be accessible to the public.
- The need to encourage professional and collaborative behaviour amongst the profession where all lawyers have a duty to uphold particular ethical behaviour and does not create unnecessary factions within the profession, or an inability to participate in the profession (including in terms of cost barriers).
- That New Zealand is small and this could have implications in terms of any reliance on volunteers for both regulatory and membership/representation functions. It is also likely to have cost implications and high practicing fees to support regulatory and membership functions could have a damaging effect, both in terms of costs which are likely to be passed

on to clients (potentially contributing to access to justice considerations) and in terms of how much businesses may be willing to invest in-house legal support.

23. What might a tikanga-based complaints or disciplinary process look like?

ILANZ does not have expertise to comment on this detail of this. As above ILANZ is generally supportive of more inclusive, tikanga-based approaches and processes within NZLS.

24. Is there a case to change the current arrangement where the NZLS exercises both regulatory and membership functions? Why?

ILANZ generally favours an arrangement that keeps all aspects of regulation and representation for the profession together, on the basis that we are stronger together.

However, we also see the logic in investigating the establishment of a separate regulator to focus on prompt investigation and resolution of the most serious complaints. This would hopefully help public perceptions and also deliver a better service to clients and the profession. But the cost implications of this separate regulator would need to be carefully considered to ensure that the cost was worth benefits.

Many of the other NZLS regulatory function tasks are relatively administrative and could be handled within the membership function; particularly if the CPD requirements are simplified and/or no longer mandatory.

While ILANZ primarily carries out a representative function, we are also called upon to provide specialist input into regulatory law reform activity from time to time.

In ILANZ's experience many of the membership functions such as advocacy, networking and support are working well for ILANZ members.

25. If an independent regulator is established, what functions should lie with the regulator and what functions should lie with the professional membership body?

An independent regulator would be best used to focus on prompt investigation and resolution of the most serious complaints.

26. If an independent regulator is established, what would be the implications for the continued ability of the NZLS to provide representative services?

ILANZ supports one strong representative body for the legal profession based on mandatory membership giving all lawyers appropriate education and support, and where needed advocating for, and representing, all lawyers. Sources of finance for such a body would need to be investigated.

27. If the regulatory and representative functions of the NZLS are to be split into two separate entities, what would be an appropriate modern governance structure look like and how might governance members be selected?

ILANZ has concerns regarding the structure and operation of the Law Society. While the fused regulatory and representative functions of the Law Society cause the concerns outlined in the Discussion Paper, ILANZ is also concerned that the governance and management structure of the Law Society compounds these issues and that they may continue regardless of where the regulatory function sits. The lack of meaningful representation needs to be addressed across the functions.

ILANZ Committee members still feel unclear on the governance and management structure of the Law Society and has limited membership data. We understand that this uncertainty is common across the profession.

Any modern governance structure should be simple with representation that reflects what we wish our profession to be. The current Council provides adequate representation of the profession but does not appear to meet often enough or agilely enough to provide meaningful direction to the Board. There also needs to be governance training for representatives.

28. If the regulatory and representative functions of the NZLS are to remain within the NZLS, what would an appropriate and modern governance structure look like and how might governance members be selected?

As above

29. Under either scenario (split or dual functions), how can a future governance structure better reflect Te Tiriti?

ILANZ considers that a future governance structure (under either split or dual functions) can better reflect Te Tiriti through representation of Māori and training for representatives on proper governance and appropriate tikanga principles.

ILANZ also supports increased opportunities to practice the use of tikanga and te reo Māori in this forum.

Thank you for the opportunity to provide feedback on behalf of ILANZ.

Ngā Mihi

**Prepared on behalf of the ILANZ Committee by the ILANZ Independent Review Sub-Committee;
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