



New Zealand Women's Law Journal Te Aho Kawe Kaupapa Ture a ngā Wāhine

By email

13 February 2022

New Zealand Law Society- Te Kāhui Ture o Aotearoa

Submission on proposed amendments to the Lawyers and Conveyancers Act 2006.

1. Thank you for the opportunity to provide feedback on the New Zealand Law Society's (**NZLS**) proposed amendments to the Lawyers and Conveyancers Act 2006 (the **Act**).
2. This submission is made on behalf of the New Zealand Women's Law Journal – Te Aho Kawe Kaupapa Ture a ngā Wāhine Trust (the **Trust**). The Trust is responsible for administering the New Zealand Women's Law Journal, which is the only academic publication that is solely dedicated to publishing legal scholarship about gender justice and supporting the work of women lawyers in New Zealand. The primary aims of the Trust are to promote awareness about gender justice and contribute to wider society discourse about legal issues facing women.
3. The Trust has extensive involvement and interest in the function of the NZLS as a regulator of the provision of legal services and the culture of the legal profession:
 - a. In 2020 Ana Lenard, Allanah Colley and Bridget McClay from the Trust collected a breadth of experience, ideas and practical tips and tools, culminating in *Purea Nei: Changing the Culture of the Legal Profession*.¹
 - b. The Trust has published a number of articles and commentaries addressing the culture of the legal profession that has allowed inequity and toxicity to continue unchecked for decades:
 - i. In 2017 Nicole Ashby wrote an article titled "Absent from the top; a critical analysis of women's under-representation in New Zealand's legal profession" and Louise Grey wrote an article titled "Reflections from a young woman entering the profession, would a female partner quota address gender inequality within the New Zealand legal profession"²;

¹ <https://www.lawfoundation.org.nz/wp-content/uploads/2019/12/Purea-Nei-Changing-the-Culture-of-the-Legal-Profession-December-2019.pdf>

² <https://static1.squarespace.com/static/577228a5e4fcb512c064f2a7/t/5e86a5dbc806bd11975046b8/1585882588345/Nicole+Ashby+Absent+from+the+top+a+critical+analysis+of+women%E2%80%99s+underrepresentation+in+N>

- ii. In 2018 Dr Anna Hood wrote a review essay titled “Review Essay: Reflections on the perpetual cycle of discrimination, harassment and assault suffered by New Zealand’s women lawyers and how to break it after 122 years: Reviewing Gill Gatfield’s Without Prejudice.”³ That commentary discusses the problems that face many women in the profession, what generates those problems, as well as providing practical solutions;
 - iii. In the 2018 edition four women from the profession shared their personal and professional experiences of the damaging culture within the law and what they believed needed to change to address the toxic culture. Their writing is captured in the piece “STATE OF THE NATION — TAUĀKĪ O TE MOTU.”
 - iv. In 2021 former New Zealand Law Society President Tiana Epati wrote a piece titled “#MeToo must not leave anyone behind” and Steph Dyhrberg and Zahra McDonnell-Elmetri wrote a piece titled “New rules, same culture Commentary on the changes to the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.”⁴
- c. The Trust and members from the Trust frequently comment in the media on issues involving the regulation of lawyers, including the recent decisions on James-Gardner Hopkins.⁵
4. In summary the Trust supports the amendments but notes its concerns about the real world application of some of the amendments and the failure of NZLS to suggest broader necessary changes to the Act.

Maintain public confidence in the complaints process – Section 188 (confidentiality)

5. The Trust broadly supports the intention behind the proposed amendment, and agree that NZLS should be able to disclose the existence of and details of a complaint or investigation in appropriate cases. Additionally, the Trust suggests that:
- a. guiding considerations for exercise of the discretion should be inserted into the Act;
 - b. the decision-maker should be required to make decisions in accordance with a non-statutory disclosure policy; and
 - c. further amendments are needed to require disclosure of findings of unsatisfactory conduct or misconduct that give rise to workplace safety risks.

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³<https://static1.squarespace.com/static/577228a5e4fcb512c064f2a7/t/5e86a9c312a7e1791bf3424b/1585883587757/D.pdf>

⁴ Those articles will be published on our free to access website following the 2021 editions launch on 15 February 2022.

⁵ See the **Media** section - <http://www.womenslawjournal.co.nz/advocacy>.

Also see the appendix to this submission which includes a list of media contributions from the Trust and its members.

Section 188 – discretion to release information during the course of the disciplinary process

6. The Trust acknowledges that there are competing priorities at issue when deciding whether to disclose details of an active complaint or investigation. These include:
 - a. protecting the identity and interests of any complainant or person making a confidential report in relation to the incident;
 - b. ensuring a fair process can be followed; and
 - c. ensuring persons who are genuinely interested in the information have appropriate access, especially where the information raises workplace safety concerns; and
 - d. maintaining public confidence in the integrity of the disciplinary process.
7. The Trust considers that the new s 188 should include these matters as relevant considerations for the decision-maker.
8. The Trust also suggests that s 188 should require decisions to be made consistently with a non-statutory disclosure policy to be produced by NZLS in consultation with the profession and the public. The policy should provide more detailed guidance, while allowing the decision-maker to retain discretion in difficult cases.
9. In the Trust's view, matters that should be included in any policy are as follows:
 - a. *Limited disclosure where workplace safety risks are at issue:* in cases where alleged conduct raises issue around workplace safety (including but not limited to sexual harassment, bullying, harassment and discrimination), the name of the person under investigation and the nature of the alleged misconduct should be disclosed to:
 - i. the complainant;
 - ii. any persons who have provided confidential reports;
 - iii. any other persons who provide information to the Standards Committee during the course of the process;
 - iv. the accused's current employer/workplace; and
 - v. the workplace at which the conduct is alleged to have occurred.

These persons should also be kept updated as to the status and outcome of the process.

- b. *Wider disclosure where workplace safety risks are at issue:* Employers should also be permitted to disclose the name of the person under investigation and the nature of the alleged misconduct to employees whom it considers have a genuine interest in receiving such disclosure. The Trust considers a "genuine interest" in receiving disclosure would include those with a direct reporting relationship to the person, including those in a person's team

and partnership and also extends to include support staff. However, its primary position is that all current and future colleagues should be notified.

- c. *Wellbeing of complainant / affected persons to be paramount:* In sensitive cases, the wellbeing of the complainant or other affected person should be the paramount consideration. Decisions around disclosure should always be discussed with complainants and affected persons before they are finalised.

New subsection – confidentiality rules during complaints process

10. The Trust supports a new subsection that makes the confidentiality rules clearer for parties involved in a complaints process or investigation. However, it submits that any new amendment should make it clear that while parties may not disclose information about the actual inquiry or process, they are able to disclose information they received independently of the inquiry, including information relating to the alleged conduct that is under investigation.

Disclosure after the fact

11. The Trust considers that further amendments to the Act are needed to require disclosure of Standards Committee decisions in certain circumstances.
12. In cases where a practitioner is found to have engaged in unsatisfactory conduct or misconduct involving a workplace safety risk, the name of the practitioner and the nature of the conduct should be disclosed either publicly or within the profession, unless there are exceptional circumstances that outweigh the public interest in disclosure. The Committee should retain discretion as to the release of further details.
13. At a minimum, this information should be disclosed to all employees at the practice where the practitioner currently works, and employees at the workplace where the conduct occurred. It should also be available on inquiry by persons with a genuine interest in the information – for example, persons who work with or are considering working with the practitioner in question.

Free up resources to focus on the right complaints

14. The Trust supports this amendment, provided that decisions of the triage committee are able to be reviewed by the Legal Complaints Review Officer.

Ensure frivolous technical complaints against staff and committee members do not take up resource

15. The Trust supports this change.

Enforceable Conveyancer Undertakings

16. The Trust considers this is a necessary change to the Act and supports it.

Other

17. The Trust considers this is a missed opportunity to amend other parts of the Act, notably the definition of misconduct and the process for complaints involving sexual harassment and bullying. The Trust is hopeful that further amendments will result from the independent review.
18. The NZLS Working Group itself proposed changes to the conduct definitions in the Act – including recommending amendment to definitions of “unsatisfactory conduct” and “misconduct” in the Act. The Report suggested:⁶
 - a. 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.
 - b. 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 into disrepute.
19. The Working Group of the NZLS has confirmed that the process under the Act is not fit for the purpose of dealing with complaints about harassment, sexual harassment, discrimination, bullying and violence. Yet, no changes addressing those shortcomings have been proposed.
20. Many people who make formal complaints of sexual harassment and assault report the legalistic, lengthy, opaque and often adversarial complaints process they endured caused more harm than the original conduct.⁷
21. The suggested amendments do nothing to better the process of making or progressing a complaint for complainants or to clarify the interpretation of the behaviour thresholds under the Act.
22. The four limited suggested amendments are a missed opportunity of the proposed law reform. The simple reality is that most conduct will not be complained about under the existing regime, leaving vulnerable legal workers without access to justice.

Conclusion

23. Thank you for the opportunity to submit on the proposed amendments. Please feel free to contact me if you have any questions or wish to discuss anything further.

Ngā mihi



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⁶ Report of the New Zealand Law Society Working Group, December 2018 at p 38.

⁷ Dyhrberg and McDonnell-Elementri “New Rules, same culture?” (2021) 5 NZWLJ 271.

Appendix: Media Statements by the Trust and its members

- “Under the microscope: the Gardner-Hopkins penalty decision” LawNews (4 February 2022): https://adls.org.nz/Story?Action=View&Story_id=472&fbclid=IwAR2b87JVH3aSQUE22rlnzZFedm1Zew_hPv-KOSej1IDMWGNy2oHBs-2vrlg
- “Young lawyers and students ‘disappointed’ and ‘ashamed’ of penalty in Russell McVeagh case” Katie Harris, New Zealand Herald (27 January 2022): <https://www.nzherald.co.nz/nz/young-lawyers-and-students-disappointed-and-ashamed-of-penalty-in-russell-mcveagh-case/UVUTGGUOZY4G3HEU5EPMMF0XNA/>
- “Opinion: Sasha Borissenko – Who was forgotten in the James Gardner-Hopkins misconduct ruling?” Sasha Borissenko, New Zealand Herald (23 January 2022): <https://www.nzherald.co.nz/business/opinion-sasha-borissenko-who-was-forgotten-in-the-james-gardner-hopkins-misconduct-ruling/LSVZ52RXNCSJ4YE5FPHJGGTGKY/>
- “Law firms to report back on harassment complaints under proposed changes” Rachel Thomas, Radio New Zealand (5 June 2020): <https://www.rnz.co.nz/news/national/418363/law-firms-to-report-back-on-harrasment-complaints-under-proposed-changes>
- “How law firms can change their culture” LawNews (7 February 2020): https://adls.org.nz/Story?Action=View&Story_id=50
- “Purea Nei: Changing the culture of the legal profession” LawTalk (936, 7 February 2020): <https://www.lawsociety.org.nz/practice-resources/personal-and-career-development/mind-and-body/purea-nei-changing-the-culture-of-the-legal-profession>
- “Female lawyers design blueprint for changing industry” Morning Report, Radio New Zealand (23 January 2020): <https://www.rnz.co.nz/national/programmes/morningreport/audio/2018730908/female-lawyers-design-blueprint-for-changing-industry>
- “New Zealand’s #Metoo Law’s Power Women: 9 Women Lawyers At The Centre of New Zealand Metoo Movement” LawFuel (10 July 2018): <https://www.lawfuel.com/blog/the-metoo-power-women/>
- “Where to for Russell McVeagh after Bazley report” Victoria Young, National Business Review (5 July 2018): <https://www.nbr.co.nz/article/where-russell-mcveagh-after-bazley-report-vy-p-216735>
- “What young female lawyers think of law society survey” Victoria Young, National Business Review (30 May 2018): https://natlib.govt.nz/records/39431488?search%5B%5D%5Bprimary_collection%5D=findNZarticles&search%5B%5D%5Bsubject_text%5D=Women+lawyers&search%5Bpath%5D=items
- “Embattled law firm Russell McVeagh loses sponsorship deal” Stuff.co.nz (5 March 2018): <https://www.stuff.co.nz/national/101969364/russell-mcveagh-loses-sponsorship-deal>
- “Legal fraternity cuts ties with Russell McVeagh” Newsroom (5 March 2018): <https://www.newsroom.co.nz/ex-russell-mcveagh-lawyer-moves-on>
- “Russell McVeagh chief on independent investigation” Victoria Young, National Business Review (23 February 2018): <https://www.nbr.co.nz/article/russell-mcveagh-be-independently-reviewed-vy-p-213060>
- “A profession under fire – lawyers respond to Russell McVeagh revelations” Victoria Young, National Business Review (22 February 2018): <https://www.nbr.co.nz/article/profession-under-fire-industry-responds-russell-mcveagh-revelations-vy-p-212893>