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

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Independent Legal Review Panel
By email: independentreview@lawsociety.org.nz

Feedback on the Independent Review Panel's report *Regulating Lawyers in Aotearoa New Zealand | Te Pae Whiritahi i te Korowai Rato Ture o Aotearoa*

1. Thank you for the opportunity to provide feedback on the Independent Review Panel's report *Regulating Lawyers in Aotearoa New Zealand | Te Pae Whiritahi i te Korowai Rato Ture o Aotearoa* (**report**).

2. This submission is made on behalf of the New Zealand Women's Law Journal – Te Aho Kawe Kaupapa Ture a ngā Wāhine (the **Journal**) in response to the report. The Journal has previously submitted on the Independent Review Discussion Document. This feedback should be read in conjunction with the Journal's earlier submission dated 31 August 2022.

3. This submission responds to two areas of the report: a reformed complaints system (chapter 10) and cultural challenges: improving diversity, inclusion, conduct, and mental health (chapter 11).

A reformed complaints system

4. The Journal tautoko the report's conclusion that the current complaints system is not meeting the needs of consumers or the profession and that wholesale reform is required.[1] If we keep doing things the same way, nothing will change.[2] Major structural change is required to disrupt the power imbalances within legal practice that allow

[1] Independent Review Panel "Regulating Lawyers in Aotearoa New Zealand | Te Pae Whiritahi i te Korowai Rato Ture o Aotearoa" (March 2023) [**Independent Review Panel Report**] at 143.
[2] As recognised in Steph Dyhrberg and Zahra McDonnell-Elemetri "New rules, same culture? Commentary on the changes to the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008" (2021) 5 NZWLJ 271 at 283 in the context of changes to the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008. The full article is available here.

inappropriate conduct to flourish, and that silence the victims of bullying, discrimination and harassment.[3]

5. In particular, the Journal is heartened by the report's recognition that the current complaints system was designed to deal with complaints about client service, rather than dealing with complaints about sexual harassment, bullying, and racism.[4] Broadly speaking, the Journal supports the model proposed for the new complaints system, namely that there are separate pathways for 'consumer matters' and for 'disciplinary matters'. The Journal provides feedback below on two specific areas of the report on this issue: procedures for handling sensitive complaints and disclosure of complaint information.

Procedures for handling sensitive complaints

6. The Journal agrees resources should be prioritised to investigate disciplinary matters. That is, allegations of complaints about lawyers or a practice that would, if proven, meet the standard of unsatisfactory conduct or misconduct. Prioritising the processing of such sensitive matters will go some way to addressing the feedback received by complainants about lengthy complaints processes that often cause more harm than the original conduct.[5]

7. As noted in the report, these sensitive matters must be handled by specialist, trained staff.[6] The complaints process for sensitive matters needs to be complainant-centred and provide support to victims throughout the entire process, including by providing complainants with a single point of contact, adequate information throughout the process, and information about accessing therapeutic support and services both within their workplace[7] and throughout the complaints process. The handling of such complaints also needs to be entirely separate from the pathway for dealing with consumer matters. This is consistent with the observations of Steph Dyhrberg and Zahra McDonnell-Elemetri, in an article recently published in the Journal:[8]

[3] Dyhrberg and McDonnell-Elemetri, above n 2, at 282.
[4] Independent Review Panel Report, above n 1, at 156.
[5] Dyhrberg and McDonnell-Elemetri, above n 2 (referred to in our first submission at paragraph 50 which was quoted in the Independent Review Panel Report, above n 1, at 156).
[6] Independent Review Panel Report, above n 1, at 167.
[7] See Dyhrberg and McDonnell-Elemetri, above n 2, at 282 for other steps firms are starting to take.
[8] At 282.

> The complaints and disciplinary processes need to be changed to make them more humane. People involved in complaints processes, particularly complainants, need far more support. Safe processes must be put in place for all involved.

8. The report refers to an online reporting tool that the Victorian Legal Services Board and Commissioner has developed to enable targets and witnesses of sexual harassment to make anonymous reports, in an attempt to reduce barriers to reporting of sexual harassment.[9] The Journal supports the development and use of such tools in Aotearoa New Zealand for this purpose.

9. Relatedly, the Journal is wary of the report's recommendation that the new regulator consult on an appropriate time limit for legal service complaints to be made in Aotearoa New Zealand.[10] The report suggests the regulator retains a discretion to extend the time limit where it is fair and reasonable to do so.

10. It is well known that, particularly in cases involving allegations of sexual violence and harassment, delayed complaints are not uncommon. This point was most recently acknowledged in the Employment Relations (Extended Time for Personal Grievance for Sexual Harassment) Amendment Bill (**ER Bill**), which had its third reading on 10 May 2023. Whilst ordinary personal grievances are required to be lodged within 90 days from the date of the alleged incident occurring, the ER Bill has amended this timeframe to 12 months in relation to personal grievances that are being lodged in respect of sexual harassment. This illustrates Parliamentary recognition that complaints of sexual harassment can often be delayed for a number of reasons.

11. In the context of the report, while placing a time limitation for a complaint to be made may be appropriate for consumer matters, the Journal strongly disagrees that such a limitation is appropriate in sensitive matters. The Journal considers it is critical for this distinction to be made in the report's recommendation.

Disclosure of complaint information, including naming of lawyers in disciplinary matters

12. The Journal is concerned with the report's recommendation that, following the regulator making a determination of unsatisfactory conduct, the identity of a lawyer is not to be publicly disclosed other than in accordance with the regulators' 'naming policy'.[11]

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[9] Independent Review Panel Report, above n 1, at 167 and n 332.
[10] At 168.
[11] At 168-169.

13. The report's rationale for this position is that the current model invites an adversarial response and lengthy delays as any complaint could result in disciplinary sanctions, including being publicly identified as falling short of professional standards. The report suggests the regulator adopt a 'naming policy', after consultation with the public and the profession. In practice, the public naming of a lawyer who has been found guilty of a breach of professional standards would be reserved for only the most serious matters where the Lawyers and Conveyancers Disciplinary Tribunal has found the lawyer guilty of misconduct.[12]

14. The potential issues arising from such a lack of transparency are highlighted in an article about the disciplinary proceedings against James Gardner-Hopkins, recently published by the Journal and authored by Jamie O'Sullivan:[13]

> The Court considered the frequency of misconduct and noted that no further complainants had come forward. It also considered that given "the high-profile nature of the proceeding, it is likely they would have done so if such incidents had occurred." This is a surprising comment given that it is known complaints are rare, and that the high-profile nature of the case (and the difficulty of the process in general) could deter potential further complainants. It is also a conclusion inconsistent with the findings of the NZLS Working Group Report, which noted that 57 per cent of those harassed took no further steps. Further, it does not recognise that Mr Gardner-Hopkins had his name suppressed until after the misconduct hearing. While the Tribunal and the Court were required to proceed on the basis of the available material which was limited to the six incidents, such comments fail to recognise known obstacles to the making of a complaint.
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> …
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> These proceedings highlight the vital importance of ongoing work to remove barriers to the making of complaints, and to continue efforts to improve the process for those who, by making complaints, enable the profession to regulate conduct and maintain public confidence.

15. A related issue is that s 188 of the Lawyers and Conveyancers Act 2006 gives the regulator a very limited ability to disclose complaint information.

16. The Journal considers the countervailing arguments outweigh the benefits of such a naming policy. While the Journal recognises that such a step may go some way to

[12] Independent Review Panel Report, above n 1, at 168-169.
[13] Jamie O'Sullivan "Serious, exploitative, sexual misconduct: The disciplinary proceedings against James Gardner-Hopkins" (2022) 7 NZWLJ 113 at 138 and 143. The full article is available here.

addressing the confrontational approach to lawyers' engagement with the complaint process, the Journal's position is that the following factors should be prioritised:[14]

a. transparency of disciplinary processes;

b. ensuring the law is a safe profession where members are not subject to sexual violence, harassment, bullying, discrimination, and racism;

c. ensuring consumers are given access to information that may influence their choice of lawyer; and

d. promoting public confidence in the profession.

17. The Journal's first submission on the Independent Review Discussion Document set out its view that further guidance is required on the application of s 188, including limited and wider disclosure where complaints involve sensitive matters. Given the report's proposal of a naming policy, it bears repeating. In contrast to what appears to be proposed in respect of the naming policy, the Journal considers:

a. There should be limited disclosure in relation to an investigation that is underway where workplace safety risks are at issue. Where the alleged conduct raises issues around workplace safety (including, but not limited to, sexual violence, harassment, bullying, discrimination, and racism), 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 has provided information to the regulator;

iv. the accused's current employer/workplace; and

v. the workplace where the conduct is alleged to have occurred.

b. Wider disclosure may also be appropriate in other exceptional circumstances where ongoing workplace safety risks are at issue. Employers should be permitted, on a case-by-case basis, to disclose the name of the person under investigation and the nature of the alleged misconduct to employees to whom it

[14] Factors (a), (b), and (d) are noted in the Independent Review Panel Report, above n 1, at 165.

considers have a genuine interest in receiving such a disclosure. The Journal considers a 'genuine interest' in receiving the disclosure includes those with a direct reporting relationship to the person, including those in a person's team and support staff. The case for permitting wider disclosure becomes more concrete where the regulator makes a finding of misconduct or unsatisfactory conduct.

18. In each case, the wellbeing of the complainant and affected persons should be the paramount considerations. Decisions in respect of disclosure should always be discussed with them before they are finalised.

19. The report refers to the naming policy of the Medical Council of New Zealand.[15] The Journal considers the "guiding principles" set out in that policy provide a useful example for any naming policy developed for the legal profession. If such a policy is adopted, the Journal considers the relevant guiding principles could include:

    a. weighing the public interest in disclosure against a practitioner's interest in privacy;

    b. publication should not include information that breaches, or is likely to breach the privacy of another person, particularly a complaint and affected person;

    c. the health and wellbeing of the complainant and affected persons; and

    d. if there are concerns about ongoing workplace safety risks that justify wider disclosure (to be determined on a case-by-case basis).

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

20. The Journal agrees with the report's observation that despite the progress on diversity in recent years, there remains significant barriers for certain groups of people in the Aotearoa New Zealand legal profession.[16] The lack of gender and ethnic equality in senior positions is just one example of how the legal profession still does not reflect the diverse community it claims to serve.[17] In this regard, the Journal considers the report is right to conclude the diversity of the legal profession will not change without continued focus, particularly on the pipeline into the profession and its upper echelons.[18]

[15] Independent Review Panel Report, above n 1, at 166 and n 322.
[16] At 170-171.
[17] At 170-171.
[18] At 171.

21. Despite these observations, the Journal considers a number of the report's recommendations require further focus to improve diversity and inclusion in the Aotearoa New Zealand legal profession. Below, the Journal makes further recommendations on how to address barriers which have a discriminatory effect and responds to the reporting requirement initiatives proposed in the report. In doing so, the Journal reiterates that care should be taken when making a recommendation or proposing an initiative so as not to be tokenistic or prioritise the needs of one group over another.

Removing barriers which have a discriminatory effect

22. The Journal agrees there are a number of barriers making it harder for certain groups of people to practice law.[19] The report acknowledges the barriers for those wishing to practice on their own after returning to the workforce, those being admitted to the profession, those with mental or physical conditions which may affect their ability to practice, and those seeking to be appointed as King's Counsel.[20]

23. Notwithstanding this recognition, the Journal submits the New Zealand Law Society | Te Kāhui Ture o Aotearoa (**NZLS**) should continue to advocate for and address barriers for those who are practicing across all parts of the profession, including within corporate law firm structures. One of these barriers remains the ability to secure flexible working arrangements.

24. As noted in *Purea Nei: Changing the Culture of the Legal Profession*, large portions of the legal profession work flexibly already and do so with great success.[21] This generally includes groups of lawyers such as those practicing on their own account and King's Counsel. However, monocultural thinking about flexible working, particularly at the partnership level within corporate law firm structures, remains a significant barrier to diversity.[22]

25. In this respect, the Journal is of the view that all aspects of the legal profession should strive to provide greater visibility of diverse role models in senior positions, particularly those who have children, dependent care responsibilities and flexible working arrangements. However, such arrangements must also be a reality for those practicing

[19] Independent Review Panel Report, above n 1, at 174.
[20] At 174-177.
[21] Allanah Colley, Ana Lenard and Bridget McLay *Purea Nei: Changing the Culture of the Legal Profession* (New Zealand Law Foundation and Michael and Suzanne Borrin Foundation, 2019) at 30 [**Purea Nei**]. The full report is available here.
[22] At 23.

below senior levels. Without consistent flexible working arrangements across all levels of the profession, the visibility at the senior level appears largely tokenistic.

26. The Journal acknowledges that flexible working arrangements are viewed by some as impacting employee productivity and in turn, employer profitability, particularly against concrete metrics like billable hours. Such stigma, however, directly harms the legal practice of particular groups of people such as working parents, many of whom are women. This is because being inflexible to flexible working arrangements can and does hinder career progression.[23]

27. In this respect, the Journal reiterates that the NZLS should actively promote and educate lawyers on the flexible working arrangements which can and should be available to all lawyers. It further submits that the NZLS should ensure that firms amend their targets to support such flexible working arrangements.

Regulatory initiatives to support diversity and inclusion

28. The Journal tautoko the report's recognition that there is a case for the regulator to collect new information on the diversity of the profession.[24] It is also promising that the report recommends the new regulator should report on aggregate trends on the progress of gender equality within the profession more broadly.[25] However, the Journal is disappointed to see that the report does not recommend law firms be required to collect and publicly disclose diversity information, namely the gender and ethnicity of their partners or employees.[26]

29. The Journal acknowledges that regard needs to be had for consistency of reporting across occupations and sectors,[27] however the Journal submits that creating an inclusive culture within the profession requires transparency at all levels. At the very minimum, as recommended by the Journal in its original submissions, and consistent with *Purea Nei*, the NZLS should require law firms to report on and publish information on the diversity in their board on gender and ethnicity.[28]

30. In doing so, the Journal draws attention to the comments of Alice Mander, a young lawyer and disability advocate in support of this submission. In her article, recently published by the Journal, Alice spoke of her personal experience in respect of the effect

[23] Purea Nei, above n 21, at 30; see also Lady Deborah Chambers ""Unconscious bias" is too kind" (2017) 1 NZWLJ 21. The full article is available here.
[24] Independent Review Panel Report, above n 1, at 178.
[25] At 178.
[26] At 178.
[27] At 178.
[28] Purea Nei, above n 21, at 58.

of failing to report on a specific group of people in the legal profession, namely disabled lawyers:[29]

> You only need to look at the New Zealand Law Society website to discover the complete erasure of disabled lawyers in Aotearoa. We are invisible in the statistics and invisible in the profession. Ironically, we are disproportionately represented in statistics on the other side of legal justice. For instance, 49 per cent of inmates in prisons in the Lower North Region experienced significant dyslexia. This is compared to approximately 10 per cent in the general population. It has been found that 40 per cent of disabled women experience physical violence from an intimate partner over their lifetimes, compared with 25 per cent of non-disabled women. My future career in the law—or in any field—is not free from this context and history.

31. These comments are not only illustrative of the value of reporting on diversity information for those wishing to practice law, but also of the benefit that the publication of data would provide to those the legal profession claims to serve. The report makes an appropriate observation in this regard, that there remains an assumption by firms that lawyers with disabilities will take extra time, resources and therefore lead to increased costs for clients.[30]

32. Such negative stereotypes are precisely the reason why the Journal considers it is unrealistic to wait for firms to voluntarily recognise the value of transparency and report on diversity information on their own. Without directives and mandates on firms to report on specific diversity information, the new regulator will fall short of its goal to create a real positive and diverse culture within the legal profession as the data remains "invisible".

33. Again, the Journal reminds the NZLS it should be careful that such an approach to reporting diversity information is not tokenistic. As noted by Alice Mander in her article:[31]

> The legal profession shouldn't see accessibility as a "nice to have", nor should it be marketed as an indication of how unprejudiced a firm is. I'm tired of our inclusion being congratulated as the exception, as opposed to being expected as the norm. Disabled employees have a lot to offer the workforce—and are currently utterly under-utilised. We have unique insights and empathy, we are born advocates for ourselves and our families, and we are innovative problem solvers. Physical accessibility is an

[29] Reina Vaai and Alice Mander "We are not here to bless the food or conduct accessibility audits" (2022) 6 NZWLJ 121 at 122. The full article is available here.
[30] Independent Review Panel Report, above n 1, at 181.
[31] Vaai and Mander, above n 29, at 127.

important step, but we need to move away from the notion that it is the 'charitable' or 'right' thing to do, and move towards the notion that it is the smart thing to do.

34. Accordingly, any approach which seeks to increase the visibility and transparency of certain groups of people in the legal profession should not be confined to the mere reporting of diversity information. As noted by the NZLS, the new regulator, with the assistance of appropriate representative bodies and those with lived experience of the barriers currently in place, should be expected to continue to put in place initiatives which increase the diversity and inclusion of the legal profession.[32] As noted in *Purea Nei*, this two-way reporting system ensures that compliance with reporting obligations is not tokenistic.[33]

35. The Journal maintains that education is an effective tool to improve inclusion and diversity in the legal profession. In this respect, the Journal reiterates that the new regulator should mandate compulsory annual training in unconscious bias, bullying and sexual harassment as well as cultural competency and mental health and wellbeing.[34]

36. Again, this can only be done if the courses offered by the NZLS are accessible. Accessibility in this context means that the training is provided for limited or no fees and includes learning options which cater to the needs of different groups of lawyers, including their learning styles and availability. The NZLS must also ensure that lawyers can participate without being subsequently bound to employment for a period of time if their costs are covered by their employer.

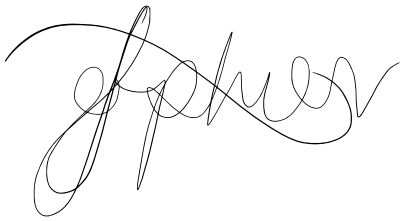
37. Firms have an obligation to support and provide their employees with appropriate training on diversity and inclusion. While the Journal commends the report for recognising that mandatory CPD courses on topics such as mental health and wellbeing unconscious bias, and anti-bullying and harassment *could* be introduced on a rolling basis, the Journal submits the NZLS should ensure this obligation is enforced through its newly amended power.[35]

[32] Independent Review Panel Report, above n 1, at 179.
[33] Purea Nei, above n 21, at 53-54.
[34] At 34.
[35] Lawyers and Conveyancers Act (Lawyers: Ongoing Legal Education – Continuing Professional Development) Rules 2013, rule 4.1(b) (amended by Amendment Rules on 1 July 2021).

Conclusion

38. Thank you again for the opportunity to provide feedback on the report. The Journal looks forward to seeing how the report and further feedback progresses. Members of the Journal are available to discuss this submission with the Independent Legal Review Panel if necessary.

Ngā mihi nui,



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