

NZBA Responses 19 June 2023

**Recommendation 1: Establish a new independent regulator.**

Recommendation	Response by NZBA	Comment
<p><b>Recommendation 1:</b> Establish a new independent regulator to regulate lawyers in Aotearoa New Zealand.</p>	<p>Accept in principle (subject to further detail)</p>	<p>The New Zealand Bar Association   Ngā Ahorangi Motuhake o Te Ture (the Bar Association) accepts that an independent regulator may be needed to enhance the confidence of both the profession and the public in the regulation function.</p> <p>However, we believe there is insufficient detail in the Independent Report to support a concluded view. In particular, we are concerned with the maintenance of the independence of the profession from the executive/government. This is a constitutional requirement.</p> <p>Therefore, we consider that there must be further consideration of the following points:</p> <ol style="list-style-type: none"> <li>1. The proposed process for appointments to the regulator. We consider that the governing board should be appointed by the profession. appointments should be on the recommendation of an independent panel which includes lawyers and lay people. The lawyers should have the casting votes. This will ensure that there is (and seen to be) adequate separation of powers between the Minister and the board of the regulator. The independent regulator should include a barrister lawyer role, to ensure the public interest in a strong and independent bar in New Zealand is maintained.</li> <li>2. The independent regulator should include a barrister lawyer role. There is a significant public interest in the importance of a strong and independent bar in New Zealand. The regulation of the bar raises unique issues given our independent role before the Courts.</li> <li>3. The ability of the regulator to delegate its functions must be considered. The delegation power should be clearly articulated through approved delegations so that it is clear to the profession what may or may not be delegated to the Law Society. There should be more discussion about what can be delegated to the Law Society, including whether it is appropriate to delegate the issuing of practice certificates, and any other matters.</li> <li>4. The impact of any independent regulator will need to be rigorously assessed. The risks, costs and benefits must be more clearly detailed before the profession can make an informed decision about whether the independent regulation model proposed is the best option.</li> <li>5. The Association wishes to ensure that the process for establishing the two new entities and allocating the functions that will sit with each, is assessed carefully, to ensure our representative body remains in place for the future.</li> </ol>

## Recommendation 2: Ensure the independence and effectiveness of the new regulator

Recommendation	Response by NZBA	Comment
<p><b>Recommendation 2a:</b> establishing an independent statutory body, which is not a Crown Entity and not subject to direction from Ministers.</p>	<p>Accept in principle</p>	<p>The role of the independent regulator should be limited to regulation only. The panel members should serve a three-year term and be eligible for reappointment for one further three-year term. The regulator should not be responsible for law reform except to the extent that they relate to the regulation of the legal profession itself. The functions of the regulator should be constrained to core regulatory functions to ensure the profession does not incur the costs of matters that are properly within the public domain. The appointment of the governing board must be genuinely independent of government.</p> <p>The Regulator’s role on law reform issues should be limited to professional matters. Substantive law issues are already covered by the representative bodies and, of course, the Law Commission. All law reform work undertaken by the Regulator should be transparent, with consultation with the profession before any policy or legislative initiatives are undertaken at Ministry or Government level.</p> <p>Regulation for non-lawyer advocates should be established to protect the public but should sit within a separate governmental agency.</p>
<p><b>Recommendation 2b:</b> a new governance board of eight members, with an equal split between lawyer and public members, chaired by a public member, and at least two members with strong te ao Māori insights.</p>	<p>Needs further consideration</p>	<p>The review panel comments that the board should consist of four lay members and four lawyers. It recommends that a public member should chair the board to signal clearly that the regulator is independent of the profession.</p> <p>This misunderstands the relationship between the legal profession and the government. The Report assumes that consumer protection is the only significant consideration. The Bar Association considers the public interest in a strong and independent profession, which can effectively uphold the rule of law and support the judicial institutions, is one of the most important considerations. These public interests must be balanced in a manner that does not allow one to dominate the other.</p> <p>Self-regulation is a fundamental requirement of what it means to be a profession, and a self-regulated legal profession, independent from government, is a fundamental element of our constitutional democracy. The Bar Association does not support removal of that principle.</p> <p>The Association is also concerned that the work of governing a regulator requires that most of the regulators have legal expertise and legal experience. The regulator must understand the complicated issue of legal ethics and it needs to have a good understanding of the practical reality of being a lawyer. These are not elements that can be injected by having some legal knowledge amongst the board members. They are fundamental to every aspect of regulation and should be well known to most of the members.</p> <p>Professional bodies should set the standards for their own profession, with the safety of the public as a primary consideration. This is reflected in the Medical Council’s composition of four lay and eight professional members.</p> <p>The Bar Association considers that the majority of the members of the board (including the chair) must be lawyers. For clarity, we are aware that an even-numbered board is not considered good governance practice.</p> <p>The Bar Association proposes a nine-member board to include:</p> <ol style="list-style-type: none"> <li>1. Not more than three lay people with a background in regulatory functions and reflect the diversity of the community.</li> <li>2. Six practising lawyers with consideration given to a mix of practice areas. Three of these lawyers should be elected from within the profession.</li> <li>3. Diversity in backgrounds.</li> <li>4. A Chair who is a practising lawyer.</li> </ol> <p>We believe that there is a real advantage in two of the members of the committee having a background in Te Ao Māori and tikanga. These members could be either lay or lawyer members. We also consider that there should be at least one member with finance and governance expertise. This may include lawyer members who can also have these skills.</p>
<p><b>Recommendation 2c:</b> appointment of the board by the Minister of Justice, following advice from a nominations panel comprising a mix of consumer representatives, governance experts and members of the legal profession.</p>	<p>Needs further consideration</p>	<p>The appointment of the governing board of the regulator needs to be independent of government. The Bar Association considered whether this could be done by having the Minister appoint members in accordance with the recommendation of an independent panel. However, its preference is for the lawyer representatives of the governing board to continue to be appointed directly by the profession. In either case, we support a transparent nomination and appointment process. New Zealand is a small country where there are often close relationships between individuals at senior levels. Avoiding any perception of political appointment is essential for the credibility and proper functioning of the regulator.</p>

### Recommendations 3: Incorporate Te Tiriti and regulatory objectives in the new Act and update the fundamental obligations of lawyers

Recommendation	Response by NZBA	Comment
<p><b>Recommendation 3a:</b> including a Tiriti o Waitangi section, requiring those exercising powers and performing functions and duties to give effect to the principles of Te Tiriti o Waitangi</p>	<p>Accept in principle</p>	<p>The Bar Association accepts that this is a proper recommendation for statutory bodies.</p> <p>Nonetheless, we are aware that there will be concerns from both within the profession and from the public about the practical implications of such a requirement.</p> <p>As a result, the Bar Association recommends that some care needs to be taken to identify the scope and application of the requirement but also to explain it to practitioners and the public. Specifically, some care should be taken to ensure that both the legal profession and the public understand that a lawyer’s primary duties are owed to their client and the court.</p>
<p><b>Recommendation 3b:</b> setting out regulatory objectives, with an overarching objective to protect and promote the public interest.</p>	<p>Needs further consideration.</p>	<p>The Bar Association considers that recommendations 3b and 3c misunderstand the position, obligations and duties of lawyers .</p> <p>The fundamental obligations of lawyers are to uphold the rule of law, be independent and meet their obligations to the court and clients.</p> <p>Any regulatory objectives (affecting the performance of the regulator’s functions and duties) must recognise these fundamental obligations that lawyers must maintain in the interests of the public, the justice system and the profession.</p>
<p><b>Recommendation 3c:</b> updating the fundamental obligations of lawyers, requiring lawyers to promote as well as protect their clients’ interests and adding a new obligation on lawyers to maintain their competence and fitness to practise.</p>	<p>Needs further consideration.</p>	<p>This appears to be a reiteration of section 4 of the Lawyers and Conveyancers Act 2006. As discussed above, we are concerned to ensure that the balancing of all fundamental obligations is maintained. The “promotion” of client interests should be seen in the context of, and subject to, the other key fundamental obligations, in particular the duty of the lawyer as an officer of the court and the “Cab rank” principle.</p> <p>See also our comments below about requirements for competence and fitness to practice. These requirements will require careful consideration and separate, detailed consultation with the profession.</p>

#### Recommendations 4: Reform the scope of regulation

Recommendation	NZBA response	Comment
<p><b>Recommendation 4a:</b> maintaining the current focus of the regulatory framework on lawyers and conveyancers, rather than extending it to cover other unregulated legal service providers.</p>	<p>Accept</p>	<p>We agree with this recommendation. Lawyers remain professionals within a constitutional framework that requires us to uphold the rule of law. Our role is not the same as advocates and any regulation of advocates should sit outside lawyers’ professional regulation.</p> <p>However, we agree with the finding that there is a need to increase consumer protection regarding unregulated advocates, including employment advocates. These advocates should have suitable qualifications and be subject to a framework that ensures competence and a disciplinary framework, and adequate recognition of the vulnerabilities of the target audience for their services, much as financial advisers and immigration advocates are now separately regulated.</p>
<p><b>Recommendation 4b:</b> introducing a new ‘freelance’ practising model that allows lawyers to provide services to the public in non-reserved areas, without requiring prior approval from the regulator.</p>	<p>Do not accept</p>	<p>We understand that this recommendation has been suggested to encourage women back into the profession after parental leave. We agree there is a need to allow for a more flexible approach to the return-to-work criteria after parental leave, taking into action previous experience, not just recent practice hours. This may well require reform to the LCA and regulations and a more modern approach to be adopted towards return to practise criteria by the Law Society (this assumes the Law Society retains responsibility for the issue of practising certificates). This is all achievable within our profession and does not require the separation of a “freelance” lawyering. This will risk creating a “second tier role” in the profession, particularly for women, any other practitioner who may elect to take parental leave or a period of leave from the full-time practice, and potentially for other groups.</p>
<p><b>Recommendation 4c:</b> permitting employed lawyers to provide pro bono services to the public in non-reserved areas.</p>	<p>Accept in principle</p>	<p>We agree subject to experience and insurance criteria. Again, we suggest at least three years’ experience. Many of the people who require pro bono services are vulnerable and require advice from experienced practitioners.</p> <p>However, we are aware of developments in Australia to provide a form of (insurance) safety net for pro bono services, where none would otherwise exist, and recommend that these developments be considered closely.</p>
<p><b>Recommendation 4d:</b> permitting new business structures, to allow non-lawyers to have an ownership interest in law firms and lawyers to enter into legal partnerships with non-lawyers.</p>	<p>Needs further consideration.</p>	<p>There are risks to the consumer from multidisciplinary practices. Any new models should be carefully examined to ensure they do not undermine the regulatory and professional objectives of the legal profession. Those objectives are not purely business-related objectives, and as a result, any new business model for practice would need to ensure that our professional objectives remain core to the governance of the new business structures.</p> <p>The delivery of legal services should remain subject to effective control by lawyers who are subject to the rules of professional conduct.</p>
<p><b>Recommendation 4e:</b> directly regulating law firms, with new firm-level obligations.</p>	<p>Accept</p>	<p>The Bar Association agrees with this recommendation as being in the best interests of the public and profession.</p>

## Recommendations 5: Enable the regulator to better protect consumers, support practitioners and assure competence

Recommendation	NZBA Response	Comment
<p><b>Recommendation 5a:</b> giving the regulator new tools, including powers to suspend practising certificates, require practitioners to undergo a health or competence review, undertake practice reviews and impose bespoke conditions on a practising certificate.</p>	<p>Needs further consideration</p>	<p>The Bar Association accepts that the regulator needs to have the power to suspend practitioners in cases that are both serious and urgent. However, this must be done in accordance with natural justice principles and with a right to a prompt review or challenge.</p> <p>We highlight that any request to undergo a health review must comply with the Bill of Rights Act 1990 and the Human Rights Act 1993 and must be limited to circumstances that raise issues of competence to practise.</p> <p>Any effort to address such health issues through regulatory means should only be done in parallel with significant reform and improvement of the availability of support mechanisms for practitioners. A functioning system requires some degree of self-reporting and lawyers need to have confidence that they will be adequately supported.</p> <p>Great care needs to be taken to ensure that lawyers can have the necessary confidence to self-report in the knowledge that they can do so safely. This requires the establishment of an anonymous method for seeking support (similar to the current counselling system run by NZLS).</p> <p>We support the provision of therapeutic and rehabilitative services to return practitioners to the workplace as soon as possible. A health committee should be established to consider how these services may be established while protecting the practitioner’s privacy and dignity.</p> <p>We support the ability of any regulator to manage and prevent vexatious and malicious complaints from the public.</p>
<p><b>Recommendation 5b:</b> reviewing CPD requirements, including the current 10-hour CPD requirement, and specifying key mandatory components of CPD to be undertaken every three to five years.</p>	<p>Accept</p>	<p>We consider that there are key areas that should be reviewed and modernised, including;</p> <ul style="list-style-type: none"> <li>• Ethics and Professional Responsibility</li> <li>• Workplace and Practice Management</li> <li>• Substantive law</li> <li>• Health and wellbeing</li> </ul> <p>The content and any mandatory components of CPD, must be considered carefully and monitored, to ensure that they remain relevant to all parts of the profession. Care is needed to consider whether a mandatory element is relevant to the profession, generally or only to parts of the profession.</p>

## Recommendations 6: Reform the system for handling complaints about lawyers

Recommendation	Approve etc	Comment
<p><b>Recommendation 6a:</b> complaints will be assessed and determined by in-house specialist staff, rather than by volunteers on Standards Committees.</p>	<p>Accept in principle</p>	<p>We agree that specialists can handle complaints. However, this should not be limited to inhouse specialists. The regulator should have the ability to call upon external specialists with relevant experience and can brief specialists as required. The input of relevant specialists with recent experience of the profession will be central to the credibility and effectiveness of this new model. Secondments and temporary or part-time appointments from within the profession should be considered to ensure relevant and current expertise.</p> <p>Some learnings must be taken from other professions (for example the audit profession) as to the application of such specialist input, to ensure that any such specialist input ensures that the complaints assessment process continues to be delivered in a manner that is fair and transparent, as well as timely and cost-effective.</p> <p>The additional costs of this new model will be significant, and so will need to be established in a cost-effective manner. There needs to be further discussion about who will fund this new regulator and what the impact will be on practising certificates (if any).</p>
<p><b>Recommendation 6b:</b> formal investigative and disciplinary processes will be reserved for those matters that require a disciplinary response from the regulator. Complaints about ‘consumer matters’ (eg, fees, delay, poor communication) will instead go through a dispute resolution process.</p>	<p>Accept in principle</p>	<p>The Bar Association supports the concept of a proportionate and cost-effective approach to complaints.</p> <p>However, the delineation between “consumer matters” and “investigative/ disciplinary” matters will need detailed consideration. There will need to remain discretion for matters to be moved between these delineations as some consumer matters will, where repeated or significant, reach a threshold for misconduct investigation and discipline.</p> <p>There needs to be a clear procedure for review by either complainant or respondent. More detail is needed about the nature of the dispute resolution service and where this function will sit and how this will be funded.</p> <p>The process must provide certainty for all affected parties, particularly the complainant and those who are subject to a complaint.</p> <p>More thought is also required about the level of support provided to those who are subject to a complaint. This must include support to enable them to engage effectively with the process itself, and support in coping with the associated stresses that are a significant fallout from complaints.</p>
<p><b>Recommendation 6c:</b> the identity of a lawyer who engages in ‘unsatisfactory conduct’ will not be publicly disclosed other than in exceptional circumstances, with naming reserved for cases where the Lawyers and Conveyancers Disciplinary Tribunal finds the lawyer guilty of ‘misconduct’.</p>	<p>Accept in principle</p>	<p>The Bar Association considers this recommendation should also be expanded to clarify that the name of a lawyer under investigation should not be publicly named until there is any adverse finding. The regulator should not reveal publicly that they have received a complaint or that there is an investigation underway when such information would in effect identify the subject of the complaint.</p> <p>The Bar Association supports the naming of some practitioners found guilty of unsatisfactory conduct, where it is in the interests of the public to do so.</p>
<p><b>Recommendation 6d:</b> the independent Legal Complaints Review Officer will be replaced by a small review committee convened by the regulator and staffed by external members or an external adjudicator.</p>	<p>Needs further consideration</p>	<p>The LCRO performs a valuable and independent service. The officers are experts in the rules and in regulatory law. There is no benefit to splitting this function off to “external members or an external adjudicator”. If anything, it could affect the ability of the regulator to efficiently deal with issues. The volume of work handled at the LCRO level should properly be seen as an issue related to poor screening/triaging of complaints and resources.</p>
<p><b>Recommendation 6e:</b> lawyers will be subject to a new duty to ensure complaints are dealt with promptly, fairly, and free of charge.</p>	<p>Needs further consideration</p>	<p>There is insufficient detail as to the scope of this duty. It requires a more discussions and better explanation.</p> <p>We assume that this first limb of complaint procedures, relates to the handling of direct complaints received by a lawyer from their client. Any procedural requirements for complaints handling should also encompass guidance on the handling (and duties) relating to vexatious complaints.</p>

**Recommendation 7: Encourage diversity and inclusion in the legal profession.**

Recommendation	NZBA Response	Comment
<p><b>Recommendation 7a:</b> creating a regulator with a specific objective of “encouraging an independent, strong, diverse and effective legal profession” and a competence-based board that reflects diversity.</p>	<p>Do not accept</p>	<p>The Bar Association strongly supports diversity and inclusion in the profession. However, we do not believe that this is a regulatory function.</p> <p>It remains an obligation on the profession to improve diversity and inclusion, and it is one that the Law Society and other lawyer member organisations have already acted on. The regulator should be supportive of the existing progress already being made by the profession.</p> <p>The Regulator should remain focused on investigative and disciplinary functions which remain core as these are universally accepted as uncontroversial and independent functions.</p>
<p><b>Recommendation 7b:</b> removing regulatory barriers that are having a discriminatory effect.</p>	<p>Accept in principle</p>	<p>The Bar Association supports the removal of discriminatory barriers where they exist and considers that the profession (including the diverse representative bodies within the profession) and the Law Commission should be responsible for recommendations for such regulatory law reform. The regulator will implement these reforms but should not be the policy maker.</p>
<p><b>Recommendation 7c:</b> giving the regulator new powers to collect diversity data from law firms and publish aggregate data on trends within the profession.</p>	<p>Needs more consideration.</p>	<p>The Bar Association considers this is an important recommendation. The Regulator should be responsible for providing data to the profession that profiles the composition of the profession. The information should, at a minimum, include the material presented in the “Snapshot of the Profession” already provided by the Law Society, but be broken down into the types of practice areas to allow representative bodies to focus on their area of representation. The data should be available to the public on the Regulator’s website.</p> <p>We reiterate that diversity is a representational issue and not a regulatory matter.</p>

## Recommendation 8: Law Society as Representative Body

Recommendation	NZBA Response	Comment
<p><b>Recommendation 8:</b> The Law Society should continue as the national representative body. It should have a single governance layer, with a board comprising 8-10 members, including public members.</p>	<p>Accept in principle, the concept of a national representative body, but the recommended make up is not accepted.</p>	<p><b>Purpose and functions</b></p> <p>The removal of regulatory functions from the Law Society will carry considerable risk for the one Law Society model. The Law Society will become a membership organisation like other representative organisations. There will be competition for members. The Law Society will therefore need a clear value to ensure that it can retain a role as strong voice for the profession. It will need to be a leader, rather than a competitor for membership by drawing all bodies in the legal sector together. We believe it can do that.</p> <p>The Australian Bar Associations, at both National and NSW/ Victorian state levels, do speak positively of their own experience of the regulatory/representative split. However, we will need to be wary about assuming this will be our own experience. We will need to consider more carefully to what extent the Australian regulators mirror our own proposal including the funding provided to those regulators from larger lawyer membership bases.</p> <p><b>Governance structure</b></p> <p>The Review suggests that a large Council is contrary to modern practice. However, the Law Society is to be a representative national body. Limiting representation on the Council will not meet the representative value of the Law Society. There is currently existing and growing diversity on the Law Society Council, this should not be diluted. This may result in membership moving away from the Law Society if they do not see true representation by being “at the table”. The Bar Association will want to continue to hold a seat on any new Board as the key representative for barristers in New Zealand.</p> <p><b>Lay members</b></p> <p>The Bar Association does not support any more than one lay member on any new governance body for the Law Society. The representative governance should remain with the profession to determine.</p> <p><b>Law Libraries</b></p> <p>The Bar Association supports a review of the use, cost and effectiveness of physical law libraries. We consider that there is merit in regulatory oversight and funding of this function given the access to justice contribution of libraries. Overseas regulator models treat law libraries as a regulator responsibility, and they remain funded by the regulator albeit the operation of these may be delegated to legal associations in some jurisdictions.</p>