



September 2022

Submission of CABNZ on the Discussion Document of the Independent Review Panel on the Regulation of Lawyers and Legal Services in Aotearoa New Zealand - Te Pae Whiritahi i te Korowai Rato Ture o Aotearoa

Introduction

1. Citizens Advice Bureaux New Zealand | Ngā Pou Whakawhirinaki o Aotearoa (CAB) welcomes the opportunity to input into the consultation on the Regulation of Lawyers and Legal Services in Aotearoa New Zealand.
2. We would like to express our appreciation to the members of the Independent Review Panel who took the time to meet with us and receive our oral feedback via video conferencing. This submission builds on the themes of that discussion. We are also happy for the Panel to make use of the raw notes from our meeting in their consideration of the issues.

About the CAB service

3. CAB is a nationwide, and locally based, community organisation that has been serving communities around Aotearoa New Zealand for over 50 years. CAB provides a free, confidential, and independent service of information, advice, and advocacy. We help people know and understand their rights and responsibilities, to take steps to act on these, and to connect with additional community services they may need. Our service is provided from over eighty locations around the motu by over 2,500 trained CAB volunteers.
4. In the past financial year, amidst the ongoing challenges presented by Covid-19, our CAB volunteers assisted with over 250,000 client interactions across the range of issues that affect people in their daily lives. Each time a person seeks help from our service, we record anonymised details of their enquiry into a national database. This gives us unique information about the issues affecting people in communities nationwide. When we see that policies or laws are not working well for people, we act as a voice for positive social change.

CAB's role in delivering legal services

5. While the Citizens Advice Bureau is not publicly promoted as a legal service, the provision of legal services is inherent to the work of the CAB. Our approach is to empower people with knowledge of their legal rights and responsibilities and to support them with options so they can take steps to resolve their issues. As a universal service, the CAB interacts with all aspects of the law and people's entitlements and obligations under the law.
6. The CAB has an essential role to play in providing legal services that support improved access to justice. As a non-lawyer service, our work is complementary to the more specialised role that lawyers play. The CAB is often the first port of call for people with a legal enquiry, and in particular for those who cannot afford to engage a lawyer, or who face other barriers to getting legal help.
7. Common areas of enquiry to CABs include disputes about property, tenancies, employment, consumer and contract issues, and the breakdown of relationships between neighbours, partners and family members. Other topics of enquiry include court processes, dispute resolution, debt recovery, care of children, relationship property disputes, wills and probate, domestic abuse, child neglect, human rights, discrimination, access to legal services, and legal aid.
8. Clients may not even identify their issue as a 'legal' one, but rather as a problem or issue to be resolved. Through accessing early support from the CAB with information, advice, and advocacy, many 'legal' problems are able to be resolved without the need to engage a lawyer.

Acknowledging the drivers for change

9. We acknowledge that there are a number of drivers for change underlying this consultation. Most significant, are the disclosures in 2018 of sexual harassment and bullying within the legal profession. This prompted wider concerns about the culture of the profession and the suitability of the complaints and disciplinary model for addressing unacceptable conduct by lawyers. Also highlighted are issues around the lack of diversity in the legal profession and allegations of systemic barriers to participation.
10. We tautoko the willingness of New Zealand Law Society | Te Kāhui Ture o Aotearoa (NZLS) to engage with these issues and to receive feedback through this independent review. We hope that this will lead to change that will better support both those within the legal profession and those the legal profession is there to serve.
11. Something that has come through in the review as a lesser driver for change, but one that has significant potential consequences, is a concern about the lack of protections for consumers who use unregulated legal services. In particular, whether there should be regulation, not just of lawyers, but of the provision of legal services, including by non-lawyers. This question of scope of regulation is the key focus of our submission.

General comments

12. Before turning to the question of which providers of legal services should be regulated, we have some comments about other issues raised in the discussion document.

Honouring Te Tiriti o Waitangi

13. The Review Panel has indicated a desire to test whether there is a case to create a new obligation for lawyers to “uphold the constitutional principles of Aotearoa New Zealand, including Te Tiriti o Waitangi”, or whether the current ‘rule of law’ obligation is broad enough to encompass these principles. We support the incorporation of Te Tiriti o Waitangi into the statutory framework for regulation of lawyers, but contend that neither of the options presented is sufficient.
14. While the obligations might be those held by lawyers, it is important for the general public to understand what to expect. For most people, the concept of the ‘rule of law’ is simply an understanding of the words as stated. However, it is far from being a straightforward concept. The Ministry of Justice website explains that “The principles of the rule of law are not easily defined”,¹ and then goes on to provide a list of five things it encompasses. What it means to uphold New Zealand’s “constitutional principles” is similarly unclear, with our ‘constitution’ being drawn from multiple sources, including legislation, judicial decisions, and customary rules. To then tag, “including Te Tiriti o Waitangi” on to the end, risks diminishing the role of Te Tiriti and the specific issues that it presents in relation to our justice system.
15. In the discussion document there is reference to the guiding principles for fostering reconciliation produced by the Federation of Law Societies of Canada. Under these principles, lawyers have a responsibility to expand their knowledge and understanding of indigenous perspectives and knowledge, and to take steps to ensure they are not contributing to the harms their indigenous clients experience when engaging with the justice system.
16. We believe that including something similar in the Aotearoa New Zealand context would be an excellent addition. This brings life to the commitment to recognise, honour and uphold Te Tiriti o Waitangi by acknowledging the historic and enduring systemic harm to Māori within the legal system and the need to actively work to redress this.

Promoting a positive and diverse culture within the legal profession

17. We wholeheartedly support the intention of the Review Panel to explore ways to promote a positive and diverse culture within the legal profession. In particular, to ensure the legal profession is welcoming and inclusive, reflects the diversity of the

¹ <https://www.justice.govt.nz/about/learn-about-the-justice-system/how-the-justice-system-works/the-basis-for-all-law/>

community it serves, encourages good conduct, and supports the mental health and wellbeing of lawyers.

18. We support the goal of increasing the diversity of the legal profession. It benefits all of us if people serving through the legal profession, represent the diversity of our society. This can be supported to some extent by having tailored entry pathways, but also needs to be about making people of diverse backgrounds feel welcome and safe in the legal profession. This includes actively working to address the systemic disadvantage experienced by Māori and Pasifika communities within the legal profession and the legal system more broadly.
19. We encourage the Review Panel to look at the mahi of the [Wayfinding for Civil Justice](#) Working Group. There are clear overlaps with the issues identified in this review. The draft strategy highlights the need to ensure diversity in the legal profession. It identifies a number of actions under the goal of *“increasing legal service providers’ knowledge and understanding of communities and their legal needs”*. These include:
 - *“Strengthen and, where they do not already exist, introduce law school programmes that create opportunities for students to connect with community legal needs and to educate students about just dispute resolution.*
 - *Ensure law schools admit and educate students from diverse backgrounds.*
 - *Ensure legal education includes tikanga Māori and Te Reo Māori.*
 - *Continue to develop and strengthen diversity and inclusion initiatives for the legal profession and judiciary.”*
20. We think it is invaluable for law students and lawyers to connect with the reality of people’s legal needs through involvement in the community. This helps to establish a culture of connection and contribution to the community as part of the role of the legal profession.
21. Volunteering with Community Law and Citizens Advice Bureau is one of the ways to do this. Law students who volunteer with us at CAB report that this is a meaningful and rewarding experience for them. They value being able to interact with people and their everyday needs and issues, to learn valuable skills, and to be part of seeing the law applied to real life situations. There are also significant opportunities for law students and lawyers to participate in social justice projects, law reform, community education, civics education in schools, pro bono legal work and service to charities and not-for-profit organisations.
22. We suggest that including a service component into the CPD requirements could be a way to keep legal professionals grounded and connected to the community they serve. This would encourage lawyers to foster relationships with diverse groups, and could in turn help to demystify the legal profession (and the law) for people who face barriers accessing justice.

23. We also support the suggestion that providing lawyers with the knowledge and tools to deal with matters such as bullying and harassment, may contribute to an improved workplace culture. We are unsure whether mandatory training on these topics is going to impact those who are most in need of having their attitudes changed. However, we believe that normalising discussion about these issues and bringing the realities of bullying, discrimination and harassment into the light, can help empower people and lead to change.
24. Similarly, we support tikanga Māori and Te Reo Māori being embedded into CPD for lawyers. Ideally, this would be through specific training and learning opportunities, as well as being woven throughout CPD so that all learning happens through a bi-cultural lens. Justice Joe Williams has highlighted the need to ‘decolonise the law’ and suggested starting with law schools and legal education.² This needs to be a continuing commitment throughout all stages of involvement in the legal profession.

Complaints about lawyers

25. We support the proposal to update the definition of ‘unsatisfactory conduct’ so that it is clear that lawyers can be held accountable for poor behaviour, beyond just conduct that relates to the direct provision of regulated services. This means including other types of unsatisfactory conduct where there is either a link to the workplace, colleagues, or clients, or where the conduct may bring the profession into disrepute.
26. From a quick search of our CAB client enquiry records, we found over 150 client enquiries in the past year from people who wanted support to make a complaint about their interaction with a lawyer. These include concerns about overcharging, unreasonable or unexpected fees, lack of communication, inaction, misrepresenting the client, rudeness, racism, bullying, harassment and intimidation. People want guidance about next steps and also often want the opportunity to talk through the situation and feel heard. We are able to explain the process and connect them with the NZLS service as appropriate.
27. In relation to the existing service for dealing with complaints against lawyers, the discussion document is clear that the current model is flawed. The NZLS Complaints Service appears to be inefficient, inconsistent, lacking transparency and independence, not consumer-centred, inaccessible to Māori and Pacific Peoples, and generally failing to meet the needs of consumers and lawyers. This is a fairly damning review and it is clear that change is needed.
28. We support the view that any change should incorporate tikanga Māori principles of dispute resolution. This includes having options to improve the informal resolution of disputes, the use of conciliation and mediation, and processes that enable all parties to preserve their mana.

² F. W. Guest Memorial Lecture 2021: Decolonising the law in Aotearoa: Can we start with the law schools?
<https://www.youtube.com/watch?v=8L8vCyKPwI4>

29. It is important the complaints process doesn't simply duplicate the same kind of barriers people face in accessing lawyers in the first place. The complaint process needs to be as fair, simple, transparent and accessible as possible and ensure that the complainant remains central to it. These principles are consistent with those developed by the Government Centre for Dispute Resolution (GCDR) to guide best practice in the design and delivery of a dispute resolution scheme. We encourage the Review Panel to look at the work of the GCDR³ and the set of questions under each principle that can be used by agencies as an assessment tool, to test whether their scheme is aligned with best practice.
30. Based on insights from our client enquiries, there are a few additional issues about the Lawyers Complaints Service that we would like to note. Generally, the service will only accept a complaint about costs where the bill is over \$2,000. It is important to recognise that amounts less than \$2,000, while they may not be significant to some lawyers, can be very significant to members of the public. We see situations where the amount in dispute is less than \$2,000. Often these are scenarios where people are at the early stages of an interaction with a lawyer. For example, they may have been charged an amount between \$600 and \$800 before they really understand what they are in for.

The client had taken advice from a local lawyer. He was with the lawyer for just under one hour and the lawyer had charged him a fee of \$636 for his time. He contacted the CAB wanting to know if this is a reasonable price, as he is feeling unhappy about the charge.

The client called the CAB to ask for information on disputing a \$600 bill that he has from his lawyer. He had already paid several amounts to his lawyer, but then applied for legal aid as he couldn't afford more costs. While waiting for legal aid to be approved, his lawyer did some further work and charged him the additional \$600. The client was unaware he would be expected to pay for this work and thinks it is unfair. His lawyer has threatened debt collection if he doesn't pay.

31. Also, an accessible service means ensuring that people can access the complaints process in multiple ways – by phone and face-to-face, and not just online.⁴ This is essential so that people who experience barriers such as low levels of literacy, or a lack of online access or skills, are still able to make a complaint and be kept informed. It is also about providing a good service that is welcoming and treats people respectfully.
32. Following are some examples of enquiries to the CAB where clients faced barriers making a complaint about a lawyer through the Lawyers Complaints Service.

³ See <https://www.mbie.govt.nz/cross-government-functions/government-centre-for-dispute-resolution/best-practice-guidance-on-dispute-resolution/assessing-a-dispute-resolution-scheme/>.

⁴ For more information about our position on this, see CABNZ's campaign for inclusive public services <https://inclusioncampaign.cab.org.nz/>.

The client wishes to lay a complaint regarding her lawyer's service. She has been onto the Law Society website to look at what's involved and then rang them for some help with the process. She was told to use their online complaint form and was not given any other options. She came to the CAB for help to make her complaint.

The client rang to say he had tried to discuss his complaint with the Lawyer Complaints Service over the phone, but they were unhelpful, saying that they would only act on complaints made in writing.

33. We also note that the discussion document highlights that the Lawyers Complaints Service has received an average of 1,467 complaints each year over the past 5 years. However, of the complaints where a Standards Committee made a determination, 87% of complaints were dismissed with no further action required. Through our client enquiries, we can see that making a complaint about a lawyer can be a challenging thing to do and those making the complaint are often stressed and feeling disempowered.
34. We are obviously not in a position to scrutinise the circumstances of the 87% of complaints that were dismissed without any action being taken, but given the recognised flaws with the system, this statistic is concerning. We hope that any changes to the system ensure people are heard and treated with dignity and respect, and that there is an openness from the profession to reflect and learn.

Scope of regulation

35. As noted in the discussion document, the majority of legal services in Aotearoa New Zealand can be provided by non-lawyers. It is the use of the term 'lawyer' that is protected, so anyone who wants to act as a lawyer, including practising in the 'reserved areas', must fulfil the requirements to obtain a practising certificate from the NZLS and be subject to regulation. The review raises the question of whether broader regulation of legal service provision is required.

Balancing protection of consumers with access to services

36. One of the motivations for considering broader regulation is the risk of harm to people if they receive poor quality legal services or are exposed to exploitative practices from an unregulated service provider. We acknowledge that there is some concern about risk of harm (for example, media reports of problems with unregulated employment advocates), but are not clear that the case has been made for regulation.
37. Regulation of legal services / legal service providers, must balance the protection of consumers with ensuring there are services available to meet people's diverse needs. We are concerned about the potential to over-regulate and further reduce access to justice – something that is already out of the reach of most people. Regulation can protect people against potential harm from legal service providers, but it can also add costs, limit options, stifle innovation, and give rise to other unintended consequences.

38. It is important that we clearly identify what problems we are attempting to solve, where in the system these problems are occurring, and whether regulatory action will address these. The focus must be on the needs of and benefits to users / consumers, and not on service providers who may be vying for position and seeking patch protection, generally with significant commercial interest. We are particularly concerned that regulation of legal services does not compromise the ability of services operating in the charitable / not-for-profit / social-good environment, to continue to provide free, accessible services to help people in their communities.
39. We do not see evidence of widespread problems with unregulated providers of legal services in our client enquiries. We do however, regularly see complaints about lawyers, as discussed in the section on *Complaints about lawyers* above. We are not trying to overstate the problems with lawyers, but we can say, that our enquiries give some insight into the nature of the problems people are facing in accessing legal services.
40. It was with a clear evidence base that we previously lobbied for the regulation of immigration advisers. We could see through our client enquiries the prevalence of exploitative practices from immigration consultants and the degree of harm being experienced by people who had particular vulnerabilities due to language and culture barriers, and insecure visa status. We are not clear, however, that the case has been made to say there is a wider problem in relation to the provision of legal services that we need to jump on by regulating.
41. Regulation of the provision of legal services by non-lawyers also ignores the fact that other providers of services may already be subject to codes of conduct, CPD / learning and development requirements, and complaints and disciplinary procedures. It is not as simple as saying that there are safeguards when you engage a lawyer because they are the only ones who are subject to regulatory oversight and professional responsibilities. For example, CAB volunteers fulfil induction, probation, and ongoing learning requirements; adhere to a volunteer agreement, code of ethics, and internal policies and procedures; and are subject to peer review of the write-up of every client interaction, performance feedback, and to complaints and disciplinary processes.
42. To the extent that regulation is seen as the appropriate tool to ensure adequate protection for consumers / clients, it should be targeted and proportionate to the risk posed and be justified by real concern – from consumers, not from competing bodies. It is also important to balance the consequences of regulation in terms of the burden on providers with the potential benefits for clients. If the balance is not well struck, providers may withdraw their services and leave clients with less access to legal services, especially at the free or affordable end of the continuum.

Lack of clear definitions

43. One of the added complexities of regulating “legal services” is the extensive range of activities this potentially encompasses. The current definitions of “legal services” and

“legal work” are incredibly broad. Legal work includes “advice in relation to any legal or equitable rights or obligations” and, “any work incidental to that”. It includes “mediation” and “conciliation”, approaches that are at the core of how many community organisations function.

Section 6, Lawyers and Conveyancers Act 2006

legal services means services that a person provides by carrying out legal work for any other person

legal work includes—

- (a) *the reserved areas of work:*
- (b) *advice in relation to any legal or equitable rights or obligations:*
- (c) *the preparation or review of any document that—*
 - (i) *creates, or provides evidence of, legal or equitable rights or obligations; or*
 - (ii) *creates, varies, transfers, extinguishes, mortgages, or charges any legal or equitable title in any property:*
- (d) *mediation, conciliation, or arbitration services:*
- (e) *any work that is incidental to any of the work described in paragraphs (a) to (d)*

- 44. There is no statutory definition for “legal advice”, nor any consistent definition in government policies or guidance. A common explanation of legal advice is that it is the application of legal information (publicly available statements of the law) to a person’s specific circumstances. This kind of activity happens every day in CABs around Aotearoa. CAB volunteers might not feel comfortable saying they are providing legal advice, but that is regularly what they are doing.
- 45. This could be about the person’s right to challenge an unlawful notice from their landlord to end their tenancy, a neighbour’s right to dispute the amount of money they are being asked to contribute to a boundary fence, an employee’s entitlement to be paid for the work they do and to not be discriminated against, or the consumer remedies available to a person who has bought a faulty product. It could involve relationship disputes, family violence, criminal charges, traffic infringements, debts, and more. The law, and its application, touches every area of our lives.
- 46. Any consideration of the regulation of legal services needs to happen with full awareness of the breadth of issues and activities it could apply to if existing definitions are used.

The essential role of non-lawyers in access to justice

- 47. The provision of legal services (noting the broad definition above) by non-lawyers is a critical element of access to justice. People come to the CAB with legal issues, but they don’t have to have identified them as legal issues. In the tenancy, consumer, income support, debt, and general neighbourhood disputes areas, there are many legal issues that lawyers aren’t very involved in, and the dominant workforce is non-lawyers. We need to recognise that reality and ensure we don’t make it harder for people to get the help they need in those spaces.

48. In addition to the work of our team of CAB volunteers, there are people operating in roles across the social service sector that interact with legal processes. Support offered to clients can stretch from providing legal information, through to advocacy and in some settings, to representation. Further examples of legal service provision can be found in the education sector and throughout the public service.
49. We believe people can and should be able to access the law, have an understanding of the law, and be able to activate the law to ensure their rights are upheld. Legal service providers should be enablers of this, not gatekeepers, and yet, unfortunately, lawyers are regularly experienced as barriers to accessing justice. As part of the *Wayfinding for Civil Access to Justice* work, there is recognition that things are not working well. The availability or opportunity to access justice through the formal legal system is already confined to a small group of people. One of the most significant barriers is cost – the reality is that for most people, lawyers cost too much.
50. For CAB, and others providing legal services in the not-for-profit sector, it is our core aims and values that drive our mahi and our commitment to ensure a quality service to our clients. We acknowledge that clients can experience harm from poor advice, whether or not a fee is paid, but reiterate that the case for broad regulation has not been made. In organisations like ours, where the service to the community is reliant on maintaining the goodwill of volunteers, there are real risks in terms of how regulation could create an environment where the burden is too great, or the anxiety about what it means is too great, and the service is compromised.

Immigration and financial service regulation and the experience of CAB

51. We have grappled with the issues raised by the scope of regulation of advice services on two previous occasions – with the licensing of immigration advisers, and then again with regulation of financial advisers. In both of these cases, we were successful in lobbying for an exemption from regulation for our organisation. This was on the basis of the robustness of our internal processes for safeguarding clients and because the burden of compliance would mean our service would have been unable to continue helping members of the public in these areas. This would have resulted in the loss of a significant public good.
52. As mentioned earlier, our organisation advocated for regulation of immigration advisers because we were regularly hearing from our clients about their experiences of predatory and exploitative behaviour by members of the industry. When the proposed legislation was introduced, we saw that CAB was caught within the scope of the licensing regime because the service we provide includes the “provision of immigration advice”.
53. We were successful in achieving [a named exemption](#) within the Act. Those exempt from licensing include “persons employed by or working as volunteers for citizens advice bureau”. In their report back to the House on the Bill, the Committee gave the following reasons for granting CAB a named exemption:

- It would not be in the consumer’s best interests for the CAB (and Community Law Centres, who were also granted a partial exemption) to cease to provide assistance in relation to immigration issues, which would be the outcome if not exempted.
 - CAB has sufficient safeguards in place to ensure the ethical and competent conduct of its people.
 - Exemption rather than definition change is the solution as there are difficulties with changing the definition of immigration advice to both avoid coverage of the CAB and prevent loopholes opening up for immigration consultants.
54. A few years later, the [Financial Advisers Bill](#) raised issues for our service as we were captured by the definition of “financial advice”. We again sought a named exemption. In this case, the Commerce Select Committee acknowledged that Citizens Advice Bureau should not be caught by the Act, but chose to recommend an exemption for all non-profit organisations.
55. In its [report](#) back to the House in 2010, the Committee stated:
“[W]e have chosen to specifically exclude not-for profit organisations providing financial adviser services. We do not consider such services to be an intended target of the regime. We are also of the view that such services are provided by various kinds of not-for-profit organisations, so an exemption by category is preferable to exemptions for specific organisations.”
56. The exemption for non-profits was introduced through the [Financial Advisers Amendment Act 2010](#) and the relevant exemption was contained in the Financial Advisers Act 2008 at section [14\(1\)\(f\)](#): “a non-profit organisation providing a relevant service if the relevant service is provided, without charge, in the course of the organisation’s activities”.

Supporting consumers to make informed choices

57. We believe that an important consideration, regardless of the position taken about further regulation, is ensuring that consumers understand what services are available and what the benefits and limitations are of each so that they can make informed choices.

Self-represented litigants

58. During our conversation with the Review Panel we were also asked for comment on concerns that have been raised about self-represented litigants slowing down the court process and whether we would get better outcomes in the system overall with more regulation.
59. It’s our view that if there are people slowing down processes in the court system because they don’t understand the system well enough or are not being well-supported, that is a reflection on ‘the system’. It is not a reason to say we need to give more control to people who know what they are doing. Seeing the solution as being

about increasing the ability to access legal representation by lawyers is not a complete answer. There are system-wide issues to be addressed to genuinely improve access to justice.

Thank you for the opportunity to contribute to this review. Please don't hesitate to get in touch with any questions you may have in relation to our submission. We welcome opportunities to provide further input into the review.

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