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New Zealand’s Legal Profession –
At a Cross-Roads?

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INTRODUCTION

What do you call 100 lawyers at the bottom of the ocean? ‘A good start!’

New Zealand’s legal profession is an easy scapegoat for public criticism. Yet barristers and solicitors are a tightly regulated profession. This paper aims to understand and analyse the current climate within the legal services market in New Zealand. Why is our legal profession under such attack?

It seems ironic that a profession which aspires to high ideals could be the subject of such criticism. Yet we rarely consider why such high standards are demanded of a profession. Chapter One will discuss the concept of a profession, and show whether the legal profession in New Zealand can retain such a position.

If there is to be any answer to disparaging remarks about lawyers, we must identify and resolve the criticisms of lawyers in New Zealand. Chapter Two will discuss the criticisms directed at barristers and solicitors, to understand why public confidence in our legal profession may be threatened.

Ironically the legal profession is subject to a number of different controls. Parliament, the Courts, the profession’s own representative bodies at both a national and local level and individual clients all impact on lawyers’ practise. Chapter Three will discuss how each institution has responded to the criticisms made of lawyers. Chapter Four will assess any resulting concerns of the profession which remain problematic.

This paper will review the legal profession in New Zealand. For all those who practise as barristers and solicitors this is your collective reputation at risk. It is a review with which all lawyers should be particularly concerned.
I THE LAW AS A PROFESSION

A. The Characteristics of a Profession

Law is said to be a professional discipline. Traditionally, the professions of medicine, theology and law have been set apart from other occupations. Doctors, lawyers and clerics are seen to aspire to something greater than those in the ordinary situation of employment for valuable consideration. Yet how is a ‘profession’ differentiated from a mere ‘occupation’? This chapter will discuss the irreducible core characteristics of a profession, and enquire whether the practise of law in New Zealand today exhibits those characteristics.

There have been many definitions of the core features of a profession. Klar, Linden, Cherniak and Kryworuk identify four requirements: (i) the work must be skilled and specialized; (ii) all professionals will have moral principles “beyond the duty of honesty”; (iii) there is an association which regulates admission; and (iv) professionals have high status in the community.¹ Freidson states that a profession may exist where there is the power to determine qualifications and credentials; the ability to limit entry; and the ability to evaluate performance.² Freidson’s “ideal type, professionalism” consists of: (i) specialised knowledge and skill, (ii) “exclusive jurisdiction in a particular division of labour”; (iii) a “sheltered position” based on qualifications; (iv) a formal training programme controlled by the profession; and (v) an “ideology that asserts greater commitment to doing good work...and to quality.”³ Richard Abel’s definition of a profession requires state protection of knowledge, controlled entry, status aspirations, the profession itself trying to suppress competition and self-regulation.⁴ In his Chorley lecture, Richard Abel defined professionalism as, “members of an occupation [exercising] a substantial degree of control over the market for their services.”⁵

¹ L Klar, Mr Justice A Linden, E Cherniak, QC and P Kryworuk, Professional Negligence (Carswell, Canada, 1995) 16.III-27.
³ Ibid 127.
Other more informal lists of the characteristics of a profession have included special skill and expertise, a confidential relationship with clients, public reliance on practitioners' standards and the observance of an ethical code. More contemporary definitions focus on the public service element in a professional's work. A classic definition of a profession contrasts the work of a professional to that of the entrepreneur where the latter's motivation is wealth accumulation as opposed to service. Indeed Justice McKay described the "hallmarks" of a profession as "integrity and service."

Analysis of the literature suggests that a profession has three essential characteristics. First, a profession emerges when a group of people become accomplished through learning in a particular skill or ability. This specialised knowledge is obtained through specific training at a designated institution of learning such as a University. Such a degree of special skill or training lays the foundation for acquired expertise, which justifies a profession setting itself apart from other 'lay persons', who may have an interest or experience in the area.

Second, a profession demands the right to regulate itself. This element of autonomy is derived from the collective interest of the professionals in preserving their reputation, and the fact that lay people would not be qualified to discipline or regulate those within the profession. Freidson's explanation of a 'monopoly' being created is a succinct way of paraphrasing Abel's definition which emphasises controlling entry and suppressing competition. In a monopoly situation, competition is non-existent, but self-regulation can be justified by 'professionalism', just as the monopoly itself is justified by 'professionalism'. This means the monopoly is justified by the necessity to maintain high standards for the protection of all consumers and to protect the knowledge that has been gained. Once a profession regulates itself without outside intervention, it effectively becomes autonomous.

9 Freidson, above n 2, 198.
10 Abel, above n 4, 471.
11 Freidson, above n 2, 200.
Third, members of the profession will aspire to professional standards which are higher than those expected of an ordinary worker or imposed by law. The origins of professionalism stem from a ‘declaration of commitment to shared ideals’,\textsuperscript{12} or a common ‘sense of purpose’.\textsuperscript{13} All the professions have aspired, or are expected to aspire, to higher standards beyond the traditional commercial pursuit of profit. It is this higher aspiration that sets the professions apart from other occupations.\textsuperscript{14} Freidson discusses professionalism’s “ideology of service”.\textsuperscript{15} Rather than simply serving the public, however, a profession must be independent of its patrons, pursuing substantive goals suitable to their particular discipline.\textsuperscript{16}

Notably both Klar, Linden, Cherniak & Kryworuk and Abel suggest some form of ‘higher social status’ is a necessary requirement for a profession.\textsuperscript{17} However, while some high social status will inevitably result for professionals in a restricted area of activity, this is more a resulting consequence than a necessary feature of a profession. This is also more likely to operate on an individual basis.

\section*{B. The Law as a Profession}

The practise of law is popularly thought of as a profession. The following discussion asks whether the three essential characteristics of a profession identified above are present in the legal profession in New Zealand today.

\subsection*{1. Special Skill and Training}

To qualify for admission as a barrister and solicitor in New Zealand, two stages of specialised training must be completed. The first is the academic LLB qualification, obtained over at least four years of full-time study. The content of core compulsory papers are determined by the New Zealand Council of Legal Education, a statutory body constituted under the Law

\begin{itemize}
\item \textsuperscript{12} R Dal Pont, \textit{Lawyers' Professional Responsibility in Australia and New Zealand} (2\textsuperscript{nd} ed, North Ryde, NSW, 2001) 5.
\item \textsuperscript{13} G Hazard & D Rhode, \textit{The Legal Profession: Responsibility and Regulation} (3\textsuperscript{rd} ed, The Foundation Press Inc, New York, 1994) 2.
\item \textsuperscript{14} Klar, Linden, Cherniak and Kryworuk, above n 1, 16.III-27.
\item \textsuperscript{15} Freidson, above n 2, 122.
\item \textsuperscript{16} Freidson, above n 2, 122 – 123.
\item \textsuperscript{17} Klar, Linden, Cherniak and Kryworuk, above n 1; Abel, above n 4, 471.
\end{itemize}
Practitioners Act 1982 and charged with the responsibilities of establishing the academic requirements for legal education in New Zealand. The Council comprises representatives of the Judiciary and the New Zealand Law Society, the Deans of the five University Law Faculties, two student representatives and a Ministry of Justice representative. The Council appoints ‘Moderators’ to approve University examination papers in the core compulsory courses. Non-compulsory courses’ examination papers are moderated between the different Law Faculties and results are assessed in an attempt to maintain consistency.

The second prerequisite for admission as a barrister and solicitor is successful completion of the Professional Legal Education course, aimed at developing practical employment-related skills. Currently, candidates for admission can choose between one of two Council of Legal Education approved courses.

The third requirement to practise law in New Zealand is formal admission by the High Court. This requires that the applicant presented to the Court be of “good character” and a “fit and proper person” to practise. An applicant must take an oath to “truly and honestly” conduct themselves in the practise of a barrister and solicitor. This requirement measures character and purports to exclude anyone in whom the profession does not have confidence.

There are further limits on practise once an applicant has satisfied the above academic, ethical and character-based standards. A current practising certificate issued by the New Zealand Law Society must be maintained (see below), and solicitors may not practise on their own account without three years supervised legal experience and completion of a short trust account management course.

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18 Law Practitioners Act 1982, s 38.
20 Law Practitioners Act 1982, s 46.
21 Law Practitioners Act 1982, s 46.
22 Law Practitioners Act 1982, s 55(2).
2. Self-regulation/Autonomy

Membership of the New Zealand Law Society (NZLS) is required for any barrister and/or solicitor to practise in New Zealand.\(^{23}\) Barristers and solicitors must hold a practising certificate, which entails membership of the NZLS and the corresponding District Law Society.\(^{24}\) There is a NZLS Council, which comprises the President, the four Vice-Presidents, the Treasurer and representatives of the fourteen District Law Societies.\(^{25}\) The NZLS Board comprises the President, the Vice-Presidents (four), and eight NZLS members elected by the Council. The Board manages the general affairs of the NZLS, although some powers are reserved to the Council. The NZLS Secretariat operates in association with the NZLS Council and Board.\(^{26}\) District Law Societies operate under the umbrella of the NZLS.\(^{27}\)

The NZLS regulates the profession through the operation of a disciplinary structure and restrictions contained in the *Rules of Professional Conduct for Barristers and Solicitors*.\(^{28}\) The NZLS has input into the educational requirements for admission through representation on the Council of Legal Education.\(^{29}\) The profession itself is therefore responsible directly or indirectly for setting and maintaining practise standards.

All barristers and solicitors are subject to discipline by the District Law Societies, the New Zealand Law Practitioners' Disciplinary Tribunal (NZLPDT) and the High Court.\(^{30}\) Any person can make a complaint to their District Law Society (or its appointed Complaints Committee), which must investigate any complaint.\(^{31}\) A District Law Society (DLS) may investigate without a complaint if it has a serious concern about a practitioner's conduct.\(^{32}\) A Complaints Committee can lay a charge before a District Disciplinary Tribunal (DDT).\(^{33}\) If a

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\(^{23}\) Law Practitioners Act 1982, s 3.
\(^{24}\) Law Practitioners Act 1982, s 56.
\(^{25}\) Law Practitioners Act 1982, s 11.
\(^{26}\) Law Practitioners Act 1982, s 15(1).
\(^{27}\) Law Practitioners Act 1982, ss 18, 26.
\(^{29}\) Law Practitioners Act 1982, s 31.
\(^{30}\) Law Practitioners Act 1982, Part VII.
\(^{31}\) Law Practitioners Act 1982, ss 98, 100, 101(1).
\(^{32}\) Law Practitioners Act 1982, s 99.
\(^{33}\) Law Practitioners Act 1982, s 101(2).
DDT finds that the practitioner is guilty of professional misconduct, conduct unbecoming a practitioner, serious or frequent negligence or incompetence, or has been convicted of an offence punishable by imprisonment which reflects on fitness to practise or brings the profession into disrepute, it may issue fines, censure the practitioner, order cession or completion of work, order compensation, inspect a lawyer’s practice and order a lawyer to pay costs. A Lay Observer can be appointed in order to investigate the way a DLS handled any complaint.

The practitioner or the District Council of the DLS (or its Complaints Committee) can appeal their case to the NZLPDT. A DDT or Council can also lay a charge before the NZLPDT. The NZLPDT can, amongst other powers, order a barrister or solicitor struck off the roll or suspended from practise. There is a right of appeal from the NZLPDT to the High Court.

The High Court has an independent regulatory role. All barristers and solicitors are required to be enrolled by the registrar at the High Court on admission to the bar. The High Court has an inherent jurisdiction in regulating who appears before it, a corollary of their power to admit barristers and solicitors to the Court. If the High Court decides a practitioner is to be struck off the roll, or is unclear as to whether to strike off, the case must be referred to the Court of Appeal.

The NZLS is involved with several other key aspects of regulation of the legal profession aside from its disciplinary role discussed above. The NZLS administers a solicitors’ fidelity guarantee fund which protects clients from defaulting lawyers. The NZLS sets the minimum level of compulsory professional indemnity insurance. All solicitors are

34 Law Practitioners Act 1982, s 106(3).
35 Law Practitioners Act 1982, s 106(4).
38 Law Practitioners Act 1982, s 110(1).
40 Law Practitioners Act 1982, s 112(2).
41 Law Practitioners Act 1982, s 118.
44 Law Practitioners Act 1982, s 92, s 93(1)(b).
45 NZLS, above n 28, Rule 1.12.
regulated in their dealings with monies in trust accounts under the *Rules of Professional Conduct for Barristers and Solicitors*.\(^{47}\) Any money which it is “not reasonable or practicable” to invest for the client in the normal way is paid into a nominated trust account.\(^{48}\) The interest from this account forms the NZLS Special Fund, which finances research and education under the supervision of the Legal Services Board and the New Zealand Law Foundation.\(^{49}\) The NZLS regulates practitioners’ trust accounts by operating a Joint Audit Board which oversees the work of the NZLS Inspectorate, and a Section 97A Committee, which has the power to review complaints handled by District Law Societies on recommendation from a Lay Observer.

There are various other restrictions on lawyers imposed by the *Rules of Professional Conduct for Barristers and Solicitors*.\(^{50}\) For example law firms are not allowed to incorporate and therefore do not have the benefit of limited liability.\(^{51}\) Multi-disciplinary practices are not permitted and advertising must be consistent with professional standards.\(^{52}\)

The disciplinary procedures and restrictions discussed above show the NZLS’s critical involvement in the regulation of the legal profession. This regulation plays a large role in maintaining the profession’s autonomous position. As Duncan Webb has suggested, “the legal profession has been typified, and to some extent defined, by its independence and autonomy”.\(^{53}\) However the current system is under threat as discussed in Chapter Two.

### 3. Professional Standards

Sir Thomas Eichelbaum highlighted the professional standards expected of lawyers at the Ninth Commonwealth Law Conference in April 1990:\(^{54}\)

> Maintenance of the standards of the profession, and of its independence, are...fundamental to the judicial system as we know it, and thence of the rule of law.


\(^{48}\) Law Practitioners Act 1982, s 91K.


\(^{50}\) Law Practitioners Act 1982, s 17(1).

\(^{51}\) NZLS, above n 28, Rule 2.03.

\(^{52}\) NZLS, above n 28, Chapter IV.


Lawyers have obligations which set them apart from commercial businesses. The legal profession is premised upon lawyers’ overriding duty to the Court. Their duties to their clients fall second. The lawyers’ duty to the Court means that their first duty is to further the administration of justice. In order to discharge this duty they must maintain their independence from their clients. Maintaining independence and facilitating the administration of justice while at the same time discharging their contractual and other legal obligations to their clients is the unique challenge facing the legal profession.

a) Administration of Justice

Furthering the administration of justice is achieved through fulfilling the duties contained in the Rules of Professional Conduct for Barristers and Solicitors, such as the requirement to present clients’ cases efficiently and clearly, and to bring all relevant authorities to the Courts’ attention. As the President of the International Bar Association recognised in 1990, “...we are primarily responsible, because of our privileged position, to ensure that our legal systems work well.” Lawyers’ role in the facilitation of justice is exemplified by the operation of legal professional privilege. This privilege recognises that our legal system puts faith in lawyers never to mislead the Court. Lawyers must discharge their duty to the Court in order to adequately serve the public.

b) Independence

The second standard to which the profession aspires is to provide independent advice. To discharge their duty to the Court, lawyers must be in a position to provide impartial, objective advice to their clients. The standard of independence requires the lawyer to override the needs of the client if necessary to satisfy the wider duty to the Court, for example refusing to act for a client wanting to mislead the Court. This is crucial for the lawyer to fulfill their duty to further the administration of justice.

55 NZLS, above n 28, Rule 8.01.
56 NZLS, above n 28, Rule 9.01(commentary iv), 10.01(commentary 3).
57 W R Smith cited in Eichelbaum, above n 54, 272.
58 NZLS, above n 28, Rules 1.03, 1.04, 1.05, 1.06, 1.07, 8.01.
59 NZLS, above n 28, Rule 10.02.
These higher standards are a central characteristic separating the professions from mere occupations. However the argument can be circular – the fact that lawyers follow a set of ethical rules, or ‘adhere to higher standards’ renders them professionals, and because they are professionals they must follow a set of ethical rules!

Sir Thomas Bingham MR recognised the importance of professional standards in *Bolton v Law Society* where he stated: “A profession’s most valuable asset is its collective reputation and the confidence which that inspires”.60 This reputation is built not only on skill and expertise but a higher pursuit of justice and independence.

*Conclusion*

This Chapter has identified the three essential characteristics of a profession – special skill and training, self-regulation or autonomy and professional standards. The legal profession in New Zealand clearly possesses all of these characteristics. A demonstrated level of special knowledge and expertise is required for admission as a barrister and solicitor. Self regulation or autonomy through the NZLS separates the profession from most other occupations. Finally, the profession aspires to higher standards than those expected in most occupations. These special characteristics help explain the high expectations of the legal profession held by the public.

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II CRITICISMS OF THE LEGAL PROFESSION

A. Sources of the Criticisms

Barristers and solicitors are increasingly under criticism from diverse groups within society. Clients, the public and third parties to legal transactions are all affected by the advice given by solicitors in different ways and make a variety of demands on lawyers.

Clients are the most obvious group which critique the performance of barristers and solicitors. Different clients will have different concerns and the lawyer’s role will reflect this. However, all clients will demand high quality professional service and accountability from their solicitors.

The public also has a vested interest in the operation of the legal profession. The Ministry of Justice must ensure that all members of the public have reasonable access to legal advice. With the establishment of the Consumers Institute in 1988 and the operation of the Consumer Guarantees Act 1993, there is increasing demand for professionals to be accountable for their services. Concerns regarding professional standards and consumer protection are further emphasised through the media.¹

Third parties to transactions are also affected by lawyers’ actions. Although third parties do not have a contractual relationship with the lawyer, lawyers’ duties to third parties such as beneficiaries of wills are increasingly being recognized by the Courts.² This group has an interest in extending the scope of the legal duty of care owed by lawyers.

B. Nature of the Criticisms

Criticisms of the legal profession by clients, the public and third parties focus attention on three main concerns. First, there are concerns that lawyers are not held accountable for serious misconduct and unsatisfactory conduct. This concern is linked to criticism of the NZLS’s representative and regulatory role. Second, there are concerns that commercialisation of the legal profession is undermining traditional professional standards. Third, the legal profession is viewed as being inherently anti-competitive.

1. Criticism of lawyers’ conduct

Clients, the public and the Government criticise the conduct of lawyers in New Zealand. First, there are concerns about serious misconduct by lawyers. Second, there are concerns that certain types of less serious but nevertheless inadequate conduct are being left unaddressed by the current disciplinary structures. Third, the NZLS has an inherent conflict between its representative and regulatory roles.

A critical distinction in this area is an understanding of the level of ‘misconduct’ that attracts disciplinary sanctions. The Law Practitioners Act 1982 only allows the NZLPDT or a District Disciplinary Tribunal (DDT) to make orders under the Act if the relevant Tribunal finds the practitioner has been guilty of misconduct in his professional capacity; conduct unbecoming a barrister or solicitor; serious or frequent negligence or incompetence in his professional capacity; or has been convicted of an imprisonable offence which reflects on his fitness to practise or brings the profession into disrepute. If these criteria are satisfied, a DDT is empowered to make wide-ranging orders, including the payment of fines, specific performance or simply that advice be taken. The NZLPDT has more serious powers as discussed earlier.

For any complaint, the DLS Complaints Committee must decide whether the conduct complained of is of “sufficient gravity” to warrant making a charge to a DDT or the

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3 Law Practitioners Act 1982, ss 106(3), 112(1). Refer Appendix.
4 Law Practitioners Act 1982, s 106(4).
5 Law Practitioners Act 1982, s 112(2).
However the Act does not define ‘misconduct’. The Court of Appeal has emphasised that it is for the profession, "through its own channels" to define misconduct. The NZLPDT defined misconduct in ADLS v Atkinson as, “of sufficient gravity to be termed reprehensible (or inexcusable, disgraceful, deplorable or dishonourable)”. This definition was expanded upon by the High Court in B v CDLS and Re: A, who stated “mere professional incompetence” or “deficiencies” would not be sufficient, often requiring “wrongful intention” for a finding of misconduct. Thus both the Courts and the profession have interpreted ‘misconduct’ as requiring serious breaches of accepted standards, with deliberate intention often required.

a) Misconduct

Where complaints sufficient to amount to ‘misconduct’ are made, it appears they are being dealt with adequately by the DDTs and the NZLPDT. In 2004, the NZLPDT made 16 determinations, including five practitioners struck off the roll, one suspended from practice, one censured and fined, and three practitioners had restrictions placed on their practice. No more than eight lawyers are generally struck from the roll each year (around 0.09%). These people are generally found to be guilty of a crime. In comparison, 32 practitioners were struck off the roll in England in 2004, where there were 121,165 solicitors on the roll (around 0.03%). The numbers of serious complaints do not appear to be rising, given that twelve years ago the NZLPDT dealt with a similar number of complaints to today, with over 3,000 fewer practitioners.

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6 Law Practitioners Act 1982, s 101(2). Refer Appendix.
8 NZLPDT, 15 August 1990.
11 Ibid.
13 N Hampton QC “NZLPDT - Report from the Chair”, above n 12.
16 The Law Society “Number of Solicitors on Roll and Practising Certificate Holders since 1950” (Internet) <www.lawsociety.org.uk> accessed 01/09/05.
It appears that ‘misconduct’ is not a widespread issue. This was certainly more of a real problem in the mid 1990s when the profession faced serious criticism as a result of high-profile defalcations from firm trust accounts. As a result of two lawyers stealing client funds at a firm, Renshaw Edwards, a special levy was imposed by the NZLS on all principals in New Zealand to compensate the affected clients.18

The Structure Committee of the NZLS, formed in 1991 to review the organization and structure of Law Societies in New Zealand, found that:19

...in regard to serious complaints where a practitioner’s right to practice may be in jeopardy, the New Zealand system was regarded amongst the best in the world. However, at the lower level of minor complaints and complaints relating to standards, there were deficiencies that needed to be addressed.

Isolated acts of professional negligence (excepting criminal barristers) can be ‘disciplined’ through negligence actions in the Courts. Until recently, barristers have enjoyed an immunity for liability for negligence in respect of Court work, but they have still been subject to discipline by the Law Societies. Complaints against barristers comprise almost one quarter of Auckland-based complaints.20 However, negligence suits are difficult and expensive to pursue. The additional cost of engaging another solicitor to sue the first is enough to deter many clients. Indeed, one of the justifications for the ‘complexity’ of the Lawyers and Conveyancers Bill 2003, was that consumers could not “assess the competence of practitioners and quality of services provided”.21 However overall, complaints regarding ‘misconduct’ appear to be being dealt with adequately.

b) Unsatisfactory conduct

Unsatisfactory conduct is a more extensive problem than ‘misconduct’ in New Zealand, with poor operation of, and access to complaints mechanisms. First, the narrow definition of ‘misconduct’ adopted by the Courts and the NZLPDT excludes any complaints of lesser, unsatisfactory or dilatory conduct. Such complaints are not easily covered by the three

17 G Ruck Discipline within the legal profession (NZLS, Wellington, 1993) 15.
19 Ruck, above n 17, 13.
further charges available under sections 106 and 112 of the Act. For example, “conduct unbecoming”\(^{22}\) has been interpreted as relevant for incidences in the private lives of lawyers which warrant disciplinary action\(^{23}\) and the final category only covers practitioners who have been convicted.\(^{24}\) Thus ‘serious or frequent negligence or incompetence’\(^{25}\) is the only feasible charge under the Act where ‘inadequate conduct’ complaints could be made. Isolated acts of negligence, or inadequate conduct which does not necessarily reflect on fitness to practise or bring the profession into disrepute, are effectively excluded.

Second, Parliament may have envisaged the DDTs handling the majority of complaints against practitioners, reflected in their wide-ranging powers.\(^{26}\) However it appears that the DDTs are not fulfilling this role. In 2004, only 9 charges were laid before the Auckland DDT,\(^{27}\) and only 4 charges before the Canterbury DDT.\(^{28}\) All other complaints are therefore being dealt with by the District Law Societies and Complaints Committees. There is no national co-ordination of standards to be applied.\(^{29}\) The Complaints Committees must interpret the Act for each complaint, leading to inconsistencies between districts. There is little guidance regarding the powers of the DLS’s if the complaint is not sufficiently serious to go to a Tribunal.\(^{30}\)

Duncan Webb has stated that the current regulation of lawyers neglects, “the mundane, but more important, questions of competence and effective client service.”\(^{31}\) The emphasis is often on punishment of serious misbehaviour, rather than disciplining poor service.\(^{32}\) Practitioners themselves have noted that, “we are wrestling with a complaints and disciplinary system...weak on the provision of prompt solutions to clients’ problems”.\(^{33}\)

\(^{22}\) Law Practitioners Act 1982, ss 106(3)(b), 112(1)(b). Refer Appendix.
\(^{23}\) Re: Baledrokdado (NZLPDT, 18 June 2001, Gapes, RM (Chair)).
\(^{24}\) Law Practitioners Act 1982, ss 106(3)(d), 112(1)(d). Refer Appendix.
\(^{25}\) Law Practitioners Act 1982, ss 106(3)(c), 112(1)(c). Refer Appendix.
\(^{27}\) ADLS “Statement of Service Performance – Regulation”, ADLS, above n 20, 26.
\(^{29}\) Ruck, above n 17, 13.
\(^{32}\) McEwin, above n 14, 61.
If the Act was intended to cover all conduct complaints, current practise indicates otherwise. For example, a Lay Observer stated in 1993 that: 34

...unless their particular lawyer has transgressed to the degree that he could be struck off or heavily fined, under the Act within which it operates the Society is unable to take any action. ...Many of the actions of the lawyers, while causing the complainants some annoyance or frustration, are certainly not serious enough for the present disciplinary action to be taken.

A complaint to the NZLS Structure Committee that year stressed that there was a need for “speedy resolution of minor complaints and those which involve breaches of standards as opposed to the investigation of serious conduct complaints”. 35

Most of the complaints received by District Law Societies are not to do with serious offending but inadequate service, 36 often involving poor communications between the client and practitioner. 37 A large section of complaints are ‘costs complaints’, 38 which are often linked to dissatisfaction with professional conduct. Many costs complaints are not successful, as the client does not appreciate the issues involved. 39 In Auckland in 2004 for example, 61.5% of the cost revision complaints revised by the ADLS remained the same. 40 Cathy Knight, Secretary of the Nelson District Law Society noted that few complaints reach the ‘required standard’ for referral to a DDT. 41

There is evidence which suggests that unsatisfactory conduct in the legal profession is a concern held by clients and the public. In 1993, 1,217 complaints (without distinction as to inadequate service or serious misconduct) were made to District Law Societies. Of 6,243 practitioners at the time, this represents a ratio of one complaint for every 5.1 lawyers. 42 Proportionately fewer complaints are received in New Zealand than in Australia and England, 43 but whether this is from a lack of confidence in the complaints system, or from

34 Ruck, above n 17, 13 – 14.
35 Ruck, above n 17, 14.
36 Interview, Alan Ritchie, Executive Director, NZLS, 10 August 2005.
37 Email from Susan Schweigman, Otago District Law Society, to Nicola Leslie dated 9 August 2005.
39 Email from Kevin Greer, Secretary, Manawatu District Law Society to Nicola Leslie dated 3 August 2005.
41 Email from Cathy Knight, Secretary Nelson District Law Society to Nicola Leslie, dated 5 August 2005.
42 Ruck, above n 17, 15.
43 Ruck, above n 17, 15.
having ‘better lawyers’ is uncertain. While there are no official figures, in 2004 the following complaints were received by various District Law Societies.\(^\text{44}\)

<table>
<thead>
<tr>
<th></th>
<th>No. of Complaints (including Revisions)</th>
<th>No. of Practitioners</th>
<th>Ratio Complaints: Practitioners</th>
</tr>
</thead>
<tbody>
<tr>
<td>Auckland(^\text{45})</td>
<td>886</td>
<td>4213</td>
<td>1: 4.8</td>
</tr>
<tr>
<td>Canterbury(^\text{46})</td>
<td>189</td>
<td>996</td>
<td>1: 5.2</td>
</tr>
<tr>
<td>Gisborne</td>
<td>9</td>
<td>46</td>
<td>1: 5.1</td>
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<tr>
<td>Hawkes Bay</td>
<td>44</td>
<td>197</td>
<td>1: 4.5</td>
</tr>
<tr>
<td>Nelson</td>
<td>42</td>
<td>137</td>
<td>1: 3.3</td>
</tr>
<tr>
<td>Otago</td>
<td>62</td>
<td>341</td>
<td>1: 5.5</td>
</tr>
</tbody>
</table>

Averaging the above statistics shows that there is about one complaint for every 4.73 lawyers. Evidently the situation has not improved since 1993.

The problem is not just the number of complaints being received but how they are being dealt with.\(^\text{47}\) The Ministry of Justice wrote to the NZLS in 1991 detailing a “certain amount of public dissatisfaction about the complaints procedures...Complaints Committees...tend to protect their fellow practitioners.”\(^\text{48}\) The majority of submissions to the Lawyers and Conveyancers Bill 2003, were in favour of reforming the regulatory system, detailing unsatisfactory experiences such as delay.\(^\text{49}\) Tim Barnett, Chairperson of the Select Committee, was aware that complaints procedures were inadequate.\(^\text{50}\) Even requesting information on complaints from the DLSs yielded wide variability in the type and extent of information provided.\(^\text{51}\)

\(^{44}\) Data obtained from email responses from various District Law Societies for the 2004 year, and compared to the number of practicing certificates issued in each DLS as per NZLS above n 12, 2.
\(^{45}\) ADLS “Statement of Service Performance – Regulation”, ADLS, above n 20, 24.
\(^{47}\) Ritchie, above n 36.
\(^{48}\) Ruck, above n 17, 13.
\(^{49}\) Ministry of Justice, above n 21, 21 - 22.
\(^{50}\) Interview with Tim Barnett, Chairperson of Select Committee on Lawyers and Conveyancers Bill (Wellington, June 2005).
\(^{51}\) Email from Cathy Knight, Secretary Nelson DLS to Nicola Leslie, dated 5 August 2005; Email from Susan Schweigman, Otago DLS, to Nicola Leslie dated 9 August 2005; Email from Trudi Roe, Gisborne DLS to Nicola Leslie, dated 3 August 2005; Email from Shonagh Matheson, Hawkes Bay DLS to Nicola Leslie, dated 9 August 2005; Email from Graham Hill, Malborough DLS to Nicola Leslie, dated 3 August 2005; Email from Kevin Greer, Manawatu DLS to Nicola Leslie, dated 3 August 2005.
A related issue is perhaps a lack of information about lawyer competence. There are no ‘higher’ qualifications within the profession in New Zealand which recognise legal expertise in a particular area. The rank of Queen’s Counsel recognises leading advocates, but excludes those who do not practise in Court or who are members of firms.\(^{52}\) Specialist firms do exist, for example Chen & Palmer, but their expertise is known through market knowledge, rather than any ‘profession wide’ system of recognising specialisation. Furthermore, there is no requirement in New Zealand for practising lawyers to improve or even maintain their level of knowledge over time. Participating in Continuing Legal Education programmes is optional and renewals of the NZLS practising certificate are merely a procedural requirement.

Evidently an individual can sue their lawyer in breach of contract or negligence for unsatisfactory conduct. However many cases will not be taken to Court due to settlement or the cost involved (notwithstanding that criminal barristers are still immune from suit). There appears to be a well founded criticism that unsatisfactory conduct complaints are not being dealt with by DDTs as the Act may prescribe, and that the resulting method of resolving these complaints is haphazard.

c) The NZLS conflict

Criticisms regarding lawyer conduct are directly related to the criticism that the NZLS has an inherent conflict in both regulating and representing its members. This conflict was viewed as the “catalyst for reform” by the NZLS Structure Committee even as long ago as in 1992.\(^{53}\) The E-DEC report in 1997 explicitly recognized the situation noting, “conflicting regulatory and member interest objectives [are] well recognized...law societies are required to be both a policeman and a friend”.\(^{54}\) Further:\(^{55}\)

The notion of law as a profession may have helped deal with this conflict in the past...But, the situation is changing. Increasing competition is causing the notion of a profession to become blurred and is leading lawyers to ask what law societies are doing to help them in this new, business-like world. The tension between regulatory and member interest roles has surfaced within law societies...

\(^{52}\) Law Practitioners Act, s 62(2).
\(^{53}\) Ruck, above n 17, 13.
\(^{54}\) E-DEC Ltd, Purposes, Functions and Structure of Law Societies in New Zealand, Final Report to the NZLS (E-DEC Ltd, Wellington, 1997) 8.
\(^{55}\) Ibid.
In 2004, Chris Darlow, NZLS President, highlighted these concerns through recognising the significance of the ‘Clementi Report’. Sir David Clementi had reviewed legal services in England and Wales in 2004, concluding that rule-makers need to be separated from advocates for the profession, and that complaints should be heard by an independent body. Mr Darlow highlighted the fact that this report “is being regarded very seriously by law societies and bar associations across the developed world”.

One independent aspect of the current system is that clients can appeal to Lay Observers if they are dissatisfied with way their DLS handled a complaint. However, Lay Observers can only refer their report to the NZLS Section 97A Committee. Thus mechanisms for resolving complaints are ultimately dealt with by the NZLS.

An obvious problem with the NZLS regulating lawyers is that clients perceive disciplinary procedures as having been developed ‘by lawyers, for lawyers’. What has been seen as a traditional feature and strength of a profession (self-regulation) is now a feature to be criticized. There are sound concerns that the NZLS is not the appropriate regulator.

2. Commercialisation in the law

This section raises concerns over the perceived commercialisation of the legal profession. In an address delivered in 1990, William Smith, (then) President of the International Bar Association, expressed the worrying trend from “professionalism to commercialism”. If lawyers’ professionalism declines, the very justifications for self-regulation and professional independence will be threatened.

The first concern is that law firms are increasingly operating as businesses, for example engaging in aggressive advertising and competitive behaviour. The commercialisation of law

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56 Chris Darlow, “President’s Review”, above n 12, 2.
58 Darlow, above n 56.
59 E-DEC Ltd, above n 54, 8.
61 Ibid.
firms questions whether the profession is becoming “contaminated with the spirit of commerce.”  

The second concern is that legal advice must increasingly take commercial or business considerations into account. The independence of lawyers from their clients is being threatened. The unique position of in-house counsel illustrates this development.

a) Commercialisation of law firms

Law firms are progressively operating more commercially, being profit-driven rather than service-orientated. Richard Abel noticed the threat of commercialisation in his 1985 Chorley lecture. He identified intensified competition and advertising, which favour commercialism at the expense of traditional perceptions of professionalism.

In 1996, a report to the Council of Legal Education and the NZLS stated that, “nowadays law firms have to have regard to business efficacy in a climate in which the free market prevails.” Law firms are structured as businesses, where advancement and success are dependant on billable hours and productivity. Becoming “enslaved to the billable hour, and the bottom line of commercial enterprise” is a development both in New Zealand and overseas. The focus on billing discourages pro bono work and community involvement in favour of excessive fees which discredit the whole profession.

Commercialisation across the board was noted by Peter Clapshaw, NZLS President in 1988: I have a concern that in some areas the commercial approach, which we all now have to take in practice, can become so dominant that it submerges to too great an extent the professional element

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65 Ibid.
68 W R Smith cited in Eichelbaum, above n 60, 271.
69 Justice McKay, above n 1, 105.
of our work...A strong and independent profession, is...dependent on lawyers who regard themselves as practising a profession first and foremost rather than being businessmen.

i) Advertising and Competition

Advertising and engaging in competitive behavior have become common and expected practises for law firms. Two significant changes have been the removal of the conveyancing scale and the relaxation of restrictions on advertising.

The NZLS Council voted to abolish the Scale of Professional Charges in March 1984. This change anticipated the Commerce Act 1986 which made it illegal to engage in price-fixing within an industry. Law firms were now free to set their prices for conveyancing services individually. Despite initial concerns that some conveyancers were overcharging for their services, competition for ‘low scale’ legal work such as conveyancing increased, resulting in falling prices.

Relaxation of advertising rules in Australia and England prompted the majority of the New Zealand profession to agitate for the removal of the ban on advertising, particularly so that lawyers could advertise their area of specialisation and their fees. The NZLS Council approved new Rules for advertising in November 1984. The possibility of advertising, ‘touting’ for clients, offering reduced prices or special services and extending opening hours encouraged commercialism.

The Rules of Professional Conduct for Barristers and Solicitors still required law firms’ advertising to be consistent with “proper professional standards.” Claims to any kind of specialist knowledge must be able to be verified by a District Law Society and

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72 Commerce Act 1986, s 30.
77 NZLS “Lawyers’ adverts have impact” (1985) 226 LawTalk 10.
advertisements must not be "intrusive or offensive". Yet advertising is now handled both by in-house teams and external agencies in law firms. While ‘visible marketing’ was still disapproved of in 1991, law firms have since had to increase their marketing strategies. This is partly as a response to increasing competition from accounting and consultancy firms. ‘Business law advice’ is an area of intense competition with a, “blurring of lawyers with the members of other professions, as part of a general category of business advisors”.

ii) Growth of the large law firm

The structuring of law firms is increasingly business orientated, as law firms match the structure of their corporate clients. It is a “self-evident fact” that there has been a substantial increase in commercial lawyers in large firms over the last thirty years. In 2004 there were 13 private law firms in New Zealand with over 16 partners. The proportion of in-house and government lawyers in New Zealand increased from 12% to 16% between 1998 and 2004, as lawyers in private practise decreased from 75% to 69%. Similar developments have occurred in England.

Number of Partners in Law Firms in England

<table>
<thead>
<tr>
<th></th>
<th>1</th>
<th>2-5</th>
<th>6-10</th>
<th>11-15</th>
<th>16+</th>
</tr>
</thead>
<tbody>
<tr>
<td>1977</td>
<td>2054</td>
<td>3586</td>
<td>595</td>
<td>128</td>
<td>57</td>
</tr>
<tr>
<td>1986</td>
<td>2617</td>
<td>4024</td>
<td>730</td>
<td>182</td>
<td>131</td>
</tr>
<tr>
<td>2004</td>
<td>4145</td>
<td>3620*</td>
<td>903*</td>
<td></td>
<td>470</td>
</tr>
</tbody>
</table>

79 Ibid, Rules 4.02, 4.03.
80 For example, Simpson Grierson “Simpson Grierson’s Advertising Agencies Awarded “Agency of the Year” (Internet) <www.simpsongrierson.com/news_and_events/> accessed 03/09/05.
82 Andrea Ruffell “Tightly-focused marketing turns small firms into big fish” (2005) 20 NZ Lawyer 1.
85 O’Brien, above n 67, 4.
87 NZLS, above n 12, 4.
88 NZLS, above n 15, 8; NZLS, above n 12, 4.
The ‘large law firm’ was originally viewed as technically and ‘collegially’ superior, and a “venue for the most exemplary professionalism”. Large law firms offer specialisation, a team approach, a known reputation to clients and high levels of professional indemnity insurance cover. However their commercial focus means success is measured by income, ‘meeting budget’ and branding. It is this change that is seen to be “profoundly at odds with professional traditions of autonomy and public service”.

The critique of large law firms is not totally negative. As Anne O’Brien suggests, “the very structure of large firms may mean that clients are protected from neglect, incompetence and embezzlement”. An efficient business will provide clients with the best “technically proficient and cost effective” service. The size of the firm means that all finances are strictly controlled. Indeed, the most frequent demands on the Solicitors’ Fidelity Guarantee Fund originate from clients of smaller law firms. Further, the firm’s interest in reputation and branding mean that the highest standards of ethical responsibility are demanded.

A large firm will have higher levels of professional indemnity insurance cover because of their involvement in large transactions. Claims against large firms tend to be much larger than claims against sole practitioners. However, large firms are far less likely to be claimed against, potentially because standards and facilities are superior, more importance is placed on risk management or they can simply attract better lawyers. In 2004, only 3.7% of complaint investigations commenced by the ADLS were regarding firms with more than 11 partners.

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91 Ibid, 189.
92 Justice McKay, above n 1, 105.
93 Galanter and Palay, above n 90, 192.
94 O’Brien, above n 67, 4.
95 Ibid.
96 Ibid.
97 Ibid.
100 ADLS “Statement of Service Performance – Regulation”, ADLS, above n 20, 25.
One problem with larger indemnity insurance is that clients may try to involve a lawyer in business decision making, knowing that indemnity insurance could compensate for any ‘poor’ decisions. This concern is acknowledged in the Corporate Lawyers Association’s *Ethics for In-House Counsel Handbook* where it states, “in-house counsel must ensure that the quality of any professional advice obtained is not influenced by whether or not an indemnity from the organization exists”. The implication is that larger firms may be viewed as preferable advisers because there is guaranteed access to substantial indemnity insurance.

*iii) Conflicts of interest*

Due to New Zealand’s limited number of commercial law firms, clients may find their lawyer has represented their opposition in a previous transaction. Where such a conflict of interest arises the lawyer must cease to act if to do so would be to disadvantage either client. One practical way of continuing to act is by using a ‘Chinese Wall’ but these are not endorsed by the *Rules of Professional Conduct for Barristers and Solicitors*.

Second, the small number of commercial law firms in New Zealand creates problems for lawyers changing firms, preventing the new firm from acting for particular clients. New Zealand’s “small number” of large firms means restricting a client’s choice of counsel has a more severe impact here than overseas.

*iv) Over-identification with clients*

The reality for large law firms is that certain high cost-generating clients become particularly important to attract and retain, in terms of profitability and reputation. A major concern is that lawyers will *over-identify* with their clients.

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102 NZLS, above n 78, Rule 1.07(1)(iii).
103 NZLS, above n 78, Rule 1.07(2). See Chapter 3, Part B 4.
One example of over-identification occurred when the wealthy Fayed family wanted to acquire the House of Fraser in London.\textsuperscript{106} Inspectors appointed to inquire into the takeover decided not to refer the acquisition to the Monopolies and Mergers Commission. This decision was based on a letter sent by the London law firm who represented the Fayeds. The letter, "created the impression that...the law firm had \textit{aligned their reputations} with those of the Fayeds".\textsuperscript{107} An independent report later concluded that over-identification with the client had meant that other parties believed the law firm itself was guaranteeing the accuracy of their client’s statements.\textsuperscript{108}

Over-identification with one client can impact on other clients. If the law firm is negligent, a “knock-on effect” can make other clients lose confidence.\textsuperscript{109} Large law firms are accused of neglecting other clients, or compromising their duties to the legal system\textsuperscript{110} through being overzealous towards certain clients,\textsuperscript{111} and potentially affecting access to justice.\textsuperscript{112} As the larger firms gravitate towards large businesses, small businesses and individuals are denied ‘top’ legal advice options. While smaller businesses often do not need such specialised advice, a ‘top tier’ of law firms may be being created. Surely this undermining of equal access to justice threatens the profession’s aspiration to further the administration of justice?

Therefore, the commercialisation of law firms can be seen through an increase in advertising and the development of the large firm. While there are distinct advantages of such a ‘business-oriented’ structure to a law partnership, there are concerns over conflicts of interest and over-identification with clients.

\textsuperscript{105} Ibid, 50.
\textsuperscript{107} Ibid, 21.
\textsuperscript{108} Ibid.
\textsuperscript{109} Bowles and Jones, above n 98, 43.
\textsuperscript{110} W R Smith, cited in Eichelbaum above n 60, 272.
\textsuperscript{111} Galanter and Palay, above n 90, 196; O’Brien, above n 67, 4 – 5; \textit{Russell McVeagh McKenzie Bartlett and Co v Tower Corporation} [1998]3 NZLR 641 at 660 per Thomas J.
\textsuperscript{112} Galanter and Palay, above n 90, 192.
b) Commercialisation of legal advice

Legal advice increasingly needs to take commercial concerns into account. The top firms now advertise that they provide commercially focused legal advice.\(^{113}\) Commercial or business advice is now frequently sought in parallel with legal advice, for example, “clients used to want service…but now they want industry expertise”.\(^{114}\) The danger is that advice on the commercial wisdom of the transaction will be blurred with advice on the legality of the transaction.

i) Compromising the independence of legal advice

Concerns of law firms over-identifying with their clients suggest that the legal advice they provide may be compromised. The tendering process used by large corporations means these clients will favour whoever can put them in the best legal position at the lowest cost.\(^{115}\) Solicitors will feel corporate pressures to ‘maintain’ these ‘important’ clients. If prudent independent advice will not support the course the client is wanting to pursue, there may be pressure for solicitors to ‘work around the law’, in order to keep a particular client happy.\(^{116}\) As Anne O'Brien suggests, “giving the client prudent, principled advice runs the risk of severance of the lawyer-client relationship, if that advice is not what the client wants to hear.”\(^{117}\)

Over-identification may also compromise legal advice stemming from solicitors’ professional duties. Unethical behaviour can appear more tempting if it will keep a large client happy. Rhode has labeled this “ethical tunnel vision”.\(^{118}\) For example when a law firm is closely tied to two clients for business, it is ‘easier’ not to recognize a potential conflict of interest,\(^{119}\) or

\(^{113}\) Simpson Grierson, *Solutions in the commercial law practice area* (Internet) <www.simpsongrierson.com> accessed 25/08/05; Bell Gully “Legal advice with commercial application” (Internet) <www.bellgully.com> accessed 25/08/05.

\(^{114}\) Ruffell, above n 82, 1.


\(^{117}\) O'Brien, above n 67, 8.


\(^{119}\) O'Brien, above n 67, 6.
attempt to use devices like Chinese walls to avoid the risk of losing a particular high profit generating client. The risk of a conflict or potential conflict may not be perceived, or if perceived, not be freely acknowledged.

Tony Lusk QC suggests that large firms rarely advise their clients to seek independent advice regarding potential conflicts, for fear of losing their client to that independent advisor.

Ironically, ‘over-identification’ is not in the long-term interests of the client. Clients will want the best objective advice for their long-term benefit, even if partisan advice could assist them in the short-term. It is also prudent for lawyers themselves, particularly if they then need to defend that advice in later litigation! Unbalanced or biased original advice will be to the long-term disadvantage of both the firm and the client.

ii) In-house counsel

In-house counsel add another dimension to concerns of the commercialisation of legal advice. Duncan Webb has rightly suggested that ‘corporate counsel’ (in-house lawyers) have different obligations than lawyers in private practice, often co-ordinating their employer’s legal services rather than providing independent legal advice themselves. The real problem is that the in-house lawyer’s employer is their primary client. The career development of such a lawyer could be jeopardized by advice which does not align with management decisions. The line between legal and commercial advice can be easily blurred when working within an organization.

The role of an in-house lawyer is “arguably inconsistent with the professional obligations that are placed on lawyers”. The lawyer will be bound by a higher duty to keep information confidential than others within the organisation. The Rules of Professional Conduct are not

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120 See Chapter Three, Part B 4.
121 Russell McVeagh McKenzie Bartlett and Co v Tower Corporation [1998]3 NZLR 641 at 660 per Thomas J.
123 O’Brien, above n 67, 8.
designed for, or compatible with the role of in-house lawyers. Bernard Robertson has suggested that the NZLS is acting unlawfully in giving practising certificates to lawyers who have no intention of complying with the cab-rank rule.\textsuperscript{126} Further, in-house counsel do not necessarily have a “place of business” but a place of employment, and may not necessarily “practise as a barrister or solicitor” as required by the Law Practitioners Act 1982.\textsuperscript{127} Admittedly, solicitors in large firms may work solely for one client, but even then they are not in a relationship of employment with their client.

An example of these concerns is that the CLANZ Ethics for In-House Counsel Handbook specifically reminds in-house lawyers of their duty to provide impartial, independent advice.\textsuperscript{128} It warns against “trading-off legal risk against the desire to facilitate a successful consummation of the transaction”,\textsuperscript{129} recognising that the in-house lawyer may feel obligated to make a company transaction run smoothly. Finally, the potential for employers to demand particular advice is highlighted by the provision: “In-house counsel should record all advice given, particularly if that advice is ignored by the client”!\textsuperscript{130}

These considerations suggest that in-house counsel are not operating as if they are members of the legal profession. The employment relationship fatally compromises the ability to give independent advice and disentitles them to professional status.

\textit{iii) Duty of care?}

The increasing demand for “commercially oriented” legal advice may merit concerns over the extent of advice that lawyers provide. However, it must be remembered that the standard of care is still that of a reasonable and competent professional. A solicitor who holds themselves out as an expert in a particular area (for example commercial law) will be judged as a reasonable solicitor possessing expertise in that area.\textsuperscript{131} Lawyers who do not practise in

\textsuperscript{123} Webb, above n 124.
\textsuperscript{124} Bernard Robertson “The lawyers and conveyancers mess” [2005] NZLJ 129.
\textsuperscript{125} Law Practitioners Act 1982, s 57(1).
\textsuperscript{126} Corporate Lawyers Association of New Zealand, above n 101, 5.
\textsuperscript{127} Ibid, 6.
\textsuperscript{128} Ibid, 7.
a commercial area will not be expected to provide advice to such a standard. The content of the duty to advise is primarily determined by the retainer between the client and lawyer. Any tortious duty of care must be reasonably limited by the retainer.

The Privy Council recognised concerns of providing 'commercial' advice in *Clark Boyce v Mouat*. The Privy Council held a lawyer did not have to advise on the wisdom of a transaction where the client is apparently aware of what they are doing, as to do so would be to impose "intolerable burdens" on solicitors.

3 An anti-competitive profession?

The legal services market can be viewed as being fundamentally anti-competitive. In New Zealand, "acting as a solicitor" is restricted to those holding a practising certificate. It is an offence to hold yourself out as a solicitor without being qualified. However, the extent of the lawyers' monopoly is undefined, aside from conveyancing and practising in court. In *Auckland District Law Society v Dempster*, the High Court allowed the ADLS's appeal to restrain the lay defendant from acting as a solicitor in relation to conveyancing, holding that it is an offence to carry out 'work of the kind ordinarily done by a solicitor'. Thus the anti-competitive nature of legal services is compounded by such an imprecise monopoly of uncertain scope. The statutory monopoly inevitably has an impact on price demand.

There are other anticompetitive aspects of the legal profession which are not immediately relevant in the New Zealand context. While academic standards and character requirements limit entry to the profession, the real barrier to entry is in finding employment. Likewise, although there are a 'limited number' of providers, the number of practising certificates issued is steadily rising. Perhaps the most apparent restrictive practice is the requirement that

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132 *Bindon v Bishop* [2003] 2 NZLR 136.
135 Law Practitioners Act 1982, s 56.
136 Law Practitioners Act 1982, s 64(1).
137 Law Practitioners Act 1982, s 65.
138 Law Practitioners Act 1982, s 54.
only a solicitor may instruct a barrister. However in New Zealand this is not a major problem because the majority of practitioners hold certificates as both barristers and solicitors.

An anticompetitive legal profession has been criticised sharply overseas. In England, a 1998 White Paper proposed to “open access to justice...and sweep away the restrictive practices in the legal professions”. In 1992 the Australian Financial Review referred to a legal profession which was, “...too expensive, too out of touch, too inefficient” and which had, “absurd rules designed to prop up the price and status of largely disappointing communities of barristers”. Further, in 1993 the Australian Trade Practices Commission concluded that, “the highly restrictive regulations which constrain many areas of the commercial and market behaviour of the legal profession cannot be justified on public interest grounds”, recommending changes such as access to barristers not being restricted. Dr Ian McEwin considered it “surprising” that New Zealand had not subjected our legal profession to as much official scrutiny.

The practise of law does have some serious restrictive practises. Freidman has suggested how the very determining features of a ‘profession’ can also be seen as an “elaborate form of market restraint.” However the only real concern in New Zealand is the fact that particular areas of work are reserved to lawyers. This has often been justified by claims to ‘professionalism’.

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140 NZLS, above n 78, Rule 11.03.
145 McEwin, above n 14, 30.
Conclusion

The legal profession is faced with varying criticisms from several sources. The key concerns challenge the elements of a profession identified in Chapter One. Concerns over the haphazard method of dealing with complaints of unsatisfactory conduct and the conflict faced by the NZLS threaten self-regulation and call into question standards of lawyers’ training, competence and diligence. Second, commercialisation of law firms raises concerns regarding over-identification with clients, conflicts of interest, legal advice reflecting a dependence on clients and the tenuous position of in-house lawyers. Traditional professional standards are being compromised as a result. Third, criticisms over the anti-competitive provision of legal advice undermine justifications for self-regulation. These concerns are magnified in the current climate of demand for increasing accountability to consumers. The legal profession does appear to be at a cross-roads.
III RESPONSE TO THE CRITICISMS

A. Response from the Legal Profession

1. Self-criticism and input into legislative change

The NZLS has been aware of criticisms directed against it since the 1980s. The NZLS itself had instigated the removal of the ban on advertising and the abolition of the conveyancing scale. The NZLS established a Structure Committee in December 1990 to review the structure and organization of the NZLS and their disciplinary procedures, and a report was commissioned in 1992.

The culmination of these investigations was an open letter from the NZLS President, Austin Forbes, to all practitioners in New Zealand, entitled ‘Time for a Change?’ This letter recognized that the last ten years had been a time of “rapid change” for the legal profession, amidst deregulation, increasing competition and a number of high-profile cases of serious misconduct. The NZLS was facing severe criticism from the profession and the public over the Renshaw Edwards debacle in 1992 and other serious defalcations. Austin Forbes realized that the Law Practitioners Act 1982 did not deal with the “tension” between the disciplinary and representative roles of the NZLS, as both a “police officer and friend”. He highlighted the problem of the inconsistent exercise of disciplinary powers between districts. He recommended the centralization of lawyer complaints and the removal of the DDTs, with the emphasis to be placed on “speedy solutions” and lay involvement at all levels.

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3 Ruck, above n 2.
5 Ibid.
6 Ibid 7.
7 Ibid.
8 Ibid.
In 1995 an independent report was commissioned from E-DEC Ltd.\(^9\) This report was innovative in recommending the removal of the disciplinary role of the NZLS and supporting voluntary membership.\(^{10}\) An elected New Zealand Law Council would instead regulate lawyers and monitor client service, administering a Disciplinary Tribunal and the Fidelity Fund. The report recommended specific improvements such as increasing conveyancing training, different types of practising certificates for solicitors with different levels of experience and the implementation of a ‘Code of Client Service’ to improve client relations.\(^{11}\)

The E-DEC Report was perhaps even less well received by the District Law Societies than Austin Forbes’ letter.\(^{12}\) However the NZLS evidently feared statutory regulation of the profession.\(^{13}\) Therefore, in 1998 the NZLS Council resolved to support the so-called ‘Haynes Model’.\(^{14}\) This was a step back from E-DEC, although it still provided for voluntary membership and changes to discipline. It is this model that forms the basis for the current Lawyers and Conveyancers Bill.\(^{15}\)

The profession has remained actively involved with the progress of the Bill ensuring that their views were included,\(^{16}\) but it was to the frustration of many in the NZLS that the late introduction of various Supplementary Order Papers\(^{17}\) meant the Bill was not read a third time before Parliament rose for elections this year.\(^{18}\) Evidently the NZLS wanted to retain professional self-regulation.\(^{19}\) One criticism of the Bill is that it is a ‘victory’ for the NZLS.\(^{20}\) Alan Ritchie, Executive Director NZLS, responds that the Bill was an attempt by the


\(\text{\textsuperscript{11}}\) E-DEC Limited, above n 9, 17 – 20.

\(\text{\textsuperscript{12}}\) Interview with Alan Ritchie, Executive Director, NZLS (Dunedin, 10 August 2005).

\(\text{\textsuperscript{13}}\) Forbes, above n 4, 7.


\(\text{\textsuperscript{15}}\) Lawyers and Conveyancers Bill 2003, no 59-2.


\(\text{\textsuperscript{19}}\) David Ryken, “Waking up the legal profession” (2005) 12 \textit{NZ Lawyer} 9.

profession to react responsibly and constructively to change\textsuperscript{21} which would be "otherwise unpalatable".\textsuperscript{22} As Austin Forbes recognised in 1995:\textsuperscript{23}

It is not surprising that our clients have become increasingly consumer conscious and demanding...the Board supports the view that the control of complaints and discipline should pass to a body independent of the law societies... Anything less is unlikely to gain political or public acceptance.

The NZLS has therefore been forced to compromise its traditional regulatory position.

2. Discipline and Education

Aside from legislative input, the profession has a practical role in addressing the various criticisms discussed in Chapter Two. Various attempts to improve disciplinary systems have been made. For example, the ADLS has tried to ensure a "more speedy progression" of complaints by actively monitoring its complaints systems.\textsuperscript{24} However, the NZLS disciplinary structures are suspended pending the introduction of the Bill. For example ten members of the NZLPDT have served over their six-year term pending the incoming legislation.\textsuperscript{25}

Another practical development is that the large firms are slowly moving away from the NZLS. Roger Kerr, Executive Director of the Business Roundtable has suggested they could even become ‘self-regulators’:\textsuperscript{26}

Bearing in mind that the six largest law firms are each larger than several of our current district law societies, some lawyers might choose not to join a professional association but to rely on the interest their firm had in maintaining a strong brand.

Large firms will always be subject to professional disciplinary regulation, but will also increasingly focus on their ‘brand name’ to attract clients. Apart from being subject to discipline, the large firms may be distancing themselves from professional associations as expensive and unnecessary.

\textsuperscript{21} Ritchie, above n 12.
\textsuperscript{26} Roger Kerr, ‘Is the law a profession or a business’ (Speech delivered at the NZ Bar Association Conference, Auckland, 12 March 1999).
An effective way the NZLS could have responded to criticisms of poor lawyer conduct would have been to increase or make compulsory continuing legal education. The NZLS has shown its competence in recognising the need for practical training by introducing the Professional Legal Training course in New Zealand in 1988. However the current educational focus of the NZLS is unconvincing. In 2004, 46% of those holding a practising certificate (9,464 registrants) attended one or more continuing legal education programmes. However, this is a proportionate drop from previous years. In 1998, 51% had attended an education programme. While proportionate figures are not available for 1990 and 1994, 10,280 and 12,000 registrations were received respectively, evidently more than in 2004! Assuming continuing legal education could improve lawyer’s conduct towards clients, it should be made compulsory. This would also strengthen the profession’s claim to ‘special skill and knowledge’.

3. Professional trends - specialisation and fragmentation

As barristers and solicitors in New Zealand have become more likely to specialise in a particular area, the legal profession has become increasingly fragmented. For example, in-house lawyers, criminal barristers, and patent attorneys operate very independently. The “increasing trend towards specialisation and polarization of the profession” was noted in the 1998 NZLS Annual Report. Lloyd Wong recently referred to the “…continued growth for the [in-house] legal sector [which] contrasts with the decreasing numbers of lawyers in the private profession.” In-house (corporate) or government lawyers grew from 12% to 16% of the profession between 1998 and 2004, with 30% of the profession employed in large firms or as in-house or government lawyers in 1998. The proportion of barristers sole within the profession has steadily increased from 7.8% in 1993 to 11.5% in 2004.

34 Grice, above n 32, 18.
35 NZLS, above n 29, 7 - 8; NZLS above n 28, 4 - 5.
The NZLS has accepted that specialisation could be an answer to concerns of lawyers’ poor conduct. It created three NZLS ‘Sections’ – Property Law, Family Law and the Corporate Lawyers Association of New Zealand (CLANZ), potentially to try to ameliorate the splits within the profession.\(^{36}\) CLANZ is a key example of the profession’s fragmentation, formed in 1987 to provide specific representation for ‘corporate’ lawyers,\(^{37}\) and which subsequently became a NZLS Section, encompassing lawyers employed by corporations, government and other organisations.\(^{38}\) The NZLS thus manages some control over these different bodies, approving CLANZ’s Ethics Handbook and working closely with the Property Law and Family Law Sections. Bernard Robertson suggested this year that the NZLS Sections are becoming more and more successful, while District Law Societies are increasingly “of minority interest”.\(^{39}\)

In response to concerns that in-house lawyers operated independently from other lawyers and should be excluded from the profession, CLANZ representative Genevieve Hancock said that the issues raised were “not practical difficulties”, and that “common sense” was important.\(^{40}\) In light of the concerns raised in Chapter Two, much work is needed to address the conflicting views of in-house lawyers and their critics.

The fragmentation of the profession is not necessarily a negative trend, but is a commercial reality which must be addressed. The main impact of fragmentation is that it shows the different needs of different lawyers.\(^{41}\) Realistically, fewer lawyers will join the NZLS in the future, particularly from the large firms. Indeed CLANZ could conceivably operate independently of, or in competition with the NZLS.

\(^{36}\) Ritchie, above n 12.


\(^{38}\) Ibid 318 – 322; CLANZ, “Membership Criteria” (Information Sheet, CLANZ, 2005).


Summary – Response by the Profession:

The NZLS is trying to cling to the traditional concept of a profession. It has realized the many criticisms of lawyers will warrant legislative action and has tried to integrate itself with the legislative process to further its own view. Aside from legislative developments, the NZLS has arguably failed the profession. It could have overhauled its own disciplinary systems or have made some degree of Continuing Legal Education compulsory. It is ironic that the NZLS’s failure to respond to the criticisms directed at the profession means that Parliament is now legislating to deprive the profession of many of its ‘professional’ attributes.
B. Response from the Courts

1. The removal of barristerial immunity - 
   Lai v Chamberlains

The decision of the Court of Appeal in March in 
Lai v Chamberlains, removes a historic protection from lawyers – the immunity of barristers for their conduct of civil litigation. Clients will be able sue in negligence in respect of acts or omissions in the conduct of a case in court, or intimately connected with such conduct. New Zealand has followed the position of the English House of Lords in 
Arthur J S Hall & Co v Simons which removed barristerial immunity. The Court of Appeal left open the question of immunity in criminal trials, noting that three of the seven judges in 
Arthur J S Hall & Co v Simons had favoured retaining the immunity in criminal cases. In an intriguing development, the same week the Australian High Court retained barristerial immunity in D'Orta-Ekenaike v Victoria Legal Aid.

The justifications for and against the immunity were discussed at length by Hammond J (for the majority) and Anderson P in his dissent. First, the immunity was seen as beneficial as a lawyer might become reluctant to perform his duty to the Court, or overly anxious to present every possible argument, if he was concerned with a suit for negligence from his client. Second, other participants in Court proceedings are immune from suit. Third, the ‘cab rank rule’ was seen to ‘justify’ the immunity. Fourth, there was a concern that original cases could be relitigated with solicitors’ negligence as the basis for appeal. Fifth, the privilege is codified in s 61 Law Practitioners Act 1982, whereby all barristers in New Zealand have the same privileges as barristers in England. Since this provision was enacted when barristers in England were immune, any change must come from Parliament. In response, Justice Hammond stated that other professionals have duties to their professional ethics as well as to

42 Lai v Chamberlains [2005] 3 NZLR 291. The Supreme Court has granted leave to appeal, and the case has been set down for hearing on 18 October 2005 
Chamberlains v Lai [2005] NZSC 32.
43 [2002] 1 AC 615.
44 Lai v Chamberlains [2005] 3 NZLR 291 [190].
46 Lai v Chamberlains [2005] 3 NZLR 291 [139], [152].
47 Ibid [141].
49 Lai v Chamberlains [2005] 3 NZLR 291 [156].
50 Ibid [160].
their clients. Lawyers will face disciplinary action from the profession or the Court itself (through awards of costs)\textsuperscript{51} if they waste the Court's time. Other members of the Court such as Judges required immunity and operated in non-partisan roles. The 'cab rank rule' and the potential relitigation of cases were seen as insufficient to justify the retention of the immunity. Finally the section 61 argument was not compelling given the subsequent removal of the immunity in England. Notably however, this argument was accepted by Anderson P.\textsuperscript{52}

The majority of the Court stressed that it was incontrovertible that there should always be a remedy for a wrong,\textsuperscript{53} and that public confidence in lawyers would be eroded if the immunity was upheld.\textsuperscript{54} Justice Hammond stated in \textit{obiter} that the standard of gross negligence \textit{could} be required for barristerial liability in negligence, or at least a failure to meet standards "normally and reasonably adopted" by the profession, thus allaying 'floodgates' concerns.\textsuperscript{55}

In contrast, in the High Court of Australia, six Judges (with Kirby, J the sole dissenter) accepted that barristerial immunity should remain for negligent acts in court, or work out of court that is "intimately connected" with work in court.\textsuperscript{56} The High Court held removing barristerial immunity could interfere with the proper administration of justice:\textsuperscript{57}

To remove the advocate's immunity would make a significant inroad upon...a fundamental and pervading tenet of the judicial system... There may be those who will seek to characterise the result...as a case of lawyers looking after their own...But...underpinning the system is the need for certainty and finality of decision. The immunity of advocates is a necessary consequence of that need.

The removal of barristerial immunity has been viewed as a positive development for New Zealand legal consumers.\textsuperscript{58} Despite the advantage to the profession of an extension to negligence actions, the New Zealand Bar Association and the NZLS have been granted leave to intervene in the appeal to the Supreme Court.\textsuperscript{59} One concern was whether the immunity would apply retrospectively for insurance claims, i.e. if a barrister was sued for negligence in

\textsuperscript{51} \textit{Harley v McDonald} [2002] 1 NZLR 1.
\textsuperscript{52} \textit{Lai v Chamberlains} [2005] 3 NZLR 291 [110] – [121] per Anderson P.
\textsuperscript{53} Ibid [175].
\textsuperscript{54} Ibid [177].
\textsuperscript{55} Ibid [186] – [188].
\textsuperscript{56} [2005] HCA 12 (10 March 2005).
\textsuperscript{57} \textit{D'Orta-Ekenaile v Victoria Legal Aid} [2005] HCA 12 at [84] per Gleeson CJ, Gummow, Hayne and Heydon JJ.
\textsuperscript{59} \textit{Chamberlains v Sun Pot Lai} [2005] NZSC 32.
a case before *Lai v Chamberlains*. Lawyers' ability to practise in both New Zealand and Australia also raises concerns over different standards to be applied.

This decision recognises increasing consumer protection as emphasised in the Lawyers and Conveyancers Bill. Perhaps in anticipation of such developments, most barristers sole already carry professional indemnity insurance. The removal of barristerial immunity should improve the public's perception of lawyers. However it does threaten one aspect of professionalism, notably the duty of furthering the administration of justice. The Courts may be unintentionally threatening a traditional facet of professionalism as they diminish the duty to the Court in favour of the rights of clients.

2. **Lawyers' liabilities**

The Courts are operating within a climate where tortious duties are increasingly recognised and professional accountability is growing. An action for negligence against a lawyer by a client can lie concurrently in tort and contract. Thus not only is there an implied duty for the solicitor to take reasonable care when performing his duties under the retainer, but an action for negligence can also lie independently of the contract. There are different advantages to clients under the different claims, for example in the damages available. A lawyer may also be held liable for breach of fiduciary duty to a client – where trust or confidence is reposed in and accepted by the lawyer for a particular transaction.

The Courts have also increased the potential for solicitors to be held liable to foreseeable or closely and directly affected third parties. For example, this has occurred where the lawyer

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60 NZLS, "Barristerial Immunity Abolished" (2005) 642 *LawTalk* 1, 12.
62 Lawyers and Conveyancers Bill 2003, no 59-2, cl 3(1).
63 *Lai v Chamberlains* [2005] 3 NZLR 291 [60].
64 *Frost and Sutcliffe v Tuiara* [2004] 1 NZLR 782 at 788 - 789.
67 *Bank of New Zealand v New Zealand Guardian Trust Co Ltd* [1999] 1 NZLR 213 at 214, 248 per Fisher J.
has assumed responsibility to the third party,\textsuperscript{69} or where the third party has relied on the lawyer, where it was reasonably foreseeable that they would do so.\textsuperscript{70} While the Courts are recognising limits on beneficiaries’ claims (will beneficiaries have not succeeded if their relationship with the solicitor lacked proximity, or if there was no assumption of responsibility by the lawyer),\textsuperscript{71} they are more willing to hold a solicitor liable to particular beneficiaries.

These various ‘extensions’ of liability may make it easier for both clients and affected third parties to sue negligent practitioners. However the yardstick is still the exercise of reasonable care and skill.\textsuperscript{72} Therefore competent lawyers should not be unnecessarily concerned about these judicial trends. As discussed, in \textit{Clark Boyce v Mouat},\textsuperscript{73} the Privy Council held that solicitors should not have to provide unsought advice on the commercial wisdom of a transaction, particularly where the solicitor involved had discussed the risks and advised the client to seek independent advice. Likewise, in a commercial situation the Courts will not impose unreasonable duties on solicitors.\textsuperscript{74}

It is clear that the Courts are increasingly recognising lawyers’ liabilities for breach of fiduciary duty and negligence, and increasingly to parties outside of any contractual relationship. Lawyers’ reputations may be adversely impacted. By increasing solicitors’ liability, the Courts may be encroaching on the ability of the profession to regulate its own members.

3. Legal professional privilege

A recent decision of the House of Lords suggests legal professional privilege may be extended beyond the strict definition of pure “legal advice” to broader commercial advice on the practical presentation of evidence. In \textit{Three Rivers District Council v The Governor} &

\textsuperscript{69} \textit{Gartside v Sheffield, Young and Ellis} [1983] NZLR 37; \textit{White v Jones} [1995] 2 AC 207.
\textsuperscript{70} \textit{Brownie Wills v Shrimpton} [1998] 2 NZLR 320 at 324-325.
\textsuperscript{71} \textit{Knox v Till} [1999] 2 NZLR 753 at 755.
\textsuperscript{72} \textit{Bannerman Brydone Folster & Co v Murray} [1972] NZLR 411 at 429.
\textsuperscript{73} [1993] 3 NZLR 641 at 649 (PC).
\textsuperscript{74} \textit{Midland Bank v Cox McQueen (a firm)} [1999] Lloyd’s Rep Bnk 78.
Company of The Bank Of England,

advice was sought “not as to what was required to be done in order to comply...but rather on how to present its evidence to the inquiry in the way least likely to attract criticism.”

While the English Court of Appeal held that such advice would not be protected by legal professional privilege, the House of Lords allowed the Bank of England’s appeal. Lord Scott warned that:

If a solicitor becomes the client’s “man of business”...responsible for advising the client on all matters of business...the advice may lack a relevant legal context...

However, ‘presentation advice’ here was clearly within the “relevant legal context”, as, “advising a client what evidence to place before an inquiry and how to present the client” were “unquestionably” legal skills. The House of Lords refrained from adopting the appellant’s argument that the role of the lawyer may extend to that of a ‘business advisor’, but it is clear that they were willing to extend the scope of protection towards more ‘commercially oriented’ advice, rather than purely legal advice.

4. Chinese walls

As discussed in Chapter Two, one concern with the legal profession is the increasing potential for conflict of interests. ‘Chinese walls’ are one response to this situation, although they have been viewed with considerable suspicion by the NZLS and by the Courts. Chinese walls involve internal organisational arrangements which prevent information passing between lawyers within a firm, such as physical separation, information management procedures, education, and discipline for breaches.

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75 [2005] 1 AC 610.
79 Ibid 653.
In *Equiticorp Holdings Ltd v Hawkins*, Henry J concluded in line with existing law that Chinese walls would not generally be an effective safeguard in a conflict created by lawyers changing firms. However the opposition to Chinese walls is diminishing. In *Russell McVeagh McKenzie Bartleet & Co v Tower Corporation*, the Court of Appeal affirmed that Chinese walls may be appropriate measures of maintaining confidentiality where a law firm wishes to act for different clients with adverse interests. Russell McVeagh (Wellington) had been acting for Tower Corporation regarding a tax dispute, when the Auckland office was engaged by another company on a planned take-over of Tower. The partners concerned decided that there was no conflict due to the specificity of the tax advice. It was not until Tower became aware of the take-over and objected to the arrangements that Russell McVeagh established a Chinese wall. The Court of Appeal however held that there was no real risk of disclosure of confidential information, and that Chinese walls may, "in some circumstances, be both appropriate and sufficient to ensure protection". In dissent, Thomas J responded that Chinese walls were akin to the lawyer asking their client to 'trust' them with no further safeguards.

In *Prince Jefri Bolkiah v KPMG*, the English House of Lords took a much stricter view, finding that a Chinese wall established by KPMG was not sufficient to ensure confidentiality. Lord Millet’s approach was similar to the approach of Thomas J in *Russell McVeagh*, as the Court would prevent the firm acting if there was any ‘real’ risk of disclosure. One criticism of this decision is that if the test for ensuring confidentiality is so high, large firms could be forced to break up rather than lose their clients. In acknowledging this concern, Thomas J stated, “it is the structure of the profession which must adjust”.

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82 [1993] 2 NZLR 737.
83 *Equiticorp Holdings Ltd v Hawkins* [1993] 2 NZLR 737 at 741.
85 *Russell McVeagh McKenzie Bartleet & Co v Tower Corporation* [1998] 3 NZLR 641 at 655 per Henry J, delivering the judgment also of Richardson P and Gault J.
86 *Russell McVeagh McKenzie Bartleet & Co v Tower Corporation* [1998] 3 NZLR 641 at 670 per Thomas J.
87 *Prince Jefri Bolkiah v KPMG (a firm)* [1999] 2 WLR 215.
88 *Prince Jefri Bolkiah v KPMG (a firm)* [1999] 2 WLR 215 at 226.
90 *Russell McVeagh McKenzie Bartleet & Co v Tower Corporation* [1998] 3 NZLR 641 at 661 per Thomas J.
New Zealand’s *Rules of Professional Conduct for Barristers and Solicitors* are somewhat ambiguous on the subject of Chinese Walls.\(^91\) Rule 1.05 prevents a lawyer from acting when to do so “would be or *would have the potential to be* to the *detriment* of the former client or could *reasonably be expected to be objectionable* to the former client.” This wording evidently ensures that the ‘appearance of injustice’ is prevented, in line with the Courts’ emphasis on this point.\(^92\) Rule 1.07.02 provides that a “notional barrier known as a Chinese wall” will *not* overcome a conflict situation where a lawyer must decline to act where to continue would disadvantage one of the clients.\(^93\) However, the commentary to Rule 1.04 encourages the firm to have “systems in place” to prevent information passing between partners acting for different clients! This could relate to anticipated conflicts, yet the wording of the commentary does seem to envisage an existing conflict situation. After the Privy Council reversed the Court of Appeal’s decision in *Clarke Boyce v Mouat*\(^94\) it was suggested that Rule 1.05 “goes too far” in saying a practitioner *must* cease to act.\(^95\) David Coull has suggested that the Courts may not allow Chinese walls without some support from the NZLS.\(^96\)

In New Zealand, Chinese walls take on a greater significance because clients here have a limited choice of who can represent them in a large commercial dispute.\(^97\) A high proportion of top commercial lawyers are concentrated in the largest eight firms, creating problems for lawyers moving firms.\(^98\) As Thomas J observed in *Russell McVeagh*, “there are...not enough firms...for [comprehensive and specialist legal] services”.\(^99\) David Coull argued that the Court must have regard to “commercial realities, while still allowing law firms to discharge their ethical and fiduciary duties to their clients”.\(^100\) It is ironic that our Court of Appeal has accepted that acting for two adverse clients still enables a firm to discharge such duties (e.g. client loyalty).\(^101\)

\(^{91}\) Dal Pont, above n 66, 234. Refer Appendix.
\(^{92}\) Ibid 233. Refer Appendix.
\(^{93}\) NZLS, above n 48, Rule 1.07.02. Refer Appendix.
\(^{94}\) [1993] 3 NZLR 641.
\(^{95}\) NZLS, “*The extent of a practitioner’s duties – the successful Privy Council appeal in Clark Boyce v Mouat*” (1993) 405 LawTalk 8, 11.
\(^{96}\) Coull, above n 80, 64.
\(^{97}\) Ibid 63.
\(^{98}\) McEwin, above n 89, 10.
\(^{100}\) Coull, above n 80, 63.
It appears that the Court of Appeal has realized that more flexibility is needed in New Zealand to balance the competing interests in conflict of interest situations. In accepting Chinese walls, they are accommodating one difficulty of the limited number of large corporate law firms. However, the very acceptance of Chinese walls undermines aspects of professionalism which should instead be specifically protected given the many concerns over the commercialism of law firms. Chinese walls directly compromise the law firms’ duty of loyalty to a client. Perhaps the NZLS has been wise to withhold its support.

5. The Courts’ disciplinary role

One final area where the Courts can be seen to have responded to the criticisms facing the profession is through their inherent jurisdiction over barristers and solicitors. Courts can award costs personally against counsel, or require the jury to be discharged where counsel have been incompetent.

The High Court may also confirm, reverse or modify any decision of the NZLPDT. For example in Wellington District Law Society v Cummins, the High Court ordered the practitioner struck off even though the NZLPDT had not considered it necessary and in Harris v Waikato/Bay of Plenty District Law Society, the High Court held that striking off by the NZLPDT was disproportionately severe. However, B v Canterbury District Law Society showed that the High Court’s power to suspend any practitioner under s 94(1) Law Practitioners Act 1982 is extremely limited. Despite B facing 11 charges of negligence/incompetence in his professional capacity and suspension from practise, the High Court held its jurisdiction was not for such “ordinary cases of professional misconduct”.

The courts have retained their inherent jurisdiction over the discipline of solicitors (and now barristers). This serves to maintain confidence both in the courts and the legal profession.

102 Harley v McDonald [2002] 1 NZLR 1.
103 R v P & Others unreported, HC Auckland, CRI-2004-44-7303, 30 August 2005, Laurenson J.
104 Law Practitioners Act 1982, ss 118(2), 118(3).
106 Unreported, HC Auckland, CIV-2003-419-001691, 22 April 2005, Baragwanath, Randerson, Rodney Hansen JJ.
108 Ibid.
Summary – Response by the Courts:

The Courts have the jurisdiction to address many of the criticisms made of lawyers, not only through their inherent ability to strike off or award costs, but also in setting the standard of professional conduct expected in negligence actions brought against lawyers. Decisions taken by the Court of Appeal do appear to narrow the professional status of lawyers – the loss of barristerial immunity effectively placing the duty to the Court below consumer demands for accountability, and allowing Chinese walls despite their blatant compromise with practitioners’ duties of loyalty. The courts are taking a practical approach to the commercialism of the profession, as can be seen by their acceptance of Chinese walls and extension of legal professional privilege. Perhaps increasing liability for lawyers to clients and third parties will improve lawyer conduct in light of inadequate professional disciplinary structures. However in the process of addressing these criticisms, the Courts may be eroding various facets of professionalism.
C Response by Parliament

The Lawyers and Conveyancers Bill

1. Overview

The Lawyers and Conveyancers Bill 2003 was drafted as a response to the criticisms of the legal profession discussed in Chapter Two. Parliament recognised that there was a need for increased accountability within the profession,\textsuperscript{109} for reform of the regulatory regime,\textsuperscript{110} for dismantling of anti-competitive structures and further consumer protection measures. This part will analyse the key sections of the Bill to see if they address the criticisms outlined in Chapter Two, and will assess its potential impact on the legal profession.

2. Analysis

a) Fundamental obligations of lawyers

The express purposes of the Bill are to maintain public confidence in the provision of legal services, protect consumers, recognise the status of the legal profession and of a new profession – licensed conveyancers.\textsuperscript{111} These purposes were added by the Select Committee after pressure to emphasise consumer protection.\textsuperscript{112}

Clause 4 describes the ‘fundamental obligations of lawyers’, namely the obligation to facilitate the administration of justice, to be independent, and to uphold fiduciary duties.\textsuperscript{113} These complement the \textit{Rules of Professional Conduct for Barristers and Solicitors}.\textsuperscript{114} The NZLS has always supported the fundamental obligations clause, considering they, “lie at the heart of and define the essential characteristics of the practise of law”.\textsuperscript{115} Alan Ritchie

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\textsuperscript{109} Minister of Justice, Phil Goff, ‘First Reading of Lawyers and Conveyancers Bill Speech Notes’ (Speech delivered at Parliament, Wellington, June 2003).
\textsuperscript{110} Minister of Justice, Phil Goff, ‘Second Reading of Lawyers and Conveyancers Bill Speech Notes’ (Speech delivered at Parliament, Wellington, 29 March 2005).
\textsuperscript{111} Lawyers and Conveyancers Bill 2003, no 59-2, cl 3(1). Refer Appendix.
\textsuperscript{112} Justice and Electoral Select Committee, above n 20, 1.
\textsuperscript{113} Lawyers and Conveyancers Bill 2003, no 59-2, cl 4. Refer Appendix.
\textsuperscript{114} NZLS, above n 48.
\textsuperscript{115} Grice, above n 16, 2.
\end{flushright}
recognized that such a clear statement of lawyers’ fundamental obligations is critical to the success of the Bill.\textsuperscript{116}

The NZLS and several large law firms were concerned that a private action for damages, (possibly strict liability) could be founded on the obligations created by clause 4(a).\textsuperscript{117} However, a privately enforceable statutory duty is unlikely, as the ‘obligations’ are not sufficiently clear or specific,\textsuperscript{118} and the Select Committee maintained the provisions. However, they may provide a useful explanation of the content of lawyers’ duties at common law.

\textit{b) Licensed Conveyancers}

In contrast to such recognition of the ‘special position’ of lawyers, the Bill establishes a new profession of licensed conveyancers, competent for conveyancing relating to the sale of land or, contrary to the Select Committee recommendation, a business.\textsuperscript{119} The New Zealand Society of Conveyancers (NZSC) is a statutory body established under the Bill with voluntary membership, a Council and Executive Board,\textsuperscript{120} seemingly paving the way for formation of a rival body to the NZLS. It also incorporates the functions of the NZ Council of Legal Education for conveyancers.\textsuperscript{121}

The NZSC has power to make practise rules binding on all conveyancers,\textsuperscript{122} who are subject to the same standards of ‘misconduct’ and ‘unsatisfactory conduct’ as lawyers.\textsuperscript{123} The NZSC disciplinary system will operate in parallel with that administered by the NZLS, culminating in the joint operation of the New Zealand Lawyers and Conveyancers Disciplinary Tribunal (NZLCDT). The NZSC must make rules which prescribe the educational requirements for

\textsuperscript{116} Ritchie, above n 12.
\textsuperscript{117} Russell McVeagh \textit{Submission to Select Committee on Lawyers and Conveyancers Bill, [7.2.] cited in Memorandum of Advice from Douglas White, QC to Alan Ritchie, Executive Director, NZLS, 2 February 2004, 7.}
\textsuperscript{118} White, above n 117, 7.
\textsuperscript{119} Lawyers and Conveyancers Bill 2003, no 59-2, cl 6; Justice and Electoral Select Committee, above n 20, 1. Refer Appendix.
\textsuperscript{120} Lawyers and Conveyancers Bill 2003, no 59-2, cl 77.
\textsuperscript{121} Lawyers and Conveyancers Bill 2003, no 59-2, cl 70.
\textsuperscript{122} Lawyers and Conveyancers Bill 2003, no 59-2, cl 72(2)(d).
\textsuperscript{123} Lawyers and Conveyancers Bill 2003, no 59-2, cl 7A, 9A. See Chapter III, Part C(2)(g).
conveyancers, and provide for cancellation of registration. A conveyancing practitioner must meet certain criteria to practise on her own account. The NZSC must find a person to be a “fit and proper person” to be registered, thus conferring the High Court’s power for the legal profession on the NZSC for conveyancers.

It is clear that Parliament is creating a ‘parallel’ conveyancing profession, to operate on the same standards as lawyers. It is conceivable that this will threaten the ‘professional’ status of the legal profession. The public may see the conveyancing profession as indistinguishable from the legal profession. The idea of professional standards will be undermined if the NZSC does not maintain high standards of skill level, competence, discipline and client service. Conveyancers are evidently not subject to a duty to the Court, and professional rules and training standards are left to be defined by the NZSC.

The NZLS has always opposed expanding conveyancing to other groups, citing the removal of the conveyancing scale permitting competitive fees, even to “depressed, barely profitable levels”. The NZLS viewed a “duplicate” system of licensed conveyancers as unnecessary and uncontrolled. In England similar changes reduced prices, yet solicitors retained most conveyancing business. Regardless, lawyers’ standards are threatened by the statutory creation of a ‘new’ profession.

c) Reserved areas of work

The Bill defines the areas of work reserved for lawyers as legal advice relating to the direction or management of proceedings, appearing as an advocate and providing legal services as required by statute. Drafting court documents is also reserved for lawyers. These areas are maintained in order to preserve the special position of lawyers, yet actually

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125 Lawyers and Conveyancers Bill 2003, no 59-2, cl 31(1).
126 Lawyers and Conveyancers Bill 2003, no 59-2, cl 73A.
128 Grice, above n 16, 7.
129 Ibid 8.
erode the areas of work traditionally reserved for lawyers by allowing 'non-lawyers' to provide any services outside these reserved areas.

The NZLS and several other parties made submissions on the Bill requesting greater regulation of 'non-lawyers'. The NZLS submitted that the Bill will allow for "unqualified and unregulated" legal advice, when it should be focusing on consumer protection. The essential concerns were that negligent or incompetent 'non-lawyers' might not compensate their clients or hold indemnity cover, that vulnerable members of the public would not realize the difference between unregulated providers and lawyers, and that the cost of the administration of justice would correspondingly increase due to unqualified legal advice. There could be confusion as to whether a particular legal service was reserved. Other protections like the fidelity fund, the financial assurance scheme and access to the NZLS disciplinary system would not cover clients of 'non-lawyers'.

After submissions from the NZLS, the Select Committee expanded “conduct of proceedings” to the “direction or management” of proceedings, and expanded the list of protected titles lawyers could use. Yet preparation of wills remains outside the reserved areas despite the NZLS showing many lawyers charged minimal fees. The Ministry of Justice does not seem to recognize the NZLS’s concerns, merely stating that, “there is no demonstrable consumer benefit” for any more regulation.

The NZLS claimed that 70% of their current ‘reserved areas’ were being removed, listing work of the kind ‘ordinarily done’ by solicitors. However, as discussed in Chapter Two, ‘acting as’ a solicitor is largely undefined. The Bill’s specific definition of the ‘reserved areas of work’ removes this uncertainty.

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134 Grice, above n 16, 1, 5.
136 Ibid.
137 Ibid 5 - 7; Darlow, above n 16, 5.
138 Lawyers and Conveyancers Bill, no 59-2, cl 16(2), 16(2A).
139 Darlow, above n 16, 7.
140 Ministry of Justice, above n 133, 26.
141 Grice, above n 16, 12, Appendix I.
These developments may maintain credibility and efficiency in our *justice system*, as the direction and management of Court proceedings are retained for lawyers. Yet the *profession* is undermined as the lawyers' monopoly is substantially reduced. In addressing anti-competitive concerns, these changes also attack a cornerstone of a profession – reducing the 'special skill and knowledge' of the profession to merely that required in the 'reserved areas of work'.

d) *Incorporation of law firms and multi-disciplinary practises*

The Bill allows for the incorporation of law firms. A practitioner who is a director or shareholder of an incorporated law firm will not be personally liable for the acts of other directors or shareholders, or for the debts of the firm, unless they have been incurred due to *theft* by a lawyer or employee. This is apparently a response to the increasingly commercial nature of the profession.

The NZLS welcomed the provisions allowing the incorporation of law firms, evidently supporting flexibility in the operation of law firms and reduced personal liability. While the NZLS may believe that it is better for lawyers and law firms to bear less responsibility for their peers than in the past, this involves a rejection of the traditional understanding of professional responsibility. The large firms are taking a "cautious approach" to incorporation, evidently not publicising their endorsement of the advantages of limited liability.

The NZLS also supported the decision to prevent the operation of multi-disciplinary practises. Their commercial operation threatens lawyers' independence and the professional duty to further the administration of justice. It is crucial that the NZLS continue their opposition to multi-disciplinary practises, despite the commercial benefits they could bring.

142 Lawyers and Conveyancers Bill 2003, no 59-2, cl 11(1). Refer Appendix.
143 Lawyers and Conveyancers Bill 2003, no 59-2, cl 12. Refer Appendix.
144 Catriona MacLennan "Large firms consider deregulated market" (2005) 3 *NZ Lawyer* 4.
145 Grice, above n 16, 2.
The NZLS was concerned that accountants and other advisors will be able to provide unregulated ‘legal advice’ to their clients (albeit outside the reserved areas of work). Further, the NZLS was particularly concerned that lawyers employed by non-lawyers might provide legal services to the public. The Institute of Chartered Accountants submitted that the Bill would prevent them providing legal services to the public through the lawyers they employed. However the NZLS emphasised that ‘non-lawyers’ such as accountants, should not currently be able to provide legal services to the public using their own ‘staff lawyers’—any legal advice would be provided to the accounting firm only. The Bill will allow accountants to continue to employ lawyers for the purposes of providing legal advice to the accounting firm, and any person will be free to provide legal advice to clients outside the reserved areas of work. The Bill effectively makes it easier for multi-disciplinary practises to emerge, “through the back door”. The Select Committee has recommended that lawyers employed by non-lawyers must not be ‘held out’ as providing legal services as a lawyer. Despite such an attempt to ‘rescue’ professionalism, the drafting is still unclear, particularly given the threat multi-disciplinary practises carry for lawyers’ professional duties.

e) The New Zealand Law Society

The Lawyers and Conveyancers Bill renders membership of the New Zealand Law Society voluntary. However, all lawyers will be subject to regulation by the NZLS and will be required to pay a fee for this purpose. In essence, the Bill aims to separate the representative and regulatory roles of the NZLS.

The regulatory functions of the NZLS will be to control and regulate the practise of law in New Zealand; to uphold the fundamental obligations imposed on lawyers; to monitor and enforce the Lawyers and Conveyancers Act; and to assist and promote the reform of law. Among other powers, the NZLS will issue practising certificates to all barristers and

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147 Darlow, above n 16, 8.
148 Ibid.
149 Ibid 9.
150 Justice and Electoral Select Committee, above n 20, 2.
151 Lawyers and Conveyancers Bill 2003, no 59-2, cl 56.
152 Lawyers and Conveyancers Bill 2003, no 59-2, cl 64A.
153 Lawyers and Conveyancers Bill 2003, no 59-2, cl 57.
solicitors;\textsuperscript{154} maintain a register of all barristers and solicitors;\textsuperscript{155} make practise rules binding on all lawyers;\textsuperscript{156} and institute prosecutions against lawyers.\textsuperscript{157} The NZLS monopoly on representation is removed.\textsuperscript{158}

There are several concerns with this proposed structure. While the Bill aims to separate the NZLS’s regulatory and representative role, all members of the LSCs and lawyer representatives on the NZLCDT are appointed by the NZLS Council,\textsuperscript{159} quite possibly therefore being members of the NZLS. The public will perceive the NZLS as representing all lawyers. Competitor organisations could arise with competing professional standards. The NZLS has accepted the “bogie” of voluntary membership\textsuperscript{160} as an inevitability, supporting this feature in under the ‘Haynes’ Model.\textsuperscript{161} Voluntary membership appears to ease the current conflict in the NZLS’s role, yet most of the regulatory roles will still be carried out by people who are members for representative purposes.

The power of the DLS’s will be reduced by voluntary membership and the removal of their statutory basis.\textsuperscript{162} While some will remain as incorporated societies,\textsuperscript{163} and continue to help in a regulatory role,\textsuperscript{164} the loss of services such as the DLS Libraries will put small law firms at a disadvantage in comparison with commercial firms who maintain their own libraries and have supported voluntary membership.\textsuperscript{165} The NZLS has stated it has no interest in running the current libraries,\textsuperscript{166} which may ultimately compromise practitioners’ duties to the Court.

\textsuperscript{154} Lawyers and Conveyancers Bill 2003, no 59-2, cl 59(2)(a).
\textsuperscript{155} Lawyers and Conveyancers Bill 2003, no 59-2, cl 59(2)(b).
\textsuperscript{156} Lawyers and Conveyancers Bill 2003, no 59-2, cl 59(2)(c).
\textsuperscript{157} Lawyers and Conveyancers Bill 2003, no 59-2, cl 59(2)(e).
\textsuperscript{158} Lawyers and Conveyancers Bill 2003, no 59-2, cl 60.
\textsuperscript{159} Lawyers and Conveyancers Bill 2003, no 59-2, cl 113(2), 213(2).
\textsuperscript{161} Grice, above n 16, 2.
\textsuperscript{162} Lawyers and Conveyancers Bill 2003, no 59-2, cl 339.
\textsuperscript{163} Lawyers and Conveyancers Bill 2003, no 59-2, cl 340.
\textsuperscript{164} Ritchie, above n 12.
\textsuperscript{165} NZ Lawyer, “DLSs mull voluntary impact” (2005) 3 NZ Lawyer 1; Ministry of Justice above n 133, 23.
\textsuperscript{166} Ministry of Justice, above n 133, 25.
f) The Rules of Professional Conduct for Barristers and Solicitors

The Rules of Professional Conduct will continue to govern all barristers and solicitors,\(^{167}\) with new requirements for practitioners to provide clients with information in advance about their fees, professional indemnity insurance and the way that complaints' mechanisms operate.\(^ {168}\) Furthermore, as originally proposed in the E-DEC Report,\(^ {169}\) a ‘Code of Professional Conduct and Client Care’ will enhance consumer protection, detailing lawyers’ duties to the Court, their clients and of independence.

A difference which raises questions concerning the independence of the profession is that the Rules of Professional Conduct must be approved by the Minister of Justice.\(^ {170}\) The Minister must take into account various factors such as the fundamental obligations of practitioners and “the principle that it may be necessary or expedient to impose duties or restrictions on practitioners in order to protect the interests of consumers.”\(^ {171}\) This relegates the NZLS ‘Rules’ to recommendations which the Minister must approve, and can amend as required.\(^ {172}\) The NZLS’s monopoly on regulation is clearly eroded under these provisions, and the NZLS’s autonomy is badly compromised.

g) Complaints and Discipline

The Bill distinguishes between misconduct and unsatisfactory conduct. ‘Misconduct’ involves disgraceful or dishonorable conduct, a willful or reckless breach of the Rules of Professional Conduct or the Bill, a willful or reckless failure to comply with a condition or restriction on a practising certificate, or charging ‘grossly excessive costs’.\(^ {173}\) ‘Unsatisfactory conduct’ comprises conduct “that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer”, unacceptable conduct (‘conduct unbecoming a lawyer’ or ‘unprofessional conduct’), and conduct which is a contravention of the Rules of Professional Conduct, the Bill, or a

\(^{167}\) Lawyers and Conveyancers Bill 2003, no 59-2, cl 94(1).
\(^{168}\) Lawyers and Conveyancers Bill 2003, no 59-2, cl 83(g). Refer Appendix.
\(^{169}\) E-DEC Limited, above n 9, 19.
\(^{170}\) Lawyers and Conveyancers Bill 2003, no 59-2, cl 87.
\(^{171}\) Lawyers and Conveyancers Bill 2003, no 59-2, cl 88.
\(^{172}\) Lawyers and Conveyancers Bill 2003, no 59-2, cl 91.
\(^{173}\) Lawyers and Conveyancers Bill 2003, no 59-2, cl 7. Refer Appendix.
condition on a practising certificate, which does not amount to misconduct under clause 7. Parliament has evidently recognized a difference between 'misconduct' (for which the current Act has been useful) and lesser, or unsatisfactory conduct which is currently largely unaddressed. This distinction will help address the concerns discussed in Chapter Two.

The Bill establishes a new three-tier complaints and discipline system which will regulate all practising lawyers. The NZLS must establish ‘complaints services’, where client complaints are received and forwarded to Lawyers Standards Committees (LSC) for consideration. Complaints can involve the conduct of a practitioner or an incorporated firm, the standard of service provided or the amount of costs charged. LSCs will be able to promote mediation and are intended to resolve complaints “quickly and effectively”, combining dispute resolution with a disciplinary function. A LSC may determine that the complaint is sufficiently serious to be considered by the NZLCDT; and also apply for a practitioner to be suspended from practise. If a LSC finds that a practitioner or incorporated law firm is guilty of unsatisfactory conduct, they can make an order under the Act. These can include compensation, specific performance, fee reduction or cancellation, censuring, training or appropriation of trust funds. However the emphasis is on resolving complaints, rather than disciplining the practitioner involved. This may have the impact of limiting disciplinary action (a criticism of the current legislation), whilst undermining professional standards. It will depend on the LSC members to ensure standards are maintained, rather than simply compensating clients.

The second tier of the complaints system is the Legal Complaints Review Office (LCRO). This person must be a non-lawyer, appointed by the Minister after consultation with the
NZLS. The LCRO may review, overturn or substitute decisions of a LSC, an expansion on their current powers. They may also lay a charge before the Disciplinary Tribunal, thus having similar powers to the LSCs. The current New Zealand lay observers support the Bill, believing the LCRO will “improve the service to the public” and bring disputes “to a speedier conclusion”. While lay involvement increases public confidence, it does undermine the profession’s claim to regulate its members.

The third tier is the New Zealand Lawyers and Conveyancers Disciplinary Tribunal. This Tribunal is created to hear and determine any charge against a (legal or conveyancing) practitioner made by a LSC or a LCRO; particularly any application for suspension of a practitioner. The NZLCDT will comprise 7 to 15 lay members, 7 to 15 lawyers, and 3 to 5 conveyancers. A Chairperson and Deputy Chairperson will be appointed by the Governor-General on recommendation of the Minister of Justice (both lawyers who are not currently practising). There may be conflict between lawyers who have established standards of conduct, and the ‘new’ profession of conveyancing practitioners. The NZLS already wants a lawyer majority on the NZLCDT. The current Chair of the NZLPDT regrets, “the loss of control of disciplinary processes that will follow under the new regime, with the statutory appointment of a chair who is not a practising lawyer.” This is a “retrograde step” and “allows something of a diminution and weakening of one of the defining characteristics of a profession – the ability to regulate and discipline its own members.”

The NZLCDT can order practitioners suspended from practise or struck off the roll. The High Court also retains this power, administered through the Court of Appeal. Notably,
none of the lower disciplinary structures have the power to strike off. There is a full right of appeal on the merits to the High Court; and a further right of appeal on a point of law to the Court of Appeal.

There are several features which recognise the need for accountability and transparency in the decision making process. The process will be nationally co-coordinated and lay members are involved at all levels. The LSC and the LCRO are empowered to publicise decisions, and the NZLC DT must publicise prohibitions on employment.

The majority of submissions received on the Lawyers and Conveyancers Bill supported the proposed disciplinary system, particularly those of the DLS’s and the NZLS. As Chris Darlow acknowledged in late 2003, “the system will be a good one and will do much to enhance our public image”. While the process may favour consumer satisfaction over maintenance of professional standards, the operation of the new procedures should increase public confidence in the profession.

h) Fidelity Funds

The NZLS and NZSC will be required to maintain fidelity funds, to compensate clients in the event of a major pecuniary loss at the fault of a practitioner. The fidelity fund will continue to provide a safeguard to clients for (otherwise uninsurable) fraudulent acts of lawyers.

The Bill provides for an ‘extraordinary’ compulsory levy to be imposed on lawyers by the NZLS (subject to Ministerial approval), to which the NZLS was opposed. Indeed the

201 Lawyers and Conveyancers Bill 2003, no 59-2, cl 231.
204 Lawyers and Conveyancers Bill 2003, no 59-2, cl 129(2), 187(3A).
205 Lawyers and Conveyancers Bill 2003, no 59-2, cl 233(1).
206 Ministry of Justice, above n 133, 23; Grice, above n 16, 14.
207 Letter from Chris Darlow, President NZLS, to Practitioners, 15 December 2003, attached to Darlow, above n 16.
208 Lawyers and Conveyancers Bill 2003, no 59-2, cl 279.
211 Grice, above n 16, 12.
NZLS had wanted the entire fidelity fund removed, describing it as “an anachronism in a competitive environment”.212 This reflects concerns that another $10,000 “Renshaw-Edwards-type” levy could occur.213 Yet the fidelity fund is important for consumer protection and professional autonomy. The NZLS did admit that if the reserved areas of work were expanded, and the funds are “truly affordable, flexible and constrained” and designed to protect on a “widows and orphans” basis, they may have a “proper and valuable place”.214 It is concerning that the profession would even consider removing the fidelity fund, particularly in light of the emphasis placed on indemnity insurance cover215 and the financial assurance scheme216 (whereby the NZLS Inspectorate investigates law practises).

i) Senior Counsel

The Bill extends the title of Senior Counsel (previously Queens Counsel) to all advocates including those in firms.217 The Chief High Court Judge Randerson has stated that Queen’s Counsel bring a “high level of objectivity and independence” to the Court, and allowing Queen’s Counsel to practise within a firm would “seriously diminish those qualities”.218 The NZLS did not press for any ‘profession-wide’ system of recognising excellence,219 perhaps favouring retaining the ‘independent’ role of Queen’s Counsel. The extension to advocates in firms is positive for showing advocacy expertise, but specialists in other areas remain unrecognized.

j) Contingency Fees

The Bill allows lawyers to charge contingency fees for all litigation other than criminal, family and immigration cases.220 This gives clients the choice of making their legal costs dependant on the outcome of their case. Contingency fees have traditionally been banned on

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212 Ibid.
213 Letter from Chris Darlow, President NZLS, to Practitioners, 15 December 2003, 2 - 3 attached to Darlow, above n 16.
214 Grice, above n 16, 12.
215 NZLS, above n 48, Rule 1.12.
217 Lawyers and Conveyancers Bill 2003, no 59-2, cl 105, 106.
218 ADLS, “Justice says Queen’s Counsel rank shouldn’t be abolished” (2005) 35 Law News 1, 4.
219 Darlow, above n 16, 16.
220 Lawyers and Conveyancers Bill no 59-2, cl 305 – 308.
the ground that monetary incentives interfere with lawyers’ duty to the Court. Lawyers would also be less likely to take on a client with a weak case, which undermines the further obligations of the ‘cab-rank’ rule. This is another feature of the Bill which threatens traditional professional standards.

k) Real Estate Agents

The Bill provides that lawyers may undertake the work of real estate agents,221 potentially as a ‘compromise’ for restricting lawyers’ reserved areas of work, or simply a continuation of the ideological attempts to increase competition throughout the Bill. The Real Estate Institute of NZ was concerned that this could compromise lawyers’ role as independent professional advisors.222 The real estate ‘extension’ does seem at odds with the rest of the Bill restricting the ‘reserved areas of work’ for lawyers, especially as lawyers can already act as agents for their clients in real estate or business sales.223 The extension is not easily justifiable, and the Select Committee has acknowledged this by recommending a clause expressly prohibiting lawyers charging commission.224 If this extension does allow lawyers to do ‘new’ work, professional expectations of ‘special skill and expertise’ may be compromised as there is no new training envisaged.

3. Evaluation

The Bill addresses several of the key criticisms of the profession discussed in Chapter Two. Criticisms over lawyer conduct will be allayed by distinguishing between “misconduct” and “inadequate conduct”, the new disciplinary structures, maintaining the Inspectorate, the Rules of Professional Conduct, the Fidelity Fund, the High Court’s inherent jurisdiction and emphasising lawyers’ fundamental obligations. However the involvement of lay people and the parallel management of licensed conveyancers threaten the profession’s claim to self-regulation. The focus on compensation rather than standards may undermine the profession’s claims to expertise.

221 Lawyers and Conveyancers Bill 2003, no 59-2, cl 311
222 Justice and Electoral Select Committee, above n 20, 4.
223 Real Estate Agents Act 1976, s 3(2)(a).
224 Lawyers and Conveyancers Bill, 2003, no 59-2, cl 311(2).
The NZLS's conflict of interest is partially removed with the change to voluntary membership and the removal of the District Law Societies' disciplinary role. This also recognises growing fragmentation, yet undermines the profession's claims to autonomy.

The Bill partially encourages the trend towards the commercialisation of law firms by permitting incorporation, although does prevent multi-disciplinary practises. Incorporation and contingency fees may undermine public confidence and affect professional standards such as the duty to further the administration of justice. The Bill ignores the position of in-house lawyers and does not address the commercialism of legal advice, both of which diverge from the profession's claim to independence.

The Bill allays many concerns of anticompetitive behaviour through the creation of licensed conveyancers and by restricting lawyers' 'reserved areas of work'. Yet the new 'profession' of licensed conveyancers and permitting unregulated advice from non-lawyers erode the legal profession's traditional monopoly and undermine their special skill and training. The real estate extension compounds these problems, particularly without compulsory continuing legal education.

It is clear that the Bill positively addresses the problems of lawyer conduct, the NZLS conflict and anticompetitive practises, but at the expense of several traditional features of the legal profession.
Assessment of the criticisms facing the legal profession shows five areas warrant further action. While the profession, Courts and Parliament are addressing these concerns, further work is needed to protect New Zealand's legal profession.

1. Unsatisfactory conduct

There are multiple concerns regarding the complaints process, which are being addressed more effectively by the Bill than by the profession. The Courts have shown they will no longer tolerate unaccountability with extensions of liability towards third parties and the removal of barristerial immunity. The new disciplinary structures in the Bill provide an effective compromise between the interests of the NZLS and the public. However, in the process the Bill erodes many traditional facets of professionalism, for example lay and Ministerial involvement in professional standards and discipline.

Continuing legal education could be strengthened to address public concerns. As Justice Chisholm stated in 1999, a disciplinary system is really the "last line of defence."\(^1\) Strong "frontline" measures are needed, particularly in education, to maintain the standards to which the profession aspires.

2. The NZLS conflict

The NZLS's unsustainable monopoly position is removed under the Bill, although disciplinary structures are still mainly controlled by the profession. In its representative capacity, the NZLS will face pressure to retain its membership. Its focus may change to advocacy and education, as associations such as CLANZ encourage even more fragmentation within the profession. Clearly the NZLS's autonomous position, a central feature of a profession, has been weakened.

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\(^1\) Justice Chisholm "Disciplining the Lost Lawyer" (Paper presented at the NZLS Conference, 1999) 2.
3. Commercialisation – Large firm growth and commercialisation of legal advice

The growth of large firms and the conflicts which arise from them are now a reality of the legal profession. If over-identification with clients, or legal advice compromised by corporate pressures become prevalent, professional independence will be threatened. The Bill’s introduction of incorporation acknowledges such developments, but conflicts with the idea of a profession being responsible for its members. The exclusion of multi-disciplinary practices is crucial for maintaining the independence of the profession. The Courts have recognised the commercial reality of New Zealand’s small legal profession and allowed devices such as Chinese walls to operate notwithstanding their deficiencies.

Criticisms of the commercialisation of the profession will not be allayed by these changes. These responses by Parliament and the Courts will not stop commercial clients making demands of commercial law firms. The profession must realize that large firms are changing the public’s view of lawyers, not only fuelling criticisms of commercialism, but raising questions about lawyers’ professional status.

The Bill fails to protect against the commercialisation of legal advice, particularly in the lack of safeguards over ‘non-lawyers’. Independence will be compromised if legal advice can be provided by lay people, especially with business motivations. The commercialism of legal advice may currently only be limited because of lawyers’ special duties to justice and of independence. Further, the House of Lords has shown that legal professional privilege may be extended to take commercial realities into account, potentially diluting the duty to the Court in the process.²

Richard Abel has warned that as “the age of professionalism is ending”, professionalism will only remain as “a nostalgic ideal and a source of legitimation for increasingly anachronistic practices”.³ However, the special position of lawyers, particularly in light of their duty to the Court, demands greater adherence to professional standards. As incorporated law firms

operate even more in a global economy, the need for ‘professionalism’ is greater than ever before. Anne O’Brien has recognised:\(^4\)

In the environment in which lawyers practise today, it is more important than ever that they retain a sense of belonging to a profession. Justice McKay has also emphasised the “present day need for truly professional attitudes.”\(^5\)

It is critical that professional standards are not lost while responding to criticisms of the profession, the incorporation of law firms or the ‘practical’ acceptance of Chinese walls being prime examples.

4. **Commercialisation - role of in-house counsel**

The position of the in-house lawyer in the legal profession is tenuous. In-house lawyers cannot be expected to maintain the same standards of independence to which the profession traditionally aspires. The operation of CLANZ is much to the benefit of in-house counsel, although their position remains unaddressed from the NZLS and Parliament. The profession should recognise that in-house lawyers operate in ‘parallel’ with, and yet separately from other lawyers. Their status as lawyers holding practising certificates seriously undermines the profession’s standard of independence.

5. **Anticompetitive provision of legal services**

The final legitimate criticism of the profession is the anticompetitive restriction of the provision of legal services. The Bill undeniably addresses this concern in defining the ‘reserved areas of work’ and removing the conveyancing monopoly. While immediate changes are unlikely, lay providers offering legal services outside the ‘reserved areas’ will undoubtedly emerge in the future. Such ‘non-lawyers’ threaten the reputation of, and confidence in the legal profession. More education on these changes would be beneficial for many lawyers. A statutorily established ‘rival conveyancing profession’, combined with the real estate extension, have serious potential to undermine the special position of our legal profession. The erosion of lawyers’ monopoly may be ideologically driven without sufficient regard to practical consequences.

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The legal profession is facing a cross-roads. The traditional characteristics of a profession are being threatened by criticisms from clients, third parties and the public, and by the responses to these criticisms. Lawyers’ claim to special skill and training is threatened by the inadequate operation of complaints mechanisms. Professional self-regulation is incompatible with modern demands for accountability and consumer protection. The professional standards to which lawyers have always aspired are under threat from the commercialisation of law firms, and the acceptance of in-house lawyers as full practising members of the profession.

The Courts, Parliament and the profession have been successful in responding to some of these pressures, particularly concerns of lawyer misconduct, the NZLS monopoly and the anti-competitive provision of legal services. The most significant development, the Lawyers and Conveyancers Bill, allays many criticisms yet overlooks many concerns of commercialisation. Special knowledge and skill is now threatened by licensed conveyancers, the real estate extension, and a reduction of lawyers’ specialist areas. Autonomy and self-regulation are clearly eroded by the Bill, as accepted by the NZLS itself. Perhaps the defining characteristic of the legal profession in the future will be adherence to professional standards. Indeed, amidst concerns of commercialism, the administration of justice and the duty of independence have become even more important to maintain. If the NZLS and the Courts can focus on rigorously enforcing these standards, we will be on the path to preserving what ‘professional’ status there is left for barristers and solicitors in New Zealand. It will certainly be a good start.
APPENDIX

Rules of Professional Conduct for Barristers and Solicitors

1.05 Rule
A practitioner must not act for a client against a former client of the practitioner when, through prior knowledge of the former client or of his or her affairs which may be relevant to the matter, to so act would be or would have the potential to be to the detriment of the former client or could reasonably be expected to be objectionable to the former client.

1.07 Rule
1. In the event of a conflict, or likely conflict or interest among clients, a practitioner shall forthwith take the following steps:
   (i) advise all clients involved of the areas of conflict or potential conflict;
   (ii) advise the clients involved that they should take independent advice, and arrange such advice if required;
   (iii) decline to act further for any party in the matter where so acting would or would be likely to disadvantage any of the clients involved.
2. Once a situation of the type described in paragraph 1.07(1)(iii) arises, it is not acceptable for practitioners in the same firm to continue to act for more than one client in a transaction, even though a notional barrier known as a Chinese Wall may be or may have been constructed. Such a device does not overcome a conflict situation.

1.04 Rule
A practitioner shall not act for more than one party in the same transaction or matter without the prior informed consent of both or all parties.
   ...Commentary (3) It is difficult to guard against conflicts of interest through clients being represented by different practitioners in the same firm. There is a danger that information may be imparted by one client to a practitioner in the firm to which the firm should not have access, having regard to the interest of another client who is represented by a different practitioner in that firm. Firms should establish systems to prevent such events occurring.

Law Practitioners Act 1982

101. Inquiry by District Council or committee -
(1) Every such complaint or matter (in this section referred to as the complaint) shall be inquired into as soon as practicable by the District Council or, if it is referred to a complaints committee, by that committee.
(2) If in the opinion of the District Council or committee the case is of sufficient gravity to warrant the making of a charge, the District Council or committee shall –
   (a) Where the complaint is against a practitioner, make a charge against him before either the District Disciplinary Tribunal or the New Zealand Disciplinary Tribunal:
   (b) Where the complaint is against a person employed by a practitioner, make a charge against him before the New Zealand Disciplinary Tribunal...

106. Powers of District Disciplinary Tribunal -
(1) The District Disciplinary Tribunal shall inquire into any charge made before it by the District Council or a complaints committee against a practitioner.
(2) If after inquiring into the charge the Tribunal is of the opinion that the case is of sufficient
gravity to warrant its referral to the New Zealand Law Practitioners Disciplinary Tribunal, it
shall forthwith refer the case accordingly.
(3) If the case is not so referred, and the Tribunal—
(a) is of the opinion that the practitioner has been guilty of misconduct in his professional
capacity; or
(b) is of the opinion that the practitioner has been guilty of conduct unbecoming a barrister or
a solicitor; or
(c) is of the opinion that the practitioner has been guilty of negligence or incompetence in his
professional capacity, and that the negligence or incompetence has been of such a degree or
so frequent as to reflect on his fitness to practise as a barrister or solicitor or as to tend to
bring the profession into disrepute; or
(d) is satisfied that the practitioner has been convicted of an offence punishable by
imprisonment, and is of the opinion that his conviction reflects on his fitness to practise as a
barrister or solicitor, or tends to bring the profession into disrepute,—

It may if it thinks fit make an order under this section...

112. Powers of New Zealand Disciplinary Tribunal in respect of charge against
practitioner—
(1) Subject to this Part of the Act, if after inquiring into any charge against a practitioner the
New Zealand Disciplinary Tribunal—
(a) is of the opinion that the practitioner has been guilty of misconduct in his professional
capacity; or
(b) is of the opinion that the practitioner has been guilty of conduct unbecoming a barrister or
a solicitor; or
(c) is of the opinion that the practitioner has been guilty of negligence or incompetence in his
professional capacity, and that the negligence or incompetence has been of such a degree or
so frequent as to reflect on his fitness to practise as a barrister or solicitor or as to tend to
bring the profession into disrepute; or
(d) is satisfied that the practitioner has been convicted of an offence punishable by
imprisonment, and is of the opinion that his conviction reflects on his fitness to practise as a
barrister or solicitor, or tends to bring the profession into disrepute,—

It may if it thinks fit make an order under this section...

Lawyers and Conveyancers Bill 2003, no 59-2

<Select Committee recommendations>; <Existing drafting>

3 Purposes
(1) The purposes of this Act are—
(a) to maintain public confidence in the provision of legal services and conveyancing
services;
(b) to protect the consumers of legal services and conveyancing services;
(c) to recognise the status of the legal profession and to establish the new profession of
conveyancing practitioner.
(2) To achieve those purposes, this Act, among other things,—
(a) reforms the law relating to lawyers;
(b) provides for a more responsive regulatory regime in relation to lawyers and conveyancers;
(c) enables conveyancing to be carried out both—
(i) by lawyers; and
(ii) by conveyancing practitioners:
(d) states the fundamental obligations with which, in the public interest, all lawyers and all conveyancing practitioners must comply in providing regulated services:
(e) repeals the Law Practitioners Act 1982.

4 Fundamental obligations of lawyers
Every lawyer who provides regulated services must, in the course of his or her practice, comply with the following fundamental obligations:
(a) the obligation to uphold the rule of law and to facilitate the administration of justice in New Zealand:
(b) the obligation to be independent in providing regulated services to his or her clients:
(c) the obligation to act in accordance with all fiduciary duties and duties of care owed by lawyers to their clients:
(d) the obligation to protect, subject to his or her overriding duties as an officer of the High Court and to his or her duties under any enactment, the interests of his or her clients.

6 Interpretation

conveyancing—
(a) means—
(i) legal work carried out for the (purposes of) (purpose of effecting or documenting) any transaction or prospective transaction that does or would create, vary, transfer, or extinguish a legal or equitable estate, interest, or right in any real property; and
(ii) legal work carried out for the (purposes of) (purpose of effecting or documenting) a sale or purchase of a business, whether or not land is involved; and
(b) includes legal work carried out for the (purposes of) (purpose of effecting or documenting)—
(i) a lease of land; or
(ii) the grant of a mortgage or charge over any interest in land; or
(iii) the creation of a trust affecting any real property or any interest in land; and
(c) includes any legal services that are incidental to, or ancillary to, any work of a kind described in paragraph (a) or paragraph (b); and
(d) includes, in particular, the presenting of any instrument for registration under the Land Transfer Act 1952 or the Deeds Registration Act 1908 and the carrying out of any other work required by either of those Acts to be performed by, or on behalf of, persons seeking to effect registration of instruments; but
(e) does not include the legal work involved in the preparation or drafting of a will; and
(f) despite paragraph (d), does not include the work (not being legal work) involved in an agent of a practitioner or incorporated firm presenting an instrument for registration under the Land Transfer Act 1952 or the Deeds Registration Act 1908

reserved areas of work means the work carried out by a person—
(a) in giving legal advice to any other person in relation to the (conduct) (direction or management) of—
(i) any proceedings that the other person is considering bringing, or has decided to bring, before any New Zealand court or New Zealand tribunal; or
(ii) any proceedings before any New Zealand court or New Zealand tribunal to which the other person is a party or is likely to become a party; or
(b) in appearing as an advocate for any other person before any New Zealand court or New Zealand tribunal; or
(c) in representing any other person involved in any proceedings before any New Zealand court or New Zealand tribunal; or
(d) in giving legal advice or in carrying out any other action that, by section 21F of the Property (Relationships) Act 1976 or by any provision of any other enactment, is required to be carried out by a lawyer

7 Misconduct defined in relation to lawyer and incorporated law firm

(1) In this Act, misconduct, in relation to a lawyer or an incorporated law firm,—
(a) means conduct of the lawyer or incorporated law firm that occurs at a time when he or she or it is providing regulated services and is conduct—
(i) that would reasonably be regarded by lawyers of good standing as disgraceful or dishonourable; or
(ii) that consists of a wilful or reckless contravention of any provision of this Act or of any regulations or practice rules made under this Act that apply to the lawyer or incorporated law firm or of any other Act relating to the provision of regulated services; or
(iii) that consists of a wilful or reckless failure on the part of the lawyer, or, in the case of an incorporated law firm, on the part of a lawyer who is actively involved in the provision by the incorporated law firm of regulated services, to comply with a condition or restriction to which a practising certificate held by the lawyer, or the lawyer so actively involved, is subject; or
(iv) that consists of the charging of grossly excessive costs for legal work carried out by the lawyer or incorporated law firm; and
(b) includes—
(i) conduct of the lawyer or incorporated law firm that is misconduct under subsection (2) or subsection (3); and
(ii) conduct of the lawyer or incorporated law firm which is unconnected with the provision of regulated services by the lawyer or incorporated law firm but which would justify a finding that the lawyer or incorporated law firm is not a fit and proper person or is otherwise unsuited to engage in practice as a lawyer or an incorporated law firm.

(2) A lawyer or an incorporated law firm is guilty of misconduct if, at a time when he or she or it is providing regulated services, and without the consent of the High Court or of the Disciplinary Tribunal, the lawyer or incorporated law firm knowingly employs, or permits to act as a clerk or otherwise, in relation to the provision of regulated services, any person who,—
(a) is under suspension from practice as a barrister or as a solicitor or as a conveyancing practitioner; or
(b) has had his or her name struck off the roll of barristers and solicitors of the High Court; or
(c) has had his or her registration as a conveyancing practitioner cancelled by an order made under this Act; or
(d) is disqualified, by an order made under section 221(1)(h), from employment in connection with a practitioner’s or incorporated firm’s practice.

(3) A person is guilty of misconduct if that person, being a lawyer or an incorporated law firm, shares, with any person other than another lawyer or incorporated law firm, the income from any business involving the provision of regulated services to the public.
(4) Despite subsection (3), a lawyer or an incorporated law firm is not guilty of misconduct under that subsection by reason only of sharing with a patent attorney (in the circumstances, and in accordance with any conditions, prescribed by the practice rules) the income from any business involving the provision of regulated services to the public.
(5) Despite subsection (3), an incorporated law firm is not guilty of misconduct under that subsection by reason only of paying a dividend to shareholders of that firm.

9 Unsatisfactory conduct defined in relation to lawyers and incorporated law firms
In this Act, unsatisfactory conduct, in relation to a lawyer or an incorporated law firm, means—
(a) conduct of the lawyer or incorporated law firm that occurs at a time when he or she or it is providing regulated services and is conduct that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer; or
(b) conduct of the lawyer or incorporated law firm that occurs at a time when he or she or it is providing regulated services and is conduct that would be regarded by a lawyer in good standing as being unacceptable, including—
(i) conduct unbecoming a lawyer or an incorporated law firm; or
(ii) unprofessional conduct; or
(c) conduct consisting of a contravention of this Act, or of any regulations or practice rules made under this Act that apply to the lawyer or incorporated law firm, or of any other Act relating to the provision of regulated services (not being a contravention that amounts to misconduct under section 7); or
(d) conduct consisting of a failure on the part of the lawyer, or, in the case of an incorporated law firm, on the part of a lawyer who is actively involved in the provision by the incorporated law firm of regulated services, to comply with a condition or restriction to which a practising certificate held by the lawyer, or the lawyer so actively involved, is subject (not being a failure that amounts to misconduct under section 7).

11 Liabilities of director or shareholder of incorporated firm
(1) For the avoidance of doubt, and subject to sections 12 and 13, a practitioner who is a director or shareholder of an incorporated firm is not liable, on a joint or several basis, by reason only of being such a director or shareholder,—
(a) for any act or omission of any other director or shareholder of the firm; or
(b) for the debts or liabilities of the firm.
(2) Subject to subsection (1), a practitioner who is a director or shareholder of an incorporated firm is subject to all the professional obligations to which he or she would be subject if he or she were in practice on his or her own account.

12 Liability of lawyer principals in respect of pecuniary loss by reason of theft
(1) If a person suffers pecuniary loss by reason of the theft of any money or valuable property that has been entrusted to a lawyer or an incorporated law firm in the course of the lawyer’s or incorporated law firm’s practice, the persons specified in subsection (2) are, in addition to the person who committed the theft, personally liable for that pecuniary loss if the theft was committed—
(a) by any person who is, in relation to the lawyer, a related person or entity; or
(b) by any agent, employer, or employee of the lawyer or incorporated law firm (whether or not that agent, employer, or employee is also a lawyer); or
(c) by any agent or employee of a person who is, in relation to the lawyer, a related person or entity (whether or not that agent or employee is also a lawyer); or
(d) by any partner or director or other person who controls or manages the incorporated law firm or any body that is, in relation to the lawyer, a related entity.

(2) The persons who are personally liable under subsection (1) are as follows:
(a) the lawyer to whom, or the incorporated law firm to which, the money or other valuable property was entrusted;
(b) any person who is, in relation to the lawyer referred to in paragraph (a), a related person or entity;
(c) any person who is a director or shareholder of the incorporated law firm referred to in paragraph (a).

83 Practice rules
The New Zealand Law Society and the New Zealand Society of Conveyancers must each have rules that include or provide for—

...(g) a requirement for practitioners and incorporated firms to provide clients in advance with information on the principal aspects of client service, including—
(i) the basis on which fees will be charged; and
(ii) indemnity insurance arrangements or other arrangements in respect of professional indemnity; and
(iii) the coverage provided by any fidelity fund; and
(iv) complaints mechanisms:

287 Power of New Zealand Law Society to impose extraordinary levy
The Council of the New Zealand Law Society may, by resolution, impose on lawyers to whom, or incorporated law firms to which, this Part applies an extraordinary levy, for payment into the Lawyers’ Fidelity Fund, if, at any time,—
(a) the Lawyers’ Fidelity Fund is not sufficient, or, in the opinion of the Council of the New Zealand Law Society, having regard to any prospective claims or liabilities likely to be received or incurred, may not be sufficient, to satisfy the liabilities of the New Zealand Law Society in relation to the fund or to meet the costs of establishing, maintaining, managing, and administering the fund; and
(b) the Minister approves both the imposition of an extraordinary levy by that resolution and the amount of that levy.

(2) A resolution under subsection (1) may provide for the amounts of the extraordinary levy to differ in all or any of the following ways:
(a) as between lawyers and incorporated law firms:
(b) as between different classes of lawyers:
(c) as between different classes of incorporated law firms...
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