

SUBMISSION BY THE AOTEAROA LEGAL WORKERS' UNION ON THE PROPOSED CHANGES TO THE CONDUCT AND CLIENT CARE RULES AND THE CPD RULES

1 JULY 2020

INTRODUCTION

1. The Aotearoa Legal Workers' Union (**ALWU**) welcomes the opportunity to make a submission on the New Zealand Law Society's consultation paper setting out proposed changes to the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care Rules) 2008 and the Lawyers and Conveyancers Act (Lawyers: Ongoing Legal Education—Continuing Professional Development) Rules 2013 (together, the **Rules**).
2. ALWU was formed in February 2019 to represent workers at legal workplaces in Aotearoa. We aim to:
 - a. Promote inclusivity, kindness and a sense of pride in the legal profession.
 - b. Provide a cohesive public voice for legal workers.
 - c. Stop the unfair treatment of junior lawyers.
 - d. Promote safe and healthy workplaces for legal workers in New Zealand.
 - e. Advocate for marginalised groups of legal workers, including junior lawyers, women, people in the LGBTQI+ community, tangata whenua, people of colour, and disabled people.
3. Our current membership base is 832 members located throughout New Zealand. It includes people who work in legal workplaces: lawyers in law firms; in-house lawyers; legal executives; and legal support staff as well as law students undertaking work experience in the legal profession prior to entering the workforce. In this respect we differ from most membership organisations (such as the Law Society, Auckland District Law Society, and New Zealand Bar Association), which solely or predominantly represent lawyers. We are proud to represent and provide a voice to a wide range of employees,

especially given that sexual harassment, bullying and discrimination affect all employees in the legal sector, not just lawyers.

4. We aim to have a constructive relationship with the Law Society as we work together to better safeguard our members. We are pleased that the Law Society has recently agreed to engage with ALWU on a quarterly basis to discuss ongoing issues that affect our membership and that the Law Society regards ALWU as one of its key stakeholders.

STARTING POINT: THE 2018 REPORT OF THE NZ LAW SOCIETY WORKING GROUP

5. The report of the New Zealand Law Society Working Group to enable better reporting, prevention, detection, and support in respect of sexual harassment, bullying, and discrimination within the legal profession was published in December 2018. The report was prepared by a five-person independent working group established by the Law Society in March 2018 and chaired by Dame Silvia Cartwright.
6. The Working Group made a number of detailed recommendations to the Law Society. The implementation of those recommendations required changes to the Lawyers and Conveyancers Act, the Conduct and Client Care Rules and Ongoing Legal Education–Continuing Professional Development Rules. There were also several recommendations that could be implemented on an operational basis without amendments to the Act or Rules. Following its recommendations, the Working Group stressed that the Law Society should not become complacent, stating that:¹

For change to be meaningful it must be enduring. The Working Group wishes to ensure that the recommendations made are implemented effectively and that positive changes within the culture of the legal profession continue to develop for the future.

Complacency must not erode the progress already made in addressing sexual violence, harassment, bullying and discrimination. Nor should complacency undermine the required culture shift in the legal profession.

An effective monitoring programme will guard against complacency. Such a programme would monitor and assess how NZLS implements the specific recommendations adopted from this report. The Working Group could provide a limited monitoring function during the initial implementation stage, and then transfer responsibility to another entity on an ongoing basis. Broader oversight of regulation of the legal profession in this area may also be a valuable tool for change.

Following stories in the media about sexual violence, harassment, bullying and discrimination, some people no longer trust NZLS to effectively address these issues. A limited independent oversight of the LCS process is also a way to regain confidence in the complaints process. Such oversight may include greater and more in-depth reporting to the Minister of Justice to include information about:

¹ Report of the Working Group, page 102.

- *the implementation of recommendations in this report;*
- *further initiatives focused on unacceptable behaviour in law firms;*
- *the number and type of complaints received that relate to unacceptable behaviour by lawyers in their workplace.*

Further limited oversight might also include the Ministry of Justice or other body outside NZLS to periodically review current processes, including the make-up of Committees and the results of confidential surveys of people involved in the complaints process.

An effective monitoring mechanism is also a way to ensure that the regulatory framework continues to adapt to the changing environment and new developments focused on unacceptable conduct.

7. In a Law Society [press release in December 2018](#) former Law Society President Kathryn Beck expressed the view that the Working Group had prepared a comprehensive and well-researched report that fully met its terms of reference. She then confirmed that the Law Society Board had accepted the recommendations made in the report.
8. We are concerned that as of July 2020, around 18 months after this statement was made, it is unclear which of the recommendations made by the Working Group the Law Society will implement and the timeframe in which it will do so. We understand that the proposed changes to the Rules in this consultation paper are a response to some of the recommendations. However, there are also recommendations that require changes to Act and recommendations that can be implemented on an operational basis without amendments to the Act or Rules. Those recommendations are not addressed in this consultation paper.
9. It is also unclear whether the Law Society has established a monitoring programme to ensure the Working Group's recommendations are implemented. As discussed above, the establishment of a monitoring group was recommended by the Working Group to guard against complacency by the Law Society.
10. We note that the Law Society set up a Culture Change Task Force as a separate initiative to the Working Group. In its report, the Working Group noted that the Task Force was established for an initial term of three years and was intending to deliver an initial draft strategy and action plan to NZLS by 30 November 2019.² On 19 September 2019, the Law Society issued a [press release](#) in which it stated that the Taskforce was on track to deliver their strategy for culture and systems change in the legal profession by the end of November 2019. We understand that strategy has been delivered to the Law Society but has not been publicly released.
11. We are of the view that the Law Society should:

² Report of the Working Group, page 14.

- a. Provide clear information as to which Working Group recommendations it intends to implement.
 - b. Implement a monitoring programme and report regularly on its progress with implementing the recommendations.
 - c. Make copies of all key documentation, such as the Culture Change Task Force's strategy, publicly available as part of its reporting processes.
12. We think that the Law Society should not have sole responsibility for monitoring the implementation of the Working Group's recommendations. As stated in the Working Group's report, some people no longer trust that the Law Society can effectively address issues of sexual harassment and bullying. That is the case for some of our members, who have personal experience of making complaints to the Law Society and feel that it has let them down. ALWU would welcome the opportunity to have a representative on an external monitoring group should one be established.
13. Monitoring progress toward implementation of the Working Group's recommendations and sharing information about that progress in a timely manner will ensure that our members, and the wider legal profession, are provided with reassurance that the Law Society is taking the issue of sexual harassment, bullying and discrimination seriously. It is also easily achieved: for example, the Law Society could have a dedicated page on its website where all relevant information is published. Members of the profession could then visit the page to see what progress is being made.

PROPOSED CHANGES TO THE CONDUCT AND CLIENT CARE RULES

14. We wish to make the following comments on the proposed rules in the consultation paper.

RULES 1.2, 1.5, 2.10, 10.1, 10.2, 10.3

15. The above rules aim to signpost to the profession what is unacceptable behaviour. For example, rule 10.3 provides that a lawyer must not engage in conduct that amounts to one or more of the following: harassment, sexual harassment, discrimination, bullying or violence.
16. However, the complaints process a person must go through if they have been harassed, sexually harassed, discriminated against, bullied and / or subjected to violence is governed by the Lawyers and Conveyancers Act 2006 (**Act**), not the Rules. The Working Group concluded in its report that this process is not fit for purpose for dealing with complaints about harassment, sexual harassment, discrimination, bullying or violence.³ We agree that the process is not fit for purpose and needs to change. Changes to the Act are therefore required.

³ Report of the Working Group, page 12.

17. In the introduction to the consultation paper the Law Society acknowledges that the Working Group recommended that the Act be amended. However, the consultation paper then goes on to state:

While the prospect of changes to the Act were initially considered, this was not possible. Substantive changes to the Act could follow the independent review of the structure and function of the Law Society which was announced in October of 2019. In the meantime, changes to the RCCC and CPD rules are being proposed in response to the Working Group's recommendations.

18. We are of the view that the Law Society should provide a more detailed explanation as to why changes to the Act are not possible at this time. The current explanation does not allow submitters to assess the merits of the decision not to make changes to the Act. It also precludes them from engaging with the Ministry of Justice on the matter, which has statutory responsibility for administering the Act.

Timeframe for changes to the Act

19. The consultation paper suggests that the Act could be amended following the independent review of the the structure and function of the Law Society. The table below provides a timeline from the time the Working Group recommended the review be commissioned to the present.

December 2018	Working Group recommends independent review of the structure and function of the Law Society.
October 2019	Law Society announces that it has accepted this recommendation and will commission the review.
March 2020	Law Society announces that a seven-member steering group has been appointed to develop the terms of reference.
July 2020	Law Society yet to announce a timeframe for the completion of the development of the terms of reference.

20. In March 2018, the Law Society commissioned the review undertaken by the Working Group. The Working Group's report was presented to the Law Society Board in December 2018, nine months later. There does not appear to be the same sense of urgency to complete the review of the Law Society's role and function. We are of the view that our members should not have to wait significant time for the Law Society to even consider changing the complaints process.
21. Our members deserve a robust complaints process that is fit for purpose, especially in light of the fact that the consultation paper provides a mandatory reporting process for misconduct in rule 2.8. This will presumably trigger the complaints process and increase

the number of complaints made to the Law Society. We are concerned that change may have the effect of drawing vulnerable people into a process that is, as currently constituted, not fit for purpose.

RULE 2.8

22. Proposed Rule 2.8 provides that:

2.8 Subject to the obligation on a lawyer to protect privileged communications, a lawyer who has reasonable grounds to suspect that another lawyer may have engaged in misconduct must make a report to the Law Society at the earliest opportunity.

2.8.1 This rule applies despite the lawyer's duty to protect confidential non-privileged information.

2.8.2 If a report by a lawyer to the Law Society may breach the lawyer's duty to protect confidential non-privileged information, the lawyer should also advise the lawyer's client of the report.

2.8.3 This rule does not apply to—

- (a) a lawyer who has received information in the course of providing confidential advice, guidance, or support to another lawyer, including a member of a panel under a "friend" system, unless disclosure of the information is necessary to—**
 - (i) prevent the anticipated or proposed commission of a crime or fraud; or**
 - (ii) prevent a serious risk to the health or safety of any person; and**
- (b) a lawyer who is a victim of the suspected misconduct; and**
- (c) circumstances where a lawyer reasonably believes the disclosure would pose a serious risk to the health (including mental health) or safety of a victim.**

Definition of misconduct

23. This rule provides that lawyers must report "misconduct" at the earliest opportunity. However, the Rules do not contain a definition for misconduct. Instead, the Act defines misconduct in a way that does not specifically include harassment, sexual harassment, discrimination, bullying or violence. The Act also contains a definition of "unsatisfactory conduct", which also does not include harassment, sexual harassment, discrimination, bullying or violence.

24. For more specific guidance on what amounts to misconduct or unsatisfactory conduct, the legal profession relies on decisions determined by the Standards Committees, which are

governed by the Act. These committees determine whether behaviour that is subject of a complaint is misconduct, unsatisfactory conduct, or neither.

25. It is notable and very concerning that in 2019, a Standards Committee concluded in the ZTUVK decision⁴ that if a lawyer grabs the hand of another lawyer and without their consent forces them to touch their genitals, this does not amount to misconduct. Instead, it only amounts to unsatisfactory conduct. Based on this decision, a lawyer could arguably not be responsible for reporting similar conduct under rule 2.8 because this rule only requires the reporting of misconduct, not unsatisfactory conduct. ZTUVK appears to be the only published decision from a Standards Committee that addresses the issue of whether sexual harassment amounts to misconduct or merely unsatisfactory conduct and has set a problematic precedent.
26. The use of the term misconduct in rule 2.8 and the disconnect between it and the definition of misconduct in the Act and Standards Committee decisions that determine what specific behaviour amounts to misconduct could lead to significant confusion amongst the profession and a lack of reporting.

Processes unclear

27. We also have concerns that rule 2.8 lacks clarity as to the procedure that follows if a lawyer reports the misconduct of another lawyer to the Law Society. For example, the Rules should make it clear whether the identity of the lawyer who reports the misconduct will be provided to the lawyer who committed the misconduct. It should also be made clear whether the lawyer will then be required to be (or compellable as) a witness in disciplinary proceedings determined by a Standards Committee. Without this clarity, many lawyers may be reluctant to report misconduct – they will be unsure what they are getting themselves in to.
28. We note that the Law Society has jurisdiction to initiate own-motion investigations, which may not require further involvement from the reporting lawyer. Again, if this is the process to be followed, there needs to be clarification as to what it entails.
29. The proposed rule provides that the misconduct needs to be reported at the “earliest opportunity”. This could be subject to a wide range of interpretations by lawyers. We suggest that the rule contains a clear timeframe within which the misconduct needs to be reported.

Risk of harm

30. We also note that the rule envisages three situations in which it would be inappropriate for a lawyer to disclose misconduct to the Law Society. We support the exceptions in 2.8.3(a) and (b) but we are concerned that a significant amount of misconduct will not be reported because of the exclusion in 2.8.3(c).

⁴ [No. ZTUVK Concerning Part 7 of the Lawyers and Conveyancers Act 2006 And Concerning an Own Motion Investigation by the Standards Committee concerning Mr X dated 16 March 2018.](#)

31. Rule 2.8.3(c) could be interpreted to allow a lawyer to simply assume that disclosure of an incident of misconduct to the Law Society would pose a serious risk of harm (including mental harm) to the victim, without specifically asking the victim if this is the case. The lawyer would then be excused from disclosing the misconduct.
32. This assumption could be made by lawyers in a vast number of situations and be relied on by lawyers who are reluctant to make disclosures to the Law Society. Given that virtually all incidents of misconduct that involve harassment, sexual harassment, discrimination, bullying or violence will give rise to the potential for serious harm to the victim if they are made public, showing the assumption to be unreasonable is likely to be exceedingly difficult.
33. We are of the view that this exception should be removed. In its place, we think that a stop gap should be provided whereby immediately following the disclosure of an incident of misconduct to the Law Society, solely the victim is informed of the disclosure. The victim should then have the opportunity to inform the Law Society that any further action that is taken by the Law Society would pose a serious risk of harm (including mental harm) to them. The Law Society could keep the disclosure on file should the victim change their mind on taking further action at a later date.
34. The removal of the exclusion in 2.8.3(c) and the adoption of our proposed process would also ensure that the Law Society has an accurate overview of prevalence of alleged misconduct in the profession, even if it cannot prosecute all of it. Data on the total number of disclosures could be reported on an anonymised basis to the profession and be used by the Law Society to inform their work programme on the effectiveness of measures to reduce misconduct.

RULE 10.14

35. Proposed rule 10.14 provides that:

10.14 A lawyer must

- (a) respond to inquiries from the Law Society respectfully and in a timely manner; and**
- (b) act in a way that does not obstruct or hinder the regulatory functions of the Law Society.**

36. We support the introduction of this rule because it will reinforce the obligations of lawyers to respond appropriately to requests for information from the Law Society. This will include requests for information where a complaint has been made about a lawyer and the complaint cannot be determined until the lawyer who is the subject of the complaint has responded and provided the requested information. Our members have experience of lawyers significantly dragging out the process because they simply will not respond to the Law Society's requests for information.

37. However, the rule simply states that the lawyer must reply within a timely manner. We do not think this is adequate to hold lawyers who are the subject of complaints to account. We suggest that the rule include a clear timeframe, specifying the number of days that the lawyer has to respond. It should also provide consequences for a failure to comply with that timeframe, or the obligation will be ineffective.
38. It is also very important that the Law Society provides information to complainants within appropriate timeframes. We suggest that the Law Society develops internal timeframes for providing information to complainants during the complaints process and that these timeframes are communicated to the complainant at the start of the process and adhered to.

PROPOSED CHANGES TO THE CPD RULES

RULES 3, 4 and 6

39. We support the changes to these rules which enable the Law Society to make it mandatory for the profession to undertake CPD on unacceptable behaviour in the legal community.
40. While some members of the legal profession have educated themselves on these issues and undertaken voluntary CPD, members of the profession who perpetrate sexual harassment and bullying or choose to turn a blind eye to it are, in our view, highly unlikely to undertake this kind of CPD on a voluntary basis.
41. We suggest that this compulsory CPD includes education on the changes to the rules that will be implemented following the current consultation period. The Law Society needs to educate lawyers on these rules, in particular rule 22.8 which provides that a lawyer must report misconduct to the Law Society. Without sufficient education on how this rule will work in practice, and evidence of its enforcement, we think there is a real risk that very few people will follow this rule.
42. We also suggest that the Law Society incorporates a stand-alone module on inappropriate behaviour into the Law Society Stepping Up Course, which is mandatory for all lawyers wishing to go into sole practice or become a partner at a firm. These lawyers will be in managerial positions and need to have a clear understanding that it is not acceptable to bully, sexually harass or discriminate against more junior staff that they manage and of the types of behaviour that constitute such misconduct. They also need to understand how to appropriately respond to complaints of this nature in respect of staff they manage when these are made.

CONCLUSION

43. Thank you for the opportunity to make a submission on the consultation paper.
44. We are proud to have a constructive working relationship with the Law Society. Here, we have provided comment on one of its most important current initiatives in order to better safeguard our members, who are predominantly junior lawyers, legal support staff and law

students about to embark on their legal careers. They are, unfortunately, the most likely to experience sexual harassment, bullying and discrimination.

45. We look forward to discussing our submission with you in more detail on Thursday 2 July 2020. If you have any questions about our submission, please contact us.

Aotearoa Legal Workers' Union

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