

Regulatory Impact Statement: Overview of required information

Regulatory Impact Statement

Lawyers and Conveyancers Act (Lawyers: Practice Rules: Practice on own Account) Amendment Regulations 2012

Agency Disclosure Statement

This Regulatory Impact Statement (RIS) has been prepared by the Ministry of Justice. It provides an analysis of options which aim to improve the competency of lawyers who wish to commence practice as a barrister and solicitor or barrister sole on their own account.

The competency of those lawyers seeking to practise on own account as either a barrister and solicitor or a barrister sole is uneven.

The analysis of options is based on qualitative and anecdotal evidence derived from the New Zealand (NZLS), the judiciary and consumers on the quality of lawyers. Information has been drawn from “Transforming the Legal Aid System: Final Report and Recommendations”, Chairperson: Dame Margaret Bazley DNZM, November 2009 (Bazley Report). There is little quantitative information available about the competency of lawyers who practice on their own account. This makes the options difficult to quantitatively assess.

The NZLS developed the proposals in this RIS. There is support for the proposals from the legal profession including the NZ Bar Association. The Chief Justice has also been consulted on the proposals and supports initiatives to improve the competency of lawyers entering practice on own account.

The proposals require amendment to existing regulations and will require all lawyers who wish to practise on their own account to meet new professional competency requirements and to commence practice within a shortened timeframe. The preferred policy options identified will not:

- impose additional costs on businesses
- impair private property rights, market competition, or the incentives on businesses to innovate and invest, or
- override fundamental common law principles (as referenced in Chapter 3 of the Legislation Advisory Committee Guidelines).

The preferred options will impose additional compliance costs on those lawyers applying to practise on their own account. The additional costs are the cost of the professional competency course itself and the time it takes to complete the course. However, these are minimal and can be justified as they improve the competence of those lawyers providing legal services on their own account. More

effective lawyers will improve the operation of the legal system. Public confidence in the justice system will also be improved.

Sarah Turner, General Manager, Public Law team, Ministry of Justice.

Status quo and problem definition

1. Lawyers are regulated under the Lawyers and Conveyancers Act 2006 (Act) by the New Zealand Law Society (NZLS). The regulatory functions of the NZLS include controlling and regulating the practice of law by barristers sole and by barristers and solicitors, and monitoring and enforcing the provisions of the Act and any regulations and rules under the Act that relate to lawyers.

Status quo

2. The Act permits lawyers (ie, barristers and solicitors and barristers sole) to structure their business forms in a variety of ways including partnerships, incorporated law firms and sole practice. Lawyers must meet certain requirements to be entitled to practise on their own account, that is, run their own legal practice without supervision. “Practice on own account” includes being a partner in a law firm, a sole practitioner (as a barrister and solicitor), or a barrister sole.

3. Sections 30 and 31 of the Act and Regulations 12 to 15 of the Lawyers and Conveyancers Act (Lawyers: Practice Rules) Regulations 2008 (Regulations) provide the regulatory basis and set out the criteria to be met by those lawyers who wish to practise on their own account, either as barristers and solicitors or barristers sole. In order to practise on their own account a lawyer needs to satisfy the NZLS or the High Court that they meet the professional competency and requirements in the Act and the Regulations. These requirements are:

- not less than 3 years’ legal experience in New Zealand during the 5 years immediately before the date of commencing practice on own account;
- completion of prescribed professional competency requirements (not applicable to barristers sole); and
- satisfying the NZLS that they are a suitable person to practise on their own account, having regard to several matters including the fields of law in which they practise and any other matters the NZLS considers relevant.

Problem definition

4. The NZLS has formed the view that failures in business practices can often lead to corner cutting in the delivery of legal services to clients. As a result clients may receive a legally unsatisfactory outcome, be dissatisfied with the legal process and ultimately lose confidence in the provision of legal services. The NZLS is concerned that the *Flying Start* course (the professional competency course prior to the introduction of the *Stepping Up* course discussed further below) does not equip those lawyers entering practice on own account with

the skills that are required to practise independently and to run a successful business.

(i) Complaints against practitioners

5. NZLS records show that for the year ended 30 June 2011, 10% of the legal profession were sole practitioners (ie, barristers and solicitors in practice on own account). This 10% of the legal profession account for 30% of the complaints made against lawyers to NZLS Standards Committees. Barristers sole comprise 13% of the legal profession and are responsible for 18% of complaints. When combined together, these groups of lawyers, representing 23% of the profession, are responsible for almost half (48%) of all complaints.

6. While complaints records do not tell the full story about lawyer competence, (for example, complaints about particular issues do not fall evenly across practice types) the sheer number of complaints is highly indicative of problems with the competence and practices of some members of these two groups of lawyers in practice on own account.

(ii) Other commentary on lawyer competence

7. There has been some criticism levelled at the regulation of lawyers and the quality of certain lawyers' practices, most recently in the Bazley Report. The Bazley Report heard from many sources of the poor quality of service offered by some barristers sole operating without office support. There was a strong theme of dissatisfaction with lawyers' services and, in particular, with the services provided by more junior lawyers, who are generally barristers sole, and who have inadequate experience or supervision.

8. A key recommendation from the Bazley Report was that the NZLS improve its regulation of lawyer competence and quality. The NZLS was given 2 years from the date of the Bazley Report (until November 2011) to make improvements. In October 2011 the former Minister of Justice, Hon Simon Power, announced the government was satisfied with the steps taken by the NZLS to address concerns about the quality of legal aid providers and was not planning to appoint an independent regulator of the legal profession.

9. While the Bazley Report is largely based on anecdotal evidence, it does highlight that there are perceived problems with lawyer competence. In the context of concerns about the quality of legal services any perceived problem affects public confidence in the legal system.

(iii) Current training for applicants limited

10. The current professional competency requirements (the *Flying Start* course run by the NZLS) only apply to those wanting to commence practice as a barrister and solicitor on own account, not applicants to be barristers sole. The *Flying Start* course content is narrow and only focuses on trust account

management. The *Flying Start* course was run on a region by region basis and as a consequence lawyers seeking to practise on own account did not receive consistent training.

11. The NZLS has examined comparable overseas jurisdictions and it is apparent that the current New Zealand training requirements are not as rigorous as similar jurisdictions. For example, in Queensland, lawyers seeking to practise on their own account must complete an intensive practice management course which comprises modules on trust accounting, professional standards, and risk management.

Summary

12. Those lawyers entering practice on own account have been assessed by the NZLS as being more at risk of providing poor quality service to clients due to inadequate professional preparation for the challenges of establishing and running a new business.

NZLS Programme of Work

13. As a result of its own research into complaints and overseas jurisdictions, and the findings of the Bazley Report, the NZLS has focussed its work on improving the skills and competence of those lawyers commencing practice on own account. The NZLS has a work programme that focuses on short-term regulatory changes which will begin to address the issues raised in the Bazley Report and also ongoing work that may require amendments to the Act.
14. As a first step in meeting the two year timeline imposed in the Bazley Report, in 2010 the three out of five years' legal experience requirements for all applicants practising on own account was implemented. Prior to 2010 those lawyers wanting to practise as a barrister and solicitor had to have three out of eight years' legal experience while those wanting to be barristers sole had to have six months' legal experience. Prior to 2008 there was no experience requirement for barristers sole.

Objectives

15. The objective of these proposals is to contribute to the continuing improvement of professional standards and competence of lawyers applying to commence practice on their own account by improving the content, currency and relevancy of training.
16. As a result of the Cabinet decision following the Bazley Report, the NZLS has a limited period to show improvements in the regulation of lawyer quality. Regulatory changes are quicker to effect but by nature are more limited in scope.

Regulatory impact analysis

17. Because of the timing required by Cabinet and the need to make changes promptly the proposed regulatory reforms are undertaken within the constraints of the current regulatory structure by amending the Lawyers and Conveyancers Act (Lawyers: Practice Rules) Regulations 2008. The Government's expectation is that the NZLS will move quickly on the competence issues identified in the Bazley Report.

18. The stage of the reform process outlined in this RIS focuses on the following issues:

- ensuring that all applicants to practise on their account have undergone suitable training within a two year period of commencing practice on own account, and
- ensuring that those who have already qualified as barristers sole cannot as of right commence practice as a barrister and solicitor on their own account without undergoing entry training.

Proposal one – Improve training requirements for barristers sole and barristers and solicitors wishing to practise on their account

19. Within the regulatory constraints three options were considered:

Option (1) Enhanced status quo - Applicants to become barristers and solicitors undergo new training requirements (no change for applicants to be barristers sole)

20. This option requires applicants to be a barrister and solicitor practising on own account to complete a new course to be specified by regulation.

21. A new nationally run course, *Stepping Up*, has been developed which focuses on:

- how to run the business of a law practice (eg: marketing and management);
- being responsible for the obligations of the practice;
- understanding and applying the relevant Rules of Conduct and Client Care; and
- understanding the principles and rules of trust accounting.

22. The specific changes to the course reflect NZLS research on:

- types of complaints made and skills needed to address these;
- focus group discussions with leading lawyers; and
- surveys of those lawyers completing the *Flying Start* programme.

23. The *Stepping Up* course is in two parts comprising a modular self-directed distance learning course and a three day workshop. To pass the *Flying Start* course applicants must complete the distance learning programme and workshop preparation, attend and participate in all sessions of the workshop, and reach the required standard in any assessments.

24. While a new course for barristers and solicitors will improve the practice of those lawyers it will not address the concerns raised about new barristers sole.

Option 2 – Introduce new training requirements for applicants to practise as a barrister sole

25. Barristers and solicitors and barristers sole have been treated quite differently in terms of entry requirements for practice on own account. Barristers cannot:

- practise as a solicitor;
- carry out the transactional aspects of conveyancing or act as a general agent or attorney;
- undertake the work of a real estate agent; or
- receive or hold money or valuable property on behalf of another person.

26. There are other restrictions on the behaviour of barristers, the main one being the intervention rule, which prevents a barrister sole from accepting clients directly. The intervention rule has been under challenge for some years. In the case of criminal legal aid work it does not exist at all. The intervention rule has been abolished in the United Kingdom and is currently under review in New Zealand by the NZLS.

27. As a result of these differences in the nature of practices, an entry course for barristers sole could be introduced. In jurisdictions where the differences between barristers and solicitors and barristers sole are more pronounced there are different entry requirements and pathways to practice on own account. For example, barristers sole applicants may be required to sit a separate bar examination followed by a period of pupillage of about 9-12 months that involves active supervision and mentoring by at least two senior supervisors. Once in practice on own account, barristers are required to meet continuing legal education requirements. These courses usually focus on the actual practice of being a barrister, that is, the legal ethics of being a barrister, aspects of evidence and court practice and procedure.

28. The introduction of a separate entry course for barristers is not a preferred option. The information gathered by the NZLS illustrates that both types of applicants need assistance with running a legal business. While there may also be a need for additional skills training in work as a barrister sole or as a barrister and solicitor this does not surpass the need for competency in core areas of legal business practice.

29. While the nature of practices may diverge, core legal practice skills remain the same. Both types of lawyers run businesses, deal with clients, are subject to client care requirements, and may run trust accounts. The skills that are associated with running a successful business and managing professional staff are generic as between practice types.

Option 3 – Require applicants to have completed training within two years of commencing practice on their account (compared to status quo of three years)

30. NZLS records show that applicants seeking to practise on own account generally do so within two years of completing the necessary training. Few lawyers commence practice in the two to three year window. Approximately 30% of lawyers completing the course do not commence practice on own account after three years.

31. A rationale for the 2010 reforms requiring applicants to have three out of five years legal work experience was to ensure the currency and relevance of that legal experience. The new *Stepping Up* programme is intended to provide practitioners with the knowledge and skills to establish a successful legal practice. Reducing the time to commence practice from three to two years will ensure the training remains current and relevant.

Summary - preferred option (1) and (3) combined

32. Introducing a new comprehensive course that all applicants for practice on own account are required to complete within a two year period of commencing practise on their account is the Ministry's preferred option. This option ensures that the range of skills learned in the training will be utilised within a short time frame. It also builds on the 2010 changes to the legal work experience requirements.

Proposal two – Ensure that a barrister entitled to practise on their own account cannot as of right become a barrister and solicitor entitled to practise on their own account

33. Existing barristers sole have not had to undertake any formal training in running a legal practice unlike barristers and solicitors practising on their own account. Many became barristers sole with negligible legal experience, that is six months or less. This group of barristers have not had the benefit of supervision by more experienced lawyers. While these barristers gain experience on a daily basis, the evidence available illustrates that competence and quality is lacking amongst some in this group of practitioners.

34. Currently, a lawyer with limited legal experience would have difficulty satisfying the NZLS that they should be entitled to practise on their account as a barrister and solicitor, and they may not meet the three out of five years work experience requirement. The proposed changes to the Regulations to make the legal experience requirements and training requirements the same as between barristers sole and barristers and solicitors may give cause to arguments that those already entitled to practise as a barrister sole can commence practise as of right as a barrister and solicitor.

35. It is more likely that those barristers sole who wish to change practice type and become a barrister and solicitor will be more likely to do so in adverse economic times. The change would be driven by a need to take on a broader

range of work. The timing of the change, when practices are under stress, increases the risk to consumers of poor business practices.

36. Within the regulatory constraints only two options were considered:

Option 1 - Status quo

37. Making no change to the Regulations ignores the evidence available about the competence and quality of some barristers sole. In the Ministry's view the status quo will perpetuate unnecessary risks to consumers by permitting barristers sole to commence practice in a broader range of practice areas without adequate training and scrutiny by the NZLS.

Option 2 - (Preferred) Require barristers sole to apply to be barristers and solicitors

38. Amending the Regulations to require barristers to apply to the NZLS for approval to practise on their account as a barrister and solicitor is the Ministry's preferred option. This option means that applicants will be required to complete the *Stepping Up* course which will provide applicants with a good grounding in the complexities of operating a business. While there will be a cost associated with this requirement, it is the Ministry's view that this is relatively small in the context of changing practice type. Furthermore, there will be benefits to clients.

Consultation

39. The NZLS has led the development of these proposals as a result of its work on lawyer competence. The proposals have been through the NZLS Council process. The Council is made up of representatives of district law societies, various sections of the legal profession and the NZ Bar Association. The proposals have the support of the Council.

40. Consultation with individual members of the legal profession has not been conducted although members of the NZLS will have had opportunity to provide comment on these changes due to NZLS publicity about the changes.

41. Consumers had the opportunity to participate in the Bazley Report review process. Consumers have not been consulted on the proposals as the nature of the changes proposed would limit the benefit and value of any consultation exercise which would be costly and time consuming.

42. The Chief Justice has been consulted and supports the reforms.

43. The Ministry has consulted the Ministry of Economic Development, the Crown Law Office and the Treasury on these proposals. The Department of Prime Minister and Cabinet has been informed.

Conclusions and recommendations

44. The NZLS has an extensive work programme on improving the competence of lawyers. Through its research on comparative jurisdictions, examination of complaints, and research, the NZLS has determined that the training requirements for lawyers seeking to practise on their own account do not adequately prepare those lawyers for the challenges of operating a successful legal practice.
45. The preferred option of requiring all applicants to commence practice on own account within two years of completing the new *Stepping Up* course will ensure that these lawyers have a solid basis of training in the skills necessary for running a legal practice. The NZLS thinks that training in good business practice and related skills (eg, marketing and management) will equip lawyers with the skills that will prevent the types of practices identified in the Bazley Report and enhance the quality of legal services provided to consumers.
46. While the course imposes a higher cost on applicants than the status quo it is not significant when viewed against the costs associated with lawyers commencing practice on their own account.
47. The change will have a positive impact on consumers as they will have access to better trained lawyers. This will have flow-on benefits for the profession as a whole as professional standards improve.
48. Amending the Regulations to ensure that barristers sole cannot as of right commence practice as barristers and solicitors will ensure that they must complete the comprehensive training programme before engaging in the provision of a wider range of legal services.

Implementation

49. The NZLS has already developed the new *Stepping Up* course which is a major building block in the NZLS's competence and professional development programme. It will assist candidates to:
 - Run the business of a law practice;
 - Be responsible for the obligations of the practice;
 - Understand and apply the relevant Rules of Conduct and Client Care; and
 - Understand the principles and rules of trust accounting.
50. The NZLS has and will continue to publish information about the changes to the training requirements on its website and in its monthly newsletter, *LawTalk*, which is distributed to all lawyers.
51. The preferred options will be given effect to by way of amendment to the Lawyers and Conveyancers Act (Lawyers: Practice Rules) Regulations 2008.

Monitoring, evaluation and review

52. The NZLS, as regulator of the legal profession, has an obligation to maintain the quality and professional standards of the legal profession. These changes are part of a competency development work stream that is being undertaken by the NZLS.
53. The NZLS is required to report on the work of Standards Committees in its annual report on regulatory function. The Ministry will encourage the NZLS to look further at the types of complaints brought against lawyers practising on own account compared to employed lawyers (ie, who are not practising on own account).
54. The Legal Complaints Review Officer (an independent body empowered to review Standards Committee decisions on complaints) is required to provide an Annual Report to the Minister of Justice, and the NZLS that must list, among other things, the number and types of applications for review made and the outcomes of those reviews. The Ministry will monitor these reports for trends in complaints.