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**Boosting productivity in the Services Sector: 2nd Interim Report Competition and ICT Topics
(the Report)**

Thank you for the opportunity to comment on the Report. We have limited our comments to the topic of “Legal Services in New Zealand” and in particular to the issues set out at Q3.2:

“ Are there additional steps that the Law Society could take to further strengthen competition within the legal profession?

For example, would there be merit in following the UK lead and including the promotion of a competitive market in the statutory objectives of the Law Society?

What measures could be undertaken by other professional bodies to strengthen competition in their respective professions?”

Those questions cannot be dealt with without consideration of the role of lawyers in providing legal services and the New Zealand legal profession. We set out below a number of factors which provide the context and background for that consideration.

Fundamental obligations of lawyers

We agree with the importance of encouraging a competitive market for the provision of professional services. Professional services generally, and in particular legal services, are subject to issues stemming from information asymmetry and complexity which tempers the approach to regulation. These issues are outlined in the Report.¹ A particularly significant and overarching consideration for lawyers is that they are subject to mandatory fundamental obligations imposed on them by statute

¹ The Report at p.59 para 3.3

and common law, reflective of the unique role of lawyers in the justice system, the operation of the courts and the administration of justice in our jurisdiction.²

The effectiveness of New Zealand's democracy, public institutions and its independent and highly regarded judiciary are dependent on an effective legal profession. The integrity of these institutions in turn gives the country a great competitive advantage.³

The fundamental obligations are set out in the Lawyers and Conveyancers Act 2006 (the Act) at section 4:

“ 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.”

Consumer Protection obligations

The first two purposes of the Act focus on the maintenance of public confidence in the provision of legal services and the protection of consumers of legal services:⁴ These purposes do not negate the professional responsibilities of lawyers to give the best professional advice even if that is not what the client wants to hear, nor do they compromise the lawyer's fundamental obligations.

² New Zealand is regarded highly in the measurement of effectiveness of its judiciary and legal system. This effectiveness is dependent on a strong legal profession see eg: Transparency International Corruption Perceptions Index 2013. Released March 2014: www.transparency.org/cpi. The World Justice Project has just ranked New Zealand sixth in its global Rule of Law index.

³ “New Zealand's high trust public sector is its greatest competitive advantage.” Phil O'Reilly, Chief Executive of Business New Zealand. Cited at www.transparency.org/cpi.

⁴ Lawyers and Conveyancers Act 2006, section 3(1)(a) and (b). The third purpose is to recognise the status of the legal profession (s.3(1)(c) of the Act)

The reforms of the regulation of lawyers introduced by the Act, were far-reaching and designed to support the maintenance of the fundamental obligations and the statutory purposes. The Act commenced on 1 August 2008.⁵

One year later, in 2009, the government announced a review of the quality of legal services and disciplining of poorly performing lawyers, within two years.⁶

As a result of that announcement the Law Society accelerated its work on improving the regulation of competency and professional development for lawyers as well as instituting an ongoing regulatory review. Among other things, this resulted in the earlier than planned introduction of the continuing professional development scheme and experiential requirements which must be established before a lawyer can practise on his/her own account.⁷ These initiatives were designed to be proportionate, evidence-based and not to impose barriers or undue costs on lawyers. In late 2011 the government announced it was satisfied with the performance and steps taken by the Law Society.⁸

As the Report notes, a key part of the Law Society's consumer protection role is an efficient and accessible complaints service. The first layer of complaints handling is provided by the Lawyers Complaints Service and Standards Committees (which includes non-lawyer members).⁹

⁵ That Act replaced the Law Practitioners Act 1982 (the LPA) which had no express consumer protection purposes. The previous Act was overdue for reform. The new Act was implemented in August 2008 and disjointed regulatory and complaints systems were replaced with a national Lawyers Complaints Service and supporting Standards Committees which deal with the significant number of complaints received each year at a primary level with the independent Legal Complaints Review Officer.

⁶ New Zealand Cabinet Agreement 2009. Minister of Justice media statement 30 November 2009. Consequent upon recommendations in the Review of the Legal Aid System, Dame Margaret Bazley (2009).

⁷ Including extending to barristers, experiential requirements already required of barristers and solicitors.

The Continuing Professional Development requirements are focused on individual lawyer's training requirements. They must take responsibility for their own competency and their learning needs, including planning their education requirements. The scheme allows a wide range of activities with no provider accreditation requirements. The scheme is descriptive not prescriptive and incorporates efficiencies such as authorising certain firms to "self-audit" to ensure resources are allocated on a risk basis. The design has been adopted in a number of overseas jurisdictions. A similar scheme is likely to be adopted by solicitors and barristers regulators in the United Kingdom following a recent report on legal training.

⁸ Simon Power, Minister of Justice, Press Release October 2011.

⁹ The complaints handling process provides independent checks and balances. The Legal Complaints Review Officer (LCRO) is an independent body funded by the Law Society which is able to review the decisions of any Standards Committee (SC) at the request of the complainant or the lawyer concerned. In addition, the New Zealand Lawyers and Conveyancers Disciplinary Tribunal is established under the Act. That Tribunal is independent and presently chaired by a District Court Judge. It is that body which hears and determines disciplinary charges against lawyers which are laid by Standards Committees. The Tribunal also receives applications regarding suspension, striking off and other matters. Both the LCRO and Disciplinary Tribunal are administered by the Ministry of Justice.

The Complaints Service is accessible and responsive.¹⁰ The present level of complaints indicates that consumers are able easily to access the services, whether by telephone (including an 0800 line), the website, email or through one of 14 geographic locations.¹¹ The information gathered through the service on causes of complaints and feedback on the complaints handling is regularly reviewed and that information is used to inform changes to the system as well as targeting problem areas.

Over the past two years the Complaints Service has introduced a number of initiatives to improve efficiency and access. These include the Early Resolution Service which employs alternative dispute resolution techniques to deal with complaints, and a “concerns” process which enables a consumer to discuss an issue with Law Society staff without initiating a formal complaint. This often results in the inquirer being satisfied from the information provided. Sometimes the client, having clarified the issue, takes it back to the lawyer or the firm’s internal complaints process and the matter is resolved.

The Complaints Service has adopted an evidence-based approach. The patterns and information gathered from reviewing complaints, including trends and feedback on complaints handling, assists to identify changes, trends, improvements and new issues. These also provide information for Law Society communications¹², provision of information, education topics and improvements to the system generally.¹³

Limited areas of legal work reserved to lawyers

The areas of legal work reserved only to lawyers are minimal. This reflects an appropriate regulatory response and strikes a balance. By reserving a small area of legal work to lawyers it allows other providers of legal services to compete in non-reserved areas.

The Act reserves to lawyers only narrowly defined areas of work related to court, certain tribunals¹⁴ and areas prescribed by other statutes. These are:

¹⁰ The volume of complaints attests to a very accessible complaints service. For members, see the NZLS Regulatory Report: <http://www.lawsociety.org.nz/news-and-communications/annual-reports>

¹¹ The National Office is based in Wellington. It has 13 branches situated throughout New Zealand.

¹² Publications include the booklet referred to in the Report: *“Seeing a lawyer – what you can expect.”*

¹³ At present the Law Society is reviewing the linking of disciplinary records to the relevant lawyer’s name on “Find a Lawyer” on the NZLS website.

¹⁴ A number of tribunals and courts permit non-lawyer advocates and representatives to appear as of right by statute: eg Employment Court and Environment Court.

- “ (a) in giving legal advice to any other person in relation to the 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 part 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;¹⁵ 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 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.”

Conveyancing is reserved to licensed conveyancers and lawyers.

The competition amongst New Zealand lawyers is robust.¹⁶ There are approximately 11,500 practising lawyers in New Zealand. This provides one of the highest percentage ratios of lawyer to population in the world. The educational requirements for entry to the profession are prescribed by the independent Council of Legal Education.¹⁷ A recent review of pre-admission training by the Council of Legal Education¹⁸ confirmed that New Zealand should not adopt the training contract, articling or pupillage pathways which create additional hurdles for entry to the legal profession in some overseas jurisdictions.¹⁹

Comparisons with UK Legal Professional Regulation

¹⁵ Supra at fn 14

¹⁶ In relation to foreign lawyers, s.25 of the Act enables them to provide New Zealand legal services in non-reserved areas and provide legal services concerning foreign and international law.

¹⁷ Part 8 of the Lawyers and Conveyancers Act. The Council of Legal Education also regulates the educational requirements of overseas lawyers for admission in New Zealand.

¹⁸ New Zealand Council of Legal Education: Professional Legal Studies Course Review. Report by Sir Andrew Tipping 2013.

¹⁹ “LPC Students struggle to get training deals.” The Law Society Gazette (Law Society of England and Wales) 20/1/14 www.lawgazette.co.nz.

The adoption of overseas provisions in the regulation of the New Zealand legal profession must be considered with care.

The United Kingdom model is complex. It establishes an oversight regulator (the Legal Services Board) and at least nine approved legal services regulators who regulate an extensive landscape of reserved areas of legal services. Those reserved legal services are delivered by different parts of the legal profession. This results in the regulation and reservation of wider areas of legal work and legal professionals than is the case in New Zealand.²⁰

A recent review of the UK legal services model²¹ has attracted submissions which indicate a high degree of dissatisfaction with the model, its numerous institutions, complexity and cost. The New Zealand profession has a major advantage in that it is a fused profession.²² This supports simplicity, responsiveness and flexibility in regulation. The creation of numerous and multilayered regulatory bodies and complaints processes inevitably leads to silo behaviour, duplication of functions and added costs.

The multiplicity, complexity and variety of institutions involved in the regulation of legal services and legal service professionals consequent upon the Legal Services Act 2007 (UK) was a response to the legal services environment in the United Kingdom. This reflects separate historic legal professional divisions, regulation and institutions. These divisions have never existed in New Zealand. The resultant UK legislation structures and duplications and resultant competition issues and regulatory responses are more difficult, complicated and costly than would be appropriate in New Zealand.

Promoting competition in lawyer services

Competition in the context of legal services is often seen as encouraging improvement of consumer experience and protection as well as driving the provision of better information for consumers about legal services.

The Rules of Conduct and Client Care²³ include obligations on a lawyer to cooperate and facilitate a transfer to another lawyer. The lawyer must transfer the files and materials to the new lawyer upon

²⁰ Legal Services Act 2007 (UK).

²¹ www.lawgazette.co.uk: "MoJ begins 'full-breadth' review of legal regulation", 10 June 2013

²² All lawyers are admitted as barrister and solicitors of the High Court of New Zealand and are regulated by the New Zealand Law Society. A lawyer may choose to practise as a barrister and solicitor or a barrister sole.

²³ Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008

request, in the event of a termination of the retainer.²⁴ Further, the client has the right to terminate a retainer at any stage, and a lawyer must not exert any pressure on a client not to terminate a retainer. At the same time a lawyer has an obligation, consistent with the fundamental obligations, not to terminate a retainer or withdraw unless for good cause.²⁵ This requirement supports the smooth administration of justice, particularly in the courts, so a client is not left summarily unrepresented.

The Report looks at the promotion of competition among professional service providers by the use of comparative websites. The availability and usefulness of comparative service websites is outlined in the Report. There are difficulties in providing unbiased truly comparative and trustworthy information in relation to lawyers' services. This is because of the personal nature of the services and the high trust involved. In a number of areas of legal service, for instance conveyancing services and less complicated services as the obtaining of marriage dissolution orders, comparative costs are in fact readily available from law firms. Inquiries of that nature are often made of us through our Property Law Section and Family Law Section.

In the United Kingdom the recent establishment of the "Legal Choices"²⁶ website, is a direct response to the Legal Services Board review and the requirement to promote competition. Our website, legal guides and information bulletins compare favourably to that site. Appendix 1, attached, is a comparison table.

The Rules also require lawyers to provide client care and service information at the outset of the client engagement. This includes a description of the work to be provided and information on costs.²⁷

We continually promote improvements and initiatives in consumer protection and the provision of information to meet the statutory purposes of maintaining public confidence in the legal profession and consumer protection.²⁸

²⁴ Supra Rule 4.3

²⁵ Supra Rule 4.2

²⁶ www.legalchoices.org.uk.

²⁷ The Rules (supra) at p.2.

²⁸ For instance a review of the intervention rule allowing direct access by the public to barristers in specific areas of the law, subject to safeguards will result in the modification of the rule. This is due to go to the Minister of Justice in April 2014. The intervention rule requires barristers to be instructed through solicitors.

Summary

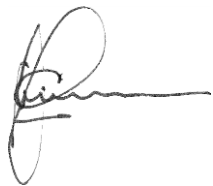
The relevant issues which should be taken into account in considering how to encourage competitiveness in the provision of legal services are that:

- The legal profession operates under a regulatory system which is designed to promote the public interest and consumer protection while maintaining lawyers' fundamental obligations and professional responsibilities.
- The areas of legal work reserved solely to lawyers are minimal.
- Other service providers actively compete in the provision of legal services. These include advisory and tax services as well as advocacy services in courts, such as employment and resource management, and in other tribunals.
- The numbers entering the legal profession and practising law are increasing rather than diminishing and there is intense competition within the profession.
- The New Zealand legal profession, its history and environment are substantially different from that of the United Kingdom and this dictates different regulatory responses.

We agree that competition is a desirable outcome in the legal professional service market, but we are very firm in our view that no specific statutory provision requiring the promotion of competition is appropriate within the present framework. The New Zealand legal professional environment and regulation enables the provision of legal services by a variety of providers while providing for the unique role and obligations of lawyers and imposes adequate safeguards for the public.

We would be pleased to meet the Commission to discuss any aspect of the submission.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Chris Moore', with a stylized flourish at the end.

Chris Moore
President

APPENDIX 1

Legal Choices website	Purpose	NZLS equivalent
<p>Got a legal issue? http://www.legalchoices.org.uk/legal-choices/got-a-legal-issue/</p>	<p>Covers a variety of reasons a consumer may need a lawyer (ie 'House', 'Arrested', 'Wills') and offers information on what to consider. Has links to appropriate online services.</p>	<p>Very similar to the NZLS 'Guides to the Law'. http://www.lawsociety.org.nz/news-and-communications/guides-to-the-law</p>
<p>Types of lawyers http://www.legalchoices.org.uk/legal-choices/types-of-lawyers/</p>	<p>Lists and explains the types of lawyers in England and Wales (ie Solicitors, Notaries, Costs Lawyers)</p>	<p>Not needed as the legal environment in NZ is different. NZLS website explains what services a lawyer in NZ is able to provide.</p>
<p>If you want to complain http://www.legalchoices.org.uk/legal-choices/if-you-want-to-complain/</p>	<p>A brief introduction, then a link to the website of the Legal Ombudsman.</p>	<p>NZLS's Complaints Service content and access is more comprehensive. http://www.lawsociety.org.nz/for-the-community/lawyers-complaints-service</p>
<p>Legal Costs http://www.legalchoices.org.uk/legal-choices/money-talks/</p>	<p>Suggests questions to ask lawyers about costs. Offers advice on a variety of costs-related issues, ie legal aid, no win/no fee arrangements and legal insurance.</p>	<p>NZLS website and publication has similar content on costs, how to discuss costs with your lawyer and how to complain. http://www.lawsociety.org.nz/for-the-community/how-can-we-help-you/how-much-will-it-cost and http://www.lawsociety.org.nz/for-the-community/how-can-we-help-you</p>