Non-Lawyer Employment Advocates and the Trade-Off Between Accessibility and Capability

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List of Abbreviations

In order of appearance:

IC&A Act – the Industrial Conciliation and Arbitration Act 1894

PG – Personal Grievance

LRA – the Labour Relations Act 1987

ECA – the Employment Contracts Act 1991

IEA – Individual Employment Agreement

ERA – the Employment Relations Act 2000

LCA – the Lawyers and Conveyancers Act 2006

NZLS – the New Zealand Law Society

MBIE – the Ministry of Business, Innovation and Employment

ELINZ – the Employment Law Institute of New Zealand

CAB – Citizens Advice Bureau

CLC – Community Law Centre

MF – McKenzie Friend

NZSOC – the New Zealand Society of Conveyancers

REA – Registered Employment Advocate

NZSEA – the New Zealand Society of Employment Advocates

CFA – Conditional Fee Agreement

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Introduction

Labour law is a politically charged area. The law has been malleable to the political ideologies of see-sawing governments. For the last four decades, New Zealand's labour law system has been in a state of flux.[1]

The employment jurisdiction is unique, given its non-legal beginnings. Since their inception, the institutions have allowed a special place for lay-advocates. They carry out the same work as lawyers, including representing their clients at Mediation Services, the Employment Relations Authority, the Employment Court, and with special leave, beyond. In recent decades, some advocates have been cause for concern. Without regulation or prescribed standards, non-lawyer employment advocates are essentially self-governing. This paper will consider the appropriateness of this model and suggest regulatory policy.

Chief Judge Christina Inglis in *Ward v Concrete Structures* noted her concerns about this industry:[2]

> [10] I do, however, wish to make a general observation about concerns of this sort, which regrettably arise on a not infrequent basis and which highlight a broader issue in this jurisdiction.
>
> [11] Advocates are entitled to appear on behalf of their clients in the Authority and the Court under the Employment Relations Act 2000. No regulatory framework currently exists to address any issues of competence. Nor does a complaints mechanism exist. The New Zealand Law Society, which oversees such matters in respect of lawyers, has no role to play in relation to employment advocates.
>
> [12]…There is a limit to the extent to which the Court can appropriately address professional standards issues which arise in respect of the conduct of some advocates and which impacts on often vulnerable litigants, the opposing party and more generally in terms of the efficient and effective administration of justice… all of this is, of course, a matter for Parliament if it so chooses, not the Court.

[1] Gordon Anderson *Reconstructing New Zealand's Labour Law: Consensus or Divergence?* (Victoria University Press, Wellington, 2011) at 13.
[2] *Ward v Concrete Structures (NZ) Ltd* [2019] NZEmpC 111 at [10]-[12].

Chapter 1 explores the employment jurisdiction's peculiar history. The space has shifted from a pluralist paradigm to a unitary one.[3] Employees have arguably lost effective voice in employment relationships.[4] This background contextualises the existence of employment advocates and their role in the legal system.

Chapter 2 uses determinations of the Authority and Employment Court to illustrate the poor practices of a small cohort of employment advocates. These shortcomings form the foundation for arguments in favour of regulation.

Chapter 3 highlights how finely balanced this topic is. Employment advocates play a vital role in improving access to justice. Regulators must engage in value judgements to strike an appropriate balance between improving the standard of advocacy without inhibiting access.

Chapter 4 considers the comparable professions of conveyancing practitioners and English McKenzie friends. Each example sheds light on the options for, and appropriateness of, regulation.

Finally, Chapter 5 makes preliminary recommendations for legislative reform. The Lawyers and Conveyancers Act should be amended to encompass employment advocates. The regulation is five-part. Firstly, the profession of employment advocacy should be established. Subsequently, the New Zealand Society of Employment Advocates should be created as the regulatory body of the industry. The third part is developing requirements surrounding advocates' qualification, registration and continuing education. Next, the society should create rules regarding advocates' conduct and client care. The final piece of regulation is ensuring a complaints process and disciplinary mechanism exist to censure malpractice. The chapter will also forecast the likely impacts of such regulations on interested stakeholders.

These recommendations are preliminary, this paper is designed to re-spark a conversation which has rattled around the employment space for the last decade.

[3] Anderson, *Reconstructing New Zealand's Labour Law*, above n 1, at 258.
[4] At 258.

Chapter I – The History

This chapter will detail the history of New Zealand's unique employment jurisdiction. The Employment Relations Authority (the Authority) and the Employment Court (the Court) are specialist dispute resolution institutions, initially designed to relieve congestion from the civil court system.[5] The Court has exclusive jurisdiction, to deal with employment matters, which has expanded over time as the law develops. The Court sits alongside the High Court, equal in status, but narrower in scope.[6] The Court hears de novo appeals from the Authority.[7] Hon Justice Miller commented it seems extravagant that employment matters can be the subject of two first-instance adjudications.[8] The Court of Appeal hears appeals from the Employment Court on questions of law.[9]

The current regime must be understood against its' historical backdrop.[10] Collective rights and actions dominated New Zealand's employment law history for almost a century. Unions have been incredibly dependent on legislation for their creation and survival, so have been hugely affected by changing governments.[11] The foundations of today's model were laid down largely by the Employment Contracts Act 1991. The current Employment Relations Act 2000 has emerged to be a reasonably stable statute.[12]

A. 1894 - 1987. The Industrial Conciliation and Arbitration Act 1894 (IC&A Act).

The IC&A Act was designed to encourage the formation of unions and to facilitate settlement through conciliation and arbitration.[13] Unions, with a minimum of 15 workers,[14] would

[5] Susan Robson "Policy, Operations and Outcomes in the New Zealand Employment Jurisdiction 1990-2008" (Thesis, Doctor of Philosophy, University of Otago, 2017) at 1.
[6] Christina Inglis "The Employment Court of New Zealand Where it Sits in the Court Structure and Why" (paper presented to Auckland University Employment Law Class, May 2019) at 3.
[7] Law Commission *Delivering Justice for All, A Vision for New Zealand Courts and Tribunals* (NZLC R85, 2004) at 229.
[8] Hon Justice Miller "Access to Justice presentation" (New Zealand Work Research Institute's conference, Barriers to Participation: what would make a difference and would it work?, Wellington, May 2019) at 8.
[9] At 3.
[10] Paul Roth, "Collective autonomy in New Zealand". In D. Roux (Ed.), *Autonomie collective et droit du travail. Mélanges en l'honneur du professeur Pierre Verge.* (Quebec, Canada: Les Presses de l'Université Laval, 2014) 327 at 328.
[11] Ian McAndrew, Alan Geare and Fiona Edgar "The Changing Landscape of Workplace Relations" in *Transforming Workplace Relations in New Zealand 1976-2016* (Victoria University Press, Wellington, (2017) 23 at 28.
[12] Anderson, *Reconstructing New Zealand's Labour Law*, above n 1, at 14.
[13] Industrial Conciliation and Arbitration Act 1894, Long Title.
[14] Ian McAndrew, Alan Geare and Fiona Edgar, above n 11, at 26.

register with the Arbitration Court and gain the exclusive right to represent workers.[15] Employers of union members were legally obliged to negotiate with their union.[16] Union delegates were specialised and competent but importantly, not lawyers. Labour law was quarantined from the influence of the ordinary courts and the legal profession.[17] Legal representation was only permitted with the consent of all parties,[18] which, in practice, was rare.[19] Further, at this time, costs could not be awarded in respect of barristers or solicitors, [20] which also damped the use of legal representation.[21]

The legislation and government of the day were discernably supportive of unions. After the Maritime Strike of 1890, there was a public outcry against sweated labour.[22] New Zealand was a protected economy until 1976, with a collectivist, welfare state ethos.[23] These attitudes were reflected in the employment sphere, and by 1913 New Zealand was one of the most unionised countries in the world.[24] The peak of voluntary unionism in 1921 showed 400 unions with almost 100,000 members.[25] Unionism was compulsory between 1936 and 1961.[26] The sentiment was, the terms and conditions of work should be jointly determined under the supervision of the state.[27]

A rather unworkable personal grievance (PG) procedure was introduced in 1970.[28] Only once the employee and their union had approached the employer, could the matter go before the grievance committee.[29] PGs were undertaken by the affected workers' union as an incident to the collective interest.[30] In 1985, the grievance committee dealt with just 658 cases,[31] as

[15] Roth, "Collective autonomy in New Zealand", above n 10, at 328.
[16] Erik Olssen "Unions and employee organisations" (11 March 2010) Te Ara – the Encyclopedia of New Zealand, <http://www.TeAra.govt.nz/en/unions-and-employee-organisations/print>.
[17] Anderson, *Reconstructing New Zealand's Labour Law*, above n 1, at 101.
[18] IC&A Act, s 53.
[19] Paul Roth "The Place of the Employment Court in the New Zealand Judicial Hierarchy" (2019) 50 VUWLR at 9
[20] Section 69(1).
[21] Roth "The Place of the Employment Court in the New Zealand Judicial Hierarchy", above n 19, at 9.
[22] Ian McAndrew, Alan Geare and Fiona Edgar, above n 11, at 26.
[23] At 24.
[24] Erik Olssen, above n 16.
[25] Erik Olssen, above n 16.
[26] Ian McAndrew, Alan Geare and Fiona Edgar, above n 11, at 26.
[27] Gordon Anderson "Competing Visions and the Transformation of New Zealand Labour Law" in *Transforming Workplace Relations in New Zealand 1976-2016* (Victoria University Press, Wellington, (2017) 191 at 194.
[28] Ian McAndrew, Alan Geare and Fiona Edgar, above n 11, at 27.
[29] Peter Franks "Barriers to participation: a mediator's perspective" (New Zealand Work Research Institute's conferences, Barriers to Participation: A Symposium, Auckland, September 2018).
[30] Roth, "Collective autonomy in New Zealand", above n 10, at 330.
[31] Peter Franks, above n 29.

unions would only pursue cases with high chances of success.[32] The system was quick and avoided litigation; the average wait time for a meeting was between a few days and a month.[33] Non-unionised workers could pursue redress in the general jurisdiction, although the rights and remedies were inferior.[34] The lack of effective redress outside of the collective majorly bolstered union membership.

B. 1987 – 1991. The Labour Relations Act 1987 (LRA).

The Labour Government of 1984 took dramatic steps to deregulate the economy by opening financial markets, reducing tariffs and privatising public enterprises.[35] The LRA encouraged collective bargaining without the involvement of courts and the ministry.[36] During this period, the government took a 'hands-off' approach to industrial relations. Disputes could only go to court with the agreement of both parties, so strong employers would simply refuse.[37] Union membership had dropped by 80,000 by the late 1980s.[38]

C. 1991 – 2000. The Employment Contracts Act 1991 (ECA).

The National Government sought to further deregulate the labour market by enacting the ECA, commencing the "lassize-faire era".[39] The Arbitration Court was replaced with the Employment Tribunal and Employment Court. The Tribunal was a first-instance institution to provide a "low level, informal, … speedy, fair, and just resolution".[40] The Employment Court was created as a second-tier, senior court that heard appeals from the Tribunal.[41] The Court initially signalled that it intended to employ not only legal rules but also industrial expertise of those appearing before it.[42] The employment jurisdiction was not restricted by issues of

[32] Robson "Policy, Operations and Outcomes" above n 5, at 48.
[33] Peter Franks, above n 29.
[34] Roth, "Collective autonomy in New Zealand", above n 10, at 330.
[35] Ian McAndrew, Alan Geare and Fiona Edgar, above n 11, at 30.
[36] At 31.
[37] At 30.
[38] At 32.
[39] Employment Contracts Act 1991.
[40] Section 76(c).
[41] Roth "The Place of the Employment Court in the New Zealand Judicial Hierarchy", above n 19, at 6.
[42] At 9.

witness credibility, contradictory facts, inadequate proof of issues and other imperfections which arose in cases.[43]

Academics agree the ECA was anti-union and favoured employers.[44] All types of employment relationships were provided for, with the creation of individual employment agreements (IEA).[45] The employment relationship was conceptualised as private, and the IEA as capable of regulating both party's rights and responsibilities.[46] Anderson described the legislation as "devastatingly effective" in replacing a pluralist system, with a unitary one, with notions of "master and servant".[47] The term 'union' was deliberately replaced by the more expansive term "employee organisation",[48] and only incorporated societies with at least 1,000 members were recognised.[49] Contractual provisions became dictated by the employer rather than achieved through mutual negotiations.[50] As expected, union membership further declined with this regime.[51]

Unions' monopoly over legal representation ended with the ECA allowing representation in the Tribunal and Court to be provided by 'any other person'.[52] This created an unusually broad range of representatives including lawyers, advocates and other advisors.[53] Lawyers arrived en masse to a jurisdiction from which they had traditionally been excluded.[54] Representatives differed hugely in their training, qualifications and approaches to issues.[55] When drafting the ECA, lay representation was regarded as useful to improve access to the institutions.[56]

The ECA made PGs available to all employees, which Robson described as the "trojan horse to decollectivisation".[57] Direct access to the institutions led to a phenomenal increase in

[43] Former CJ Graeme Colgan "Dinner Speech" (New Zealand Labour Law Society Conference, 22 November 2013) at 3.
[44] Ian McAndrew, Alan Geare and Fiona Edgar, above n 11, at 33.
[45] At 330.
[46] Roth, "Collective autonomy in New Zealand", above n 10, at 330.
[47] Anderson, *Reconstructing New Zealand's Labour Law*, above n 1, at 200.
[48] At 330.
[49] Erik Olssen, above n 16.
[50] Ian McAndrew, Alan Geare and Fiona Edgar, above n 11, at 33.
[51] Roth, "Collective autonomy in New Zealand", above n 10, at 332.
[52] Employment Contracts Act, s 59.
[53] *Bay of Plenty District Health Board v Culturesafe New Zealand Ltd* [2020] NZEmpC 149 at [72].
[54] Roth, "Collective autonomy in New Zealand", above n 10, at 332.
[55] Robson "Policy, Operations and Outcomes" above n 5, at 49.
[56] At 31.
[57] Susan Robson "The influence of the Legal Profession on Dispute Resolution after 1990" in *Transforming Workplace Relations in New Zealand 1976-2016* (Victoria University Press, Wellington, (2017) 210, at 212.

litigation.[58] In 1997 the Tribunal received 5,242 applications and had 3,472 outstanding at the end of the year.[59] Unions had filtered out poor cases and focused primarily on the reinstatement of an employee's role.[60] The adversarial model is the paradigm of resolution for lawyers.[61] Further, the Court was required to develop substantive legal principles to govern PGs and the more contract-law-based IEAs.[62] These factors shifted employment law from quasi-legal to adversarial.

The ECA rejected the 100-year-old philosophy that the inherent power imbalance between employers and employees should be redressed, through the governments' legislative support of unions and collective action.[63] The radical character of the Act meant it was unlikely to survive long term.[64]

D. 2000 - Present. The Employment Relations Act 2000 (ERA)

The Labour Government of 1999 quickly replaced the ECA with the ERA in 2000. This statutory scheme hoped to cater to both individualised and collective approaches to employment law. The ERA appears more union-friendly, though academics like Geare have commented on its superficiality.[65] The term 'union' was reinstated, but the system is one of self-help rather than state protection of unions.[66] The Act slowed the sharp decline in membership, however, the latest Union Membership Return Report from 2018 showed that just 351,769 people or 13.29 percent of employees in the workforce belong to a union.[67] Individualised employment continues to dominate,[68] the representation by 'any other person' provision was transplanted into s 236 and sch 3 cl 2 of the Act.

The ERA retained the Employment Court but split the mediation and adjudicative functions of the Tribunal between a newly created Mediation Service and Employment Relations

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[58] Roth, "Collective autonomy in New Zealand", above n 10, at 333.
[59] Peter Franks, above n 29.
[60] Robson "Policy, Operations and Outcome", above n 5, at 42.
[61] At 219.
[62] Anderson, *Reconstructing New Zealand's Labour Law*, above n 1, at 105.
[63] Ian McAndrew, Alan Geare and Fiona Edgar, above n 11, at 35.
[64] Anderson *Reconstructing New Zealand's Labour* Law, above n 1, at 14.
[65] Ian McAndrew, Alan Geare and Fiona Edgar, above n 11, at 36.
[66] Anderson *Reconstructing New Zealand's Labour Law*, above n 1, at 17.
[67] "Annual Return membership reports" New Zealand Companies Office <https://www.companiesoffice.govt.nz/all-registers/registered-unions/annual-return-membership-reports/>.
[68] Anderson "Competing Visions and the Transformation of New Zealand Labour Law", above n 27, at 203.

Authority.[69] Mediation was designed to reduce adjudication by filtering out proceedings likely to settle.[70] Before any formal proceedings are heard, attempts must have been made to settle a problem through mediation.[71] In 2017-2018 mediation's settlement rate was 76 percent, and the disposal rate is estimated to be as high as 96 percent (settlements plus unresolved matter that do not progress to the Authority).[72]

The Authority has full first-instance jurisdiction to hear and determine all types of employment disputes.[73] The Authority is less adversarial than its' predecessor.[74] In *Samuels,* CJ Inglis described it as "…not a court. It is an investigative body. Its unique design is geared towards the non-technical, cost-effective and speedier disposition of employment cases at first instance."[75] The investigative power of the Authority is very unusual within the New Zealand legal system.[76] It assists unrepresented parties, as members can ensure all relevant evidence is presented and tested correctly.[77]

While the Authority was designed to be informal, it was vulnerable to the imposition of the strictures of legal method, and arguably its fullest informality potential was never realised.[78] To combat this, the language surrounding proceedings was changed. The terminology of the general jurisdiction may have been importing legalistic attitudes and closing off other modes of resolution. The term "contract" was replaced with, "relationship", "cause of action" with "statement of problem", "hearing" with "investigation meeting", "decision" with "determination". These changes are an attempt to signal a change in attitude in the Authority.[79] Some feel as if these changes are merely cosmetic.[80] The Authority appears to be a successful innovation, disposing problems within a reasonable time frame.[81]

[69] Anderson *Reconstructing New Zealand's Labour Law*, above n 1, at 249.
[70] Robson "The influence of the Legal Profession on Dispute Resolution after 1990", above n 57, at 214.
[71] Anderson *Reconstructing New Zealand's Labour Law,* above n 1, at 249.
[72] Peter Franks, above n 29.
[73] Robson "Policy, Operations and Outcomes", above n 5, at 101.
[74] Ian McAndrew, Alan Geare and Fiona Edgar, above n 11, at 38.
[75] *Samuels v The Employment Relations Authority* [2018] NZEmpC 138 at [27]
[76] Anderson *Reconstructing New Zealand's Labour Law,* above n 1, at 251.
[77] Robson "Policy, Operations and Outcomes", above n 5, at 101.
[78] Robson "The influence of the Legal Profession on Dispute Resolution after 1990", above n 57, at 216.
[79] Robson "Policy, Operations and Outcomes", above n 5, at 164.
[80] At 164.
[81] Anderson *Reconstructing New Zealand's Labour Law*, above n 1, at 252.

E. Conclusion

The last 40 years have seen the judicialisation of the employment jurisdiction, which has increased the time and cost of enforcing individual rights.[82] Anderson predicts that after years of political shifting, the ERA may have achieved a state of reasonable stability.[83] Before 1990, trade union and employer association's advocates were the only laypeople in practice.[84] The ECA opened the floodgates to lay representation in the true sense of the word. The current labour landscape, and thus any potential changes must be understood in this historical context.

Chapter II - The Problems

This chapter will illustrate some of the issues that a small cohort of non-legal representatives are causing in the employment space. There has been a discernable growth in the number of advocates appearing pursuant to cl 2(1)(b)(ii).[85] There have been calls for regulation and a range of options mooted, to no consequence.[86] The problems can be grouped into three broad target areas: fees, professional obligations and competence.

Preface: Lawyers Behaviour

It is crucial to preface this chapter with an acknowledgement of the misbehaviour of legal counsel. In any industry, there is a spectrum of quality and behaviour of practitioners. There is no shortage of lawyers who are incompetent or engage in reprehensible conduct. The key difference is regulation provides safeguards and a means of redress.[87] The Lawyers and Conveyancers Act 2006 (LCA) empowers the New Zealand Law Society (NZLS) as the national regulator of the legal profession.[88] They created the Lawyers: Conduct and Client Care rules which they monitor, and enforce.[89] NZLS regulate around 15,000 lawyers with the

[82] At 119.
[83] Anderson *Reconstructing New Zealand's Labour Law,* above n 1, at 14.
[84] Former CJ Graeme Colgan "Special article: Regulation of the Industry" (1 September 2019) ELINZ Newsletter, Employment Lore.
[85] *2 Appearance of Parties* (online loose-leaf ed, Thomson Reuters, 2020) at 3.2.04.
[86] At 3.2.04.
[87] *Fee-charging McKenzie Friends* (Legal Services Consumer Panel Report, April 2014) at 17.
[88] "What is the Law Society" (6 August 2020) New Zealand Law Society <https://www.lawsociety.org.nz/about-us/what-is-the-law-society/ >.
[89] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

intention of ensuring public confidence in the provision of legal services.[90] The Standards Committee investigates and determines complaints, with actions including disbarment.[91] This paper acknowledges lawyers' inadequacies but focuses on the narrower topic of the regulation of employment advocates.

A. Target Area 1 - Fees.

How advocates calculate and charge their fees is of significant concern. There are three methods: contingency arrangements, percentage arrangements and hourly rates. Each of these methods can be problematic. Overcharging has been considered professional misconduct for lawyers since the 1940s.[92]

1. Contingency arrangements

Contingency arrangements are often termed "No-Win-No-Fee" or a conditional fee agreement. They are defined in respect to lawyers by the LCA in s 333 as:[93]

> an agreement under which a lawyer agrees with a client that some or all of the lawyer's fees and expenses for the provision to that client of advocacy or litigation services in respect of a matter are payable only if the outcome of that matter is successful.

The same applies to advocates; the fees only become payable if they are successful. Employment issues do not usually result in a clear 'winner' and 'loser'. They typically result in a negotiated settlement sum, with which each party's satisfaction will vary. An advocate may frame a nominal sum as a 'win', triggering the fee, even if their client is entirely unsatisfied. As noted in *Greig,* a satisfactory result is subjective, and most litigants are never wholly satisfied.[94] This appears to be the dominant fee structure within New Zealand's labour advocates.[95]

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[90] "What is the Law Society", above n 88.
[91] "Lawyers Complaints Service" (13 March 2020) New Zealand Law Society < https://www.lawsociety.org.nz/professional-practice/client-care-and-complaints/complaints-and-discipline/lawyers-complaints-service/>.
[92] University of Otago Legal Issues Centre, "Accessing Legal Services: The Price of Litigation Services" (Working Paper, 2019) at 9.
[93] Lawyers and Conveyancers Act, s 333.
[94] *The Order of St John Midland Regional Trust Board v Greig* (2004) 7 NZELC 97,610, [2004] 2 ERNZ 137 at [14]
[95] See < http://personalgrievance.org.nz/nowinnofee.html>; <http://unfair.co.nz>; <http://www.abbeyes.co.nz/no-win-no-fee/>; <https://www.andersonlaw.nz>; <https://www.worklaw.co.nz/no-

The Authority member in *Lucas v Te Rito Daycare Ltd* explained lawyers can enter into conditional fee arrangements in specific circumstances,[96] governed by r 9.8 - 9.11 of the lawyer's rules.[97] These requirements include explaining alternative fee arrangements, the reasonableness of the total sum, transparency of the method of calculation, outlining what amounts to success, explaining any additional charges and the basis of termination as well as other details about the arrangement.[98] In *Lucas,* there was no evidence of these safeguards, with no estimated total fee or method for calculating it.[99] The LCA does not compel advocates to meet those specific requirements. This is problematic for the client, the opposing party and the adjudicator. It provides no public confidence in the protection of clients or fees to be charged,[100] and for costs purposes, there is no way to ascertain the true fee the client agreed to pay.[101]

Contingency fees do, however, play a role in improving access to justice. In *Greig,* the advocate said 70 percent of people who consult him have "no job and no money". The contingency fee enables people with a good claim to pursue it with assistance.[102] Some also suggest contingency fees increase efficiency, as the representative's profitability is determined by how readily matters can be settled.[103] The safe use of contingency arrangements should be encouraged.[104]

2. Percentage arrangements

Another extremely problematic, yet fruitful method is charging a percentage of the settlement package. In *Brown v Te Kohu Logging Ltd*, the client agreed to pay Mr Mateer, a fixed fee of $300 and one-third of any monetary orders made in his favour by the Authority.[105] The determination resulted in a $12,451.40 award, which added to over $4,300 in payable fees.[106] The member held the statement of problem was poor quality, the advocate provided

win-no-fee/>; <https://www.nowinnofeekiwi.co.nz/WinKiwi>; <http://www.sackedkiwi.co.nz> and <https://www.mathewswalker.co.nz>.
[96] *Lucas v Te Rito Daycare Ltd* [2018] NZERA Auckland 5 at [8]
[97] Lawyers and Conveyances Act (Lawyers Conduct and Client Care) Rules, r 9.10.
[98] Rule 9.9.
[99] *Lucas,* above n 96, at [11].
[100] At [11].
[101] At [11].
[102] *Greig,* above n 94, at [16].
[103] Mark Nutsford "What to do when… 'You're Fired!'" (31 January 2009) Sunday Star Times < http://www.stuff.co.nz/sunday-star-times/business/money-story-archive/earlier-money-stories/44022/What-to-do-when-You-re-fired >.
[104] Law Commission *Delivering Justice for All,* above n 7, at 48.
[105] *Brown v Te Kohu Logging Ltd* [2018] NZERA Auckland 2 at [55].
[106] At [56].

unnecessary documentation, some submissions were not drafted by him, and he could not answer questions about them.[107] The member ordered only a $500 contribution to costs to recognise the minimum work undertaken by Mr Mateer.[108]

In New Zealand, lawyers cannot charge a percentage of the recovery.[109] Lawyers rules require fees to be fair and reasonable, factoring in among other things, the time and labour expended, the skill needed for and the complexity of the matter and the ability of the lawyer.[110] The $4,300 payable to Mr Mateer appears disproportionate to his apparent work on the matter. The Lawyers rules do not bind Mr Mateer; however, members use them for guidance to assess advocate's fees.[111] The LCA illustrates parliament's perspective that these arrangements are unethical and beyond the public interest.

Both contingency and percentage arrangements result in the advocate having a direct interest in the outcome of cases. This removes their professional independence and could incite overly zealous behaviour. Advocates may either waste resources on a meritless case or decline to assist clients without a clear chance of success. Neither of these scenarios is beneficial to the client. Independence is key to effective, focused advocacy.[112]

3. Hourly Rate

Many argue charging by the hour rewards inefficiency and puts the professional in an immediate conflict with their client.[113] However, through regulation, most professional industries deem hourly rates suitable. The amount charged by advocates per hour, however, can be controversial. The Authority deals with this issue regularly during cost determinations. Costs awards allow for a modest contribution to reasonably incurred costs. The Authority traditionally uses the notional daily tariff as a starting point for costs.[114] It is set at $4,500 for the first day of any matter and $3,500 for subsequent days.[115] Parties must remember if

[107] At [58].
[108] At [61].
[109] LCA, s 333(d)
[110] Lawyers Rules, r 9.1 (a), (b), (f) and (g).
[111] *Lucas,* above n 96, at [6].
[112] Helen Winkelmann, above n 112, at 237.
[113] Law Commission *Delivering Justice for All,* above n 7, at 47.
[114] James Crichton "Practice Note 2 Costs in the Employment Relations Authority" (30 June 2016) at 1.
[115] At 4.

unsuccessful they will almost always have to contribute to costs, as well as meeting their own.[116]

The Authority often reduces the tariff in relation to advocates:[117]

> The tariff has been set to recognise that a variety of representatives appear in the Authority including qualified, registered professionals who are required to adhere to a professional code of conduct and unregulated advocates who have no such obligations. Mr Brown's representative is an unregulated advocate and as such does not have the expenses and obligations of his qualified and registered counterparts.

In *MacDonald v TKR Properties Ltd*, the advocate's hourly unit price was $350. The Authority stated this was not reasonable in the case of an unregulated advocate, without the expenses and obligations of their counterparts.[118] The Law Society's survey in 2016 found the average hourly charge-out rate for a lawyer was $292.70.[119] The Member applied a "still relatively generous rate" of $250 to the 41 hours of work, which tallied to $10,150, rather than $14,350. A modest contribution to costs of 70% was $7,175.[120]

In *Lucus*, the advocate's hourly rate fluctuated between $150 and $350.[121] The Authority cited *MacDonald* that $350 for an unregulated advocate was unreasonable. The advocate charged the same rate for a range of activities without itemising the time spent on each. Activities such as filing and general administration did not justify a rate of $120 per hour.[122] The Authority also noted this rate was substantially higher than the legal aid rates for employment advocates of $82 per hour.[123]

Again, in *Cross v D Bell Distributors Ltd,* $350 per hour was "not reasonable for an advocate providing services to a truck driver on modest wages."[124] The Authority pointed to lawyers additional duties of the regulator regime for client care and conduct as well as expenses of

[116] At 8.
[117] *Brown*, above n 105, at [60].
[118] *MacDonald v TKR Properties Ltd* [2017] NZERA Auckland 240 at [13]
[119] Geoff Adlam "Charge-out rates information released" (2016) 893 LawTalk 36 at 36.
[120] *MacDonald*, above n 118, at [16].
[121] *Lucas*, above n 96, at [8].
[122] At [20].
[123] At [13].
[124] *Cross v D Bell Distributors Ltd* [2017] NZERA Auckland 391 at [10]

professional indemnity insurance.[125] Here too, the member referenced the NZLS 2016 survey and used $250 per hour as a reasonable yardstick.[126]

The other issue with hourly rates is the proportionality with the likely outcome. In *MacDonald,* the advocate and his client were seeking $17,200 for the settlement package, and the advocate's fee totalled an $18,289.[127] Charging such significant amounts is contrary to the statement of the Employment Court in *PBO v Da Cruz*:[128]

> [47]... we urge representatives of parties to be conscious of the costs that are accumulating as a matter proceeds. Cases should be approached economically and in a way that is likely to leave a successful party with a satisfactory outcome. There is an overall need to ensure that costs being incurred are reasonable in the light of the amount that is likely to be recovered as remedies and costs from the Authority.

In *Albon v Kinestics Group Ltd,* the grievant was awarded a mere $1,000, yet her advocate's services cost $7,000.[129] *Lucas* was a straight-forward unjustified dismissal, thus charging $3,150 for research alone, was excessive in relation to the likely compensatory award.[130]

The High Court has the power to reduce or refuse costs when the interests at stake are of exceptionally low value.[131] This is designed to discourage litigious and frivolous behaviour. Representatives need to objectively forecast the likely outcome of a matter and manage the clients' expectations. Some clients value their 'day in court', but others will decide to withdraw on an economic basis.

One must remember, costs decisions simply determine a reasonable contribution of the successful parties costs. The member's comments as to the unreasonableness of advocate's fees do not change the invoice payable to the advocate's client. Without regulation, the advocate remains at liberty to charge their subsequent client similarly.

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[125] At [11].
[126] At [12].
[127] *MacDonald*, above n 118, at [15]
[128] *PBO v Da Cruz* [2005] ERNZ 808 at [47]
[129] *Albon v Kinetics Group Ltd* [2018] NZERA Christchurch 153 at [17]
[130] *Lucas*, above n 96, at [21]
[131] At [16].

(a) A glass ceiling for advocates?

The respondent in *Albon* argued costs in relation to advocates should be capped outrightly at $1,125, a quarter of the usual daily tariff.[132]

In *Lang v Gourmet Foods Ltd* the member set the contribution to $1,000.[133] Statements like, "Ms Lang's representative is an unregulated advocate and as such does not have the expenses and obligations of his qualified and registered counterparts", are recurring in Authority cost determinations.[134] The tone implies the Authority believes advocates' services should be cheaper than lawyers. Mr Samuels, the advocate in *Lang*, is judicially reviewing the Authority's cost determination.[135] Samuels argues labelling him unqualified has the potential to harm his reputation, business interests and the business interests of other employment advocates. He claims it implies that because advocates have lower costs, they should be charging lower fees and are less qualified or competent to provide representation services.[136] Mr Samuels argues he was given no opportunity to address the extent of his qualifications or the appropriateness of categorising representatives based on their perceived professional obligations and financial overheads.[137]

This matter is still before the courts, however, it raises an interesting issue. As mentioned, many employment advocates are skilful. Mr McPhail in, *Kaikorai Services Centre Ltd*, had over 40 years' experience in employment matters.[138] Putting a blanket limit on the reasonableness of advocate's fees is problematic. Advocates, like lawyers, should be able to charge fees which are reflective of their skill and work. Regulation must not create a "glass ceiling" for advocates which could stifle their career progression. Advocates' lower operating costs is only one factor that should be considered when determining the reasonableness of fees. Regulation is necessary for the protection of legal services consumers, but impacts on advocates must be kept in mind.

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[132] *Albon*, above n 129, at [12].
[133] *Lang v Gourmet Foods Ltd* [2018] NZERA Auckland 37 at [45].
[134] At [44].
[135] *Samuels*, above n 75.
[136] At [5].
[137] At [5].
[138] *Kaikorai Services Centre Ltd v First Union Inc* [2018] NZEmpC 83 at [30].

B. Target Area 2 – Professional Obligations

Lawyers are bound by their Conduct and Client Care Rules and are subject to a complaints and disciplinary mechanism. Likewise, unions are bound by incorporated society rules, specific requirements in the Employment Relations Act 2000 and their own rules, which must be registered. Unions are democratic organisations, so members will hold their delegates to account. Currently, employment advocates are answerable only general consumer law like the Consumer Guarantees Act.[139]

Misbehaviour in the employment space led to the issuing of the Practice Note, "Conduct of Representatives in the Employment Relations Authority" in 2019. It is intended to apply to all representatives but serves little more than a warning. It reads:[140]

1. Representatives have twin duties:
    - to assist their client in pursuing or defending a matter in the Authority; and
    - to assist the Authority in meeting its statutory obligation to resolve employment relationship problems.
2. In carrying out those duties, representatives are expected to:
    - be polite and constructive in their dealings with Authority Officers, Authority Members and other representatives;
    - to comply strictly with the timetables or other orders issued by the Authority including providing all information the Authority requires; and
    - to fairly and fully disclose to their clients the Authority's directions in the client's matter.

When representatives fail in those duties, the Authority may, directly engage with the parties or complain to the representative's professional body (if any). It can also impose a penalty on the representative personally under s 134A of the Employment Relations Act 2000 when the representative obstructs or delays the investigation.[141] The Authority is at liberty to consider what amounts to an obstruction of an investigation.[142]

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[139] Consumer Guarantees Act 1993, pt 4.
[140] James Crichton "Practice Note 3 Conduct of Representatives in the Employment Relations Authority" (30 April 2019).
[141] Practice Note 3, above n 140.
[142] *Bay of Plenty District Health Board* [2020], above n 53, at [120].

The following section is split into the same categories as the Practice Note: 1. Duties to the client, 2. Duties to Authority, 3. Polite and constructive behaviour and, 4. Strict compliance with orders.

1. Duties to Client

In *Turuki Healthcare Services v Makea-Ruawhare*, Turuki and their former employee reached a mediated settlement agreement.[143] The employee's advocates, Mr Halse and Culturesafe (his advocacy firm), allegedly breached the confidentiality and non-disparagement clauses of the agreement. Mr Halse posted numerous times on the Culturesafe Facebook page to an audience of about 27,000 followers, disparaging comments about Ms Makea-Ruawhare, her representatives and the contents of the record of settlement.[144] Such actions put her at risk of serious potential adverse legal, financial and employment consequences including censure for breaching the settlement agreement.[145] Advocates should be duty-bound to protect their clients' interests.[146]

In *Neil v New Zealand Nurses Organisation*, Mr Halse made allegations against an NZNO employee, their managers and their legal representatives on the same Culturesafe Facebook page.[147] He claimed full responsibility for the actions,[148] however, his actions put his client in the same precarious position as Ms Makea-Ruwhare.

2. Duties to Authority

During the *Turuki* proceedings, Culturesafe deliberately failed to file a statement in reply, when they knew it was required, were reminded by the Authority and had ample time to do so.[149] Further, the statement of claim was convoluted and mostly irrelevant.[150] During a subsequent hearing, Culturesafe refused to participate in the Authority's investigation meeting. The Court-ordered good faith report pursuant to s 181 of the ERA,[151] found

[143] *Turuki Healthcare Services v Makea-Ruawhare* [2018] NZERA Auckland 136 at [17].
[144] *Culturesafe NZ Ltd v Turuki Healthcare Services Charitable Trust* [2018] NZEmpC 115 at [1].
[145] At [5].
[146] At [11].
[147] *Neil v New Zealand Nurses Organisation* [2019] NZERA 98 at [5].
[148] At [10].
[149] *Turuki,* above n 143, at [17].
[150] *Culturesafe,* above n 144, at [12].
[151] ERA, s 181.

Culturesafe deliberately obstructed the Authority's investigation and did not act in good faith towards the defendant or its legal counsel.[152]

In *Rawlings v Sanco NZ Ltd,* the advocate did not attend a teleconference he had confirmed attendance at.[153] Similarly, in *Moskal v Manor House Cuisine,* the advocate failed to attend the teleconference. The other side complained that type of behaviour had been endemic throughout their dealings.[154] When the advocate failed to address his non-attendance, the Authority issued a minute indicating the applicants' were at risk of costs and penalties for non-compliance.[155] It was unknown if the applicant or their representative occasioned the non-compliance, which put the client at risk.[156] Lawyers, as officers of the High Court, are barred from undermining the judiciary in any way.[157]

3. Polite and constructive behaviour

In *Turuki*, Mr Halse sent "hectoring and bullying" emails, threatening that Turuki and their Counsel would "feature prominently in the public arena"[158] unless they withdrew from the proceedings.[159] Employing tactics of blackmail and intimidation is completely unacceptable. Mr Halse also made several comments implying an Authority member was corrupt and biased in favour of the defendant's counsel.[160]

The Authority in *Neil* recognised this was not the first case Mr Halse had made extreme allegations about Authority members. He once described a member as "determined to push… [an applicant]… to suicide".[161] An Employment Court Judge observed earlier, that is how Mr Halse reacts to any disadvantageous developments.[162] In that case, the Judge suggested Mr Halse cease making disparaging and disgraceful Facebook posts if he wished to continue acting as an advocate.[163]

[152] *Culturesafe,* above n 144, at [9].
[153] *Rawlings v Sanco NZ Ltd* [2006] NZERA 131 at [3].
[154] *Moskal v Manor House Cuisine (2015) Ltd* [2017] NZERA Auckland 236 at [3].
[155] At [13].
[156] At [13].
[157] Lawyers Rules, chapter 13.
[158] Anthony Drake "Closing Submissions on Behalf of the Defendant" Wynn Williams (4 June 2020), at 25.
[159] *Turuki*, above n 143, at [9]
[160] *Culturesafe,* above n 144, at [9].
[161] *Neil*, above n 147, at [37].
[162] At [38].
[163] At [39].

In *Brennan v Early Education Waikato Ltd* the advocate made unsubstantiated allegations against opposing counsel, which were "disrespectful and discourteous".[164] The Authority pointed out lawyers are required by their code to treat other lawyers with respect and courtesy[165] and expects similar behaviour from advocates.[166]

In *Rawlings,* the advocate, Mr Wall, served a lengthy document which included his views of the law with abusive comments about several Employment Court Judges and Authority Members. He demanded the member to stand down in the proceedings.[167] Allegations regarding members' integrity slow down proceedings, as it forces them to defend their suitability before continuing. Actions like this are likely to antagonise the court, which may harm the client. In *Wall v Work Civil Construction Limited*, the Employment Court held that personal attacks by an advocate against the judge were "at best imprudent and at worst purposefully contemptful."[168]

4. Strict compliance with orders

Representatives must comply with procedural rules and directions of the Authority.[169] During the *Turuki* proceedings, Mr Halse indicated he would continue to speak publicly about the matter despite the compliance order, stating: "Absolutely, and will, til I draw my last breath",[170] and *"*Do I regret it? No. Will I do it again? Yes."[171] Similarly, in *Neil*, Mr Halse said he had a "moral, ethical and legal, obligation to speak out publicly". Mr Halse emailed the Authority stating, "I will go to jail before complying with any non-publication or compliance orders illegally raised by Authority members or Employment Court Judges…" and that "There will be more Facebook posts and media releases at every stage of this process…".[172] The Authority described Mr Halses' behaviour as "a disturbing and dangerous disregard for the rule of law, amounting to vigilante-like behaviour."[173] He disregards the proper process and the Authority's jurisdiction to examine and determine matters.

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[164] *Brennan v Early Education Waikato Ltd* [2017] NZERA Auckland 291 at [23]
[165] Lawyers Rules, r 10.1.
[166] *Brennan,* above n 164, at [23].
[167] *Rawlings*, above n 153, at [5].
[168] *Wall v Work Civil Construction Limited* [2001] EmpC CC16/01 at [68].
[169] *Bay of Plenty District Health Board* [2020], above n 53, at [79].
[170] Drake, above n 158, at 26.
[171] At 26.
[172] *Neil*, above n 147, at [14].
[173] At [18].

There is a substantial public interest in compliance with orders, as it puts many parties' interests at risk.[174] Parties cannot choose to take advantage of the Authority's jurisdiction in some instances and ignore it in others.[175] The actions of Mr Halse, while exceptionally bad, illustrate the weaknesses of the current self-regulatory regime. Most cases do not enter the judiciary, so one may assume there is more widespread poor behaviour.

5. Penalties

The Employment Court recently reaffirmed the Authority's jurisdiction to award penalties against misbehaving representatives, under s 134A and s 196 of the Act.[176] In *Turuki*, the Culturesafe and Mr Halse were ordered to pay $30,000 in penalties and $3,000 of general damages for undermining the Authority's investigation.[177] When considering penalties, the Member said there is a clear need to deter parties from contemplating flagrant breaches of voluntarily agreed settlement terms.[178] This entire matter has been appealed on a de novo basis, so all facts are sub judice.[179] While the behaviour is now alleged, the prior determinations may indicate the type of behaviour that may be occurring. Court enforced penalties can take years of appeals and hearings, so alone are not an adequate safeguard. Regulation is necessary so outliers, like Mr Halse, can be dealt with quickly and prevent further individuals engaging their services in the future.

6. (Mis)representation of Services

While not mentioned in the practice note, another issue arising out of advocate's lack of professional obligations is misrepresentation. Numerous advocates hold themselves out as "Employment Law Experts" in promotional descriptions.[180] The general public, especially anxious grievants, are unlikely to have background to representative types. They may not appreciate this label does not necessarily mean these people are lawyers or have any specific

[174] At [24].
[175] At [26].
[176] *Bay of Plenty District Health Board* [2020], above n 53, at [171].
[177] *Turuki*, above n 143, at [46]
[178] At [36].
[179] *Culturesafe*, above n 144, at [19]
[180] See < https://www.employmentlaw.net.nz/about/>; <https://www.nowinnofee.co.nz/?s=expert >; < https://www.dismissed.co.nz >; < https://www.iremploymentlaw.co.nz > and <http://www.advocatesolution.co.nz >.

qualifications, training and experience.[181] There is a need for regulation to ensure consumers know exactly what services they are purchasing.

C. Target Area 3 – Competence

Lawyers are required to have a law degree, a current practising certificate and complete ten hours of continuing professional development annually. Currently, advocates do not have any such requirements. To best serve clients, representatives must have sufficient knowledge of the law and court processes,[182] some advocates do not. Vulnerable litigants may receive flawed legal advice; which may cause more harm than good.[183]

1. Not Understanding the Law

In *Neil,* Halse refused to follow legal processes. He posted on Facebook saying the case urgently needed to be removed to the Employment Court. He filed no application and had been reminded of the statutory processes.[184] The Authority stated Mr Halse had an:[185]

> incorrect view of the law, the interrelationship of various statutes and the procedures long developed in the common law for the fair treatment of parties and witnesses in proceedings, in the Courts and in tribunals like the Authority.

In *Lucas,* the advocate was warned about the evidential requirements necessary to prove a compensation award of $20,000. Evidence for this level of remedy required extra hearing time, which wasted an additional half-day.[186] The Authority stated an award of this amount should never have been pursued in the first place.[187] The advocate was inefficient, revealing the majority of their evidence through examination. Such evidence should have been contained in the briefs.[188] The Authority stated the advocate had a lack of specialist knowledge about the law relating to contributory conduct, which impeded him from properly advising his client.[189]

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[181] ELINZ "Outline to Minister of Labour on Regulation of Legal Advocates" (July 2020).
[182] *Fee-charging McKenzie Friends*, above n 87, at 22.
[183] Law Commission *Delivering Justice for All,* above n 7, at 233.
[184] *Neil*, above n 147, at [40].
[185] At [16].
[186] *Lucas*, above n 96, at [18].
[187] At [18].
[188] At [25].
[189] At [19].

In *Shaw v Bay of Plenty District Health Board*, "egregious delays" were caused in the Employment Court, due to the advocate not understating the steps required by s 179(1) of the Act.[190] The Judge explained the Authority had pointed it out to the advocate twice.[191] In missing the issue, the advocate was failing to represent his clients best interests.[192] The advocate also filed their application eight days late.[193]

2. Preparing Documents

In *Spillman v Tandem Skydiving*, the advocate filed no affidavits on behalf of the client. They supplied other, irrelevant documents without explanation or supporting evidence. Judge Holden gave him a further opportunity to file, but nothing else was provided.[194] In *Brennan*, Halse when given the opportunity to file, he sent a one-line email alleging "ongoing bullying", which the Authority described as "unhelpful".[195] Again, this fails to present the clients best case. In *Ward,* the client instructed their advocate to file a challenge of an Authority determination, the advocate failed to.[196] Failure to follow instructions could have amounted to the client losing the right to exercise their challenge rights.[197]

3. Rationale – the Administration of Justice

The judicial system must retain its integrity. The institutions are established for the peaceful resolution of disagreements. Representatives should be able to effectively and accurately detect issues and suggest the best route for success. Opposing, capable representatives presenting arguments to an impartial adjudicator should result in fair and accurate outcomes.

The Authority, being quasi-inquisitorial, is not bound by the pleadings. If they feel as if a representative is incompetent or pursuing the wrong cause, they can intervene. This safeguards consumers of sub-par legal services. The Employment Court, however, is bound by the pleadings and may only hear what is presented to them.[198] This risks the crux of the issue potentially not getting fair debate, which is at odds with the rationale of the judicial processes and representation. Lawyer's clients are protected by regulation to both prevent

[190] At [92].
[191] *Shaw v Bay of Plenty District Health Board* [2019] NZEmpC 121 at [91].
[192] At [92].
[193] *Bay of Plenty District Health Board v Culturesafe NZ Ltd* [2019] NZEmpC 122 at [17]
[194] *Spillman v Tandem Skydiving 2002 Ltd t/a Taupo Tandem Skydiving* [2018] NZEmpC 32 at [12]
[195] *Brennan,* above n 164, at [23].
[196] *Ward*, above n 2, at [4].
[197] At [8].
[198] Helen Winkelmann, above n 112, at 237.

incompetency and address it when it arises. All legal service consumers should be afforded the same protections.

D. Expressions of Concern

These concerns have long been discussed within the industry. In a briefing to, MP Michael Woodhouse, the Ministry of Business, Innovation and Employment (MBIE) discussed the "guerilla tactics", inadequate knowledge and intimidating behaviour seen in some employment advocates.[199] MBIE stated they were considering possible solutions.[200]

The Employment Law Institute of New Zealand (ELINZ) was founded in 1995 to promote and enhance professional standards in employment law advocacy. Currently, lawyers, advocates, consultants, arbitrators and mediators are voluntary members. ELINZ has developed its' own code and accepts complaints about members. ELINZ has no legislative authority, so cannot impose punishments, and any problematic members can simply remove themselves from the membership to avoid confrontation. Former and present ELINZ presidents' have bluntly expressed their concerns about lay-advocates:

> The driving force behind our desires for regulation have been the considerable problem with what we have come to refer to as "cowboys" in the industry … In recent times, we have been besieged by complaints and in one instance 11 complaints were received in relation to one person alone…. The executive of ELINZ and ERA Chief Jim Crichton meet regularly for updates. The ERA is well aware of the problem with sub-standard representation and is at the forefront of the issue witnessing first hand, unnecessary delays or representatives "going to ground".[201]
>
> Regulation of the industry is the solution, and is in fact, an absolute necessity…We believe it is time to 'up our game' and ensure that the general public are receiving competent and quality representation.[202]
>
> In pursuing [industry regulation] over the last eight years or so, I have witnessed the most appalling and, at times, outrageous performance or behaviour by some advocates… We are all aware that only a very small percentage of employment

[199] Shane Cowlishaw "'Guerrilla' employment advocates rife" (21 July 2017) Newsroom < https://www.newsroom.co.nz/2017/07/20/39379/guerrilla-employment-advocates-rife?amp=1>.
[200] Shane Cowlishaw, above n 199.
[201] Mark Nutsford, ELINZ former President "The Road to Regulation of the Employment Law Industry" (9 May 2017) ELINZ Newsletter, Employment Lore.
[202] Kelly Coley, ELINZ President "Further to the debate on The Regulation of the Employment Law Industry" (2 August 2018) ELINZ Newsletter, Employment Lore.

> disputes reach the ERA. We can safely assume that there is a considerable degree of poor performance in the wider arena. Indeed ELINZ has plenty of anecdotal evidence to support this assumption.[203]
>
> It is completely unfathomable that any ethical / professional advocate would have an issue with being bound by a professional code of conduct… Some of the behaviours we are observing in the jurisdiction are, quite simply, abhorrent.[204]

Graeme Colgan, former Chief Judge of the Employment Court, agrees that regulation is necessary:[205]

> [Advocate's] quality, runs from the appropriately competent at one end, to the dangerously incompetent at the other extreme. So too are their ethical practices. Their costs, again in my experience, cover a range from appropriately reasonable, to exorbitant… These vital elements of competence, cost and ethical-adherence are all reasons for regulatory licencing.

E. Conclusion

This chapter set out problems flowing from the lack of regulation. One must reiterate these characteristics are not representative of all employment advocates, and they are not uncommon in lawyers' practice. However, these issues are sufficiently serious and frequent to warrant targeted reform.

Chapter III - Access to Justice

This chapter will analyse the impact regulation may have on access to justice in the employment jurisdiction.

A. Background

Access to justice is the critical underpinning of the rule of law. For everyone to be equal before the law, there must be access to the courts.[206] Viability of adjudication encourages quality settlements, one which mirrors what a judge would come to.[207] Employment

[203] Mark Nutsford, former ELINZ President "Special article: President's resignation" (29 March 2019) ELINZ Newsletter, Employment Lore.
[204] Kelly Coley, ELINZ President "Important message from the Vice President of ELINZ" (8 August 2019) ELINZ Newsletter, Employment Lore.
[205] Former CJ Graeme Colgan "Special article: Regulation of the Industry", above n 84.
[206] Helen Winkelmann, above n 112, at 231.
[207] Hon Justice Miller, above n 8, at 2.

relationships are inherently unequal, which, paired with the inaccessibility of the institutions, is likely to distort the quality of settlements.[208] Justice Miller suggests for those reasons access to justice in the employment space is particularly important.[209]

The main barriers to access to justice include, lack of information, lack of understanding of processes, fear of consequences, cost of litigation and cost of representation. Other factors like health, literacy, and income impact an individual's ability to resolve ERPs.[210] Since 76 percent of ERPs are dealt with at confidential mediations,[211] there is a lack of empirical evidence about the substance of disputes, agreements reached, preliminary and post mediation processes and experiences.[212] People with disadvantaged access likely include migrants, youth, women, Māori and Pasifika, workers, and vulnerable workers.[213]

B. Cost of Litigation

The cost of litigation, including financial, time, stress and risk is undoubtedly a barrier to accessing the courts.[214] CJ Inglis said it's a "sobering reality that the cost of pursuing legal rights in employment matters has become eye-wateringly daunting, if not prohibitive, for many".[215] Civil courts, for policy purposes, are regarded as a user-pay service.[216] Court fees are set to incentivise out-of-court settlements and deter vexatious litigants.[217] The burden of costs will be more significant on the party that can least afford to pay them.[218] This prevents positive engagement with the institutions[219] and reinforces the cynical view that "you get the justice you pay for".[220]

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[208] At 2.
[209] At 3.
[210] Darryn Aitchison "Community Law Centre Presentation" (New Zealand Work Research Institute's conference, Barriers to Participation: a Symposium, Auckland, September 2018).
[211] Peter Franks, above n 29.
[212] Peter Franks, above n 29.
[213] Gaye Greenwood and Erling Rasmussen "Notes themes and issues from symposium" (New Zealand Work Research Institute's conference, Barriers to Participation: a Symposium, Auckland, September 2018).
[214] Helen Winkelmann, above n 112, at 232.
[215] Chief Judge Christina Inglis "A brave new technological world: Opportunities for gain and pain…" (Dinner speech at New Zealand Labour Law Society Conference, 24 November 2017) at 1.
[216] Helen Winkelmann, above n 112, at 232.
[217] Law Commission *Delivering Justice for All,* above n 7, at 10.
[218] Hon Justice Miller, above n 8, at 8.
[219] Christina Inglis "Barriers to participation in the employment institutions" (2019) 933 LawTalk 24 at 24.
[220] Law Commission *Delivering Justice for All*, above n 7, at 36.

1. *Cost of Legal Representation*

Representation is arguably essential to effectively exercise the right to access the courts.[221] Union delegates are salaried employees. Annual membership fees work like an insurance premium, in the event a member requires legal assistance, there is no additional charge.[222] Membership fees equate to a couple of lawyer's billable hours.[223] Union members benefit from early and cheap legal assistance, but as described in chapter 1, union membership is falling. Individualised relationships have higher bargaining and resolution costs for both employers and employees.[224] While lawyers must charge fair and reasonable fees, they usually cost hundreds of dollars per hour.[225] The financial threshold for legal aid eligibility is very low; the maximum level of gross annual income is $22,366.[226] Most of the population are in the 'justice gap', being those who are not eligible for legal aid, yet cannot afford to engage professional representation.[227] These people have little access to legal services and institutions.[228]

Many assume those in the justice gap self-represent, most do not.[229] The law commission described the court system as "an impenetrable maze for most non-lawyers".[230] CJ Inglis asked, "to what extent are self-litigants able to substantively engage in a process characterised by formal rules of procedure, evidential requirements, burdens of proof, difficulties of cross-examination and legal submission?" [231] Representation is de facto essential, but unaffordable, resulting in a severe market failure.[232]

Some employment disputes involve considerable sums of money and significant points of law, but most do not. Most matters involve only a few thousand dollars, which can be rapidly spent on legal costs.[233] Peter Franks and Karen Radich analysed 613 cost determinations by the Authority between 2011 and 2016.[234] The study showed that the actual costs of taking a case are much higher than the Authority's notional daily tariff, of $4,500. Median costs levels

[221] At 10.
[222] At 48.
[223] At 53.
[224] At 11.
[225] University of Otago Legal Issues Centre, above n 92, at 3.
[226] Helen Winkelmann, above n 112, at 234.
[227] Inglis "Barriers to participation in the employment institutions", above n 219, at 25.
[228] University of Otago Legal Issues Centre, above n 92, at 21.
[229] Helen Winkelmann, above n 112, at 239.
[230] Law Commission *Delivering Justice for All,* above n 7, at 10.
[231] Inglis "A brave new technological world", above n 215, at 3.
[232] Helen Winkelmann, above n 112, at 241.
[233] Anderson *Reconstructing New Zealand's Labour Law*, above n 1, at 249.
[234] Karen Radich and Peter Franks "Counting the costs" (2016), 204 *Employment Today*.

awarded by the Authority were only 37 percent of employees actual costs and 29 percent of employers'.[235] The median legal cost incurred by employees was between $8,209.56 and $11,755.13 by the employer. The median costs awarded to either group was just about $3,000.[236] People often 'win' in the institutions, but end up out of pocket. The study gave examples of legal costs outweighing the awarded remedies and costs by up to $25,000.[237] These examples include both lawyers and lay-advocates.[238] CJ Inglis pointed out it would take a person on the minimum wage, 350 hours, 44 working days or 8.5 weeks to pay for one day in the Authority, at the $4,500 daily notional tariff. [239] [240]

C. Employment Advocates, The Cheaper Option?

Assistance in employment matters is not reserved to lawyers, nor does it need to be.[241] Having a variety of legal service providers should create price competition and drive prices down. This encourages access to justice, affording representation to otherwise disenfranchised individuals.

There is no data on the average charge-out rate of advocates. The cost decisions in chapter 2 showed several advocates charging fees at a level consistent with lawyers, however, these cases likely represent the upper margins. Advocates fees presumably are on a spectrum of affordability. Chapter 2 also revealed the Authority's sentiment that advocates should charge less than their lawyer counterparts. One might assume there is a general correlation between competence and qualification, however, some advocates lack formal training but have rich employment law expertise. The chief concern is overcharging in the absence of fair, reasonable and reflective requirements. The NZLS can obtain, and publish data concerning lawyer's fees and business models. Regulation would allow such data to be recorded in respect to advocates.

If any, vulnerable litigants will engage the cheapest representation. This potentially exposes them to low-quality, inadequate representation. This exacerbates the inherent power imbalance between employers and employees, so allowing unregulated advocacy is arguably

[235] Peter Franks, above n 29.
[236] Peter Franks, above n 29.
[237] Peter Franks, above n 29.
[238] Peter Franks, above n 29.
[239] Inglis "A brave new technological world: Opportunities for gain and pain…", above n 215, at 2.
[240] Chief Judge Christina Inglis "Employment Litigation Costs" (ADLSI seminar, August 2016) at 3.
[241] ERA, s 236.

contrary to the purpose of the ERA.[242] Undoubtedly, improving access to justice through cheap advocacy is a worthy goal. However, as CJ Colgan put it access to justice must be facilitated justly, fairly and ethically.[243]

1. *How will regulation affect the price of advocates?*

Advocates are not a homogenous group. Regulation will affect them differently based on their current practice. The cost of qualification and compliance will increase some advocates' prices. Regulations should not be too onerous and only justify a nominal fee increase. Other advocates, who currently charge exorbitant fees will have to lower their fees. For competent and ethical advocates, the regulation will be relatively inconsequential. Advocates who offer high-level specialist knowledge will be enabled to charge reflective sums. The policy goal is reducing the price of advocacy, improving access, while ensuring quality.

2. *Quality vs Quantity*

Every jurisdiction must strike a balance between the quality of resolutions and the quantity of resolutions. As described in chapter 1, the employment jurisdiction has long grappled with this balance.

A Rolls-Royce approach is one which emphasises process rights, like discovery and oral evidence with cross-examination.[244] This ensures technical issues are considered thoroughly, however, takes longer, increasing costs. Conversely, a Summary approach carries an enhanced risk of error but renders adjudication accessible to more people.[245] There is a public interest in the efficient despatch of court business.[246] The employment jurisdiction utilises the latter approach. The inquisitorial nature of the Authority is cheaper than the adversarial model.[247] The Mediation Services settled 9,000 matters in 2018, compared to 750 cases heard in the Authority, and 180 cases heard in the Employment Court.[248] The Mediation Services are getting through an incredible volume of cases, but these are figures of quantity, not the

[242] Section 3(1)(ii).
[243] Former CJ Graeme Colgan "Special article: Regulation of the Industry", above n 84.
[244] Hon Justice Miller, above n 8, at 4.
[245] At 4.
[246] *Aon Risk Services Australia Ltd v Australian National University* [2009] HCA 27; (209) 239 CLR 175 at [23]
[247] Inglis "Employment Litigation Costs", above n 240, at 2.
[248] Peter Franks, above n 29.

quality of settlements.[249] Barriers to the employment advocacy profession will be low, aligning with the Summary approach, the employment jurisdiction uses.

D. What else can improve access?

Regulating advocates will not solely fix the underlying problem of access. Other measures can make legal services more affordable and efficient.[250] These factors can be divided into, 1. lowering the cost of paid representation and 2. reducing the need for paid representation.

1. Reducing the cost of paid representation

Most people cannot afford full-service representation,[251] yet feel unable to effectively act for themselves.[252] Encouraging unbundled legal services and pro-bono work will help to make professional representation more affordable.

(a) Unbundling legal services

Unbundled services, or a limited retainer, is the practice of providing a reduced, specific set of legal services within a matter. The client personally undertakes the other aspects of the proceedings.[253] This allows clients to seek assistance with the complex parts of their case while reducing overall costs.[254] The boundaries of limited retainers must be crystal-clear, as the representative is only bound to carry out the instructed tasks.[255] These services may be particularly useful at the beginning of a case, to set the client in the right direction.[256] This may reduce clients costs, as well as the delays and inefficiencies of self-representation.[257] This practice is under consideration by the rules committee and the NZLS, there may be potential rule changes in the future to support the use of limited retainers.[258]

[249] Hon Justice Miller, above n 8, at 8.
[250] At 3.
[251] Allie Cunningham and Brigette Toy-Cronin "Unbundling Litigation Services in New Zealand: Where to next?" (Working paper, University of Otago Legal Issues Centre, 2019) at 4.
[252] *Greig,* above n 94, at [77]
[253] Allie Cunningham and Brigette Toy-Cronin, above n 251, at 1.
[254] At 3.
[255] At 5.
[256] At 8.
[257] Law Commission *Delivering Justice for All,* above n 7, at 24.
[258] Letter from Kathryn Beck (President of NZLS) to Justice Dobson (Chair of the Rules Committee) regarding Unbundled legal services – potential rule changes (14 March 2019).

(b) Pro-bono

Pro-bono is the practice of providing free legal services.[259] Tiana Epati, NZLS President, has suggested lawyers should aspire to deliver 35 hours each annually.[260] A 2020 study reported, 41 percent of lawyers exceed that target, but more than 25 percent, do no pro bono at all.[261] Many lawyers provide pro-bono hours through volunteering for community services.[262] Lawyers contribute approximately 3,000 hours to Citizens Advice Bureau[263] and over 13,000 hours to Community Law Centers annually.[264] Other lawyers consider legal aid a form of pro-bono as the remuneration is so low, the hours worked are invariably more than paid for.[265] Increased pro-bono work from all legal service providers is one of many tools to help alleviate the justice gap.

2. Reduce the need for representation

The perception that representation is essential has in itself has become a barrier to participation.[266] Some parties feel there is no point in pursuing a matter without assistance.[267] The inquisitorial nature of the Authority can help support self-represented litigants. The following measures could help to empower parties to proceed alone.

(a) Remove representation

One suggestion is disallowing representation in mediation and the Authority. The onus would be on the mediators and members to address any inequalities between parties.[268] In 2014 the family law jurisdiction banned legal representation in the early stages of proceedings.[269] This policy proved to be alienating and traumatic and has recently been reverted.[270]

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[259] Kayla Stewart, Bridgette Toy-Cronin and Louisa Cloe "New Zealand lawyers, pro bono, and access to justice" (University of Otago Legal Issues Centre, March 2020) at 1.
[260] At 1.
[261] At 1.
[262] At 9.
[263] Craig Stephen "Citizens Advice - providing 3,000 pro bono hours a year" (2018) 920 LawTalk 63 at 63.
[264] Mike Hensen and John Yeabsley *The value of investing in Community Law Centres: An economic investigation* (New Zealand Institute of Economic Research, Wellington, September 2017) at 8.
[265] Kayla Stewart, Bridgette Toy-Cronin and Louisa Cloe, above n 259, at 15.
[266] *Greig,* above n 94, at [77].
[267] Robin Arthur "Reprising some earlier discussion about barriers in the institutions" (New Zealand Work Research Institute's conference, Barriers to Participation: what would make a difference and would it work?, Wellington, May 2019) at 1.
[268] At 2.
[269] "Family Court changes in effect from 31 March 2014" (26 March 2014) New Zealand Family Violence Clearinghouse <https://nzfvc.org.nz/news/family-court-changes-effect-31-march-2014>.
[270] Family Court (Supporting Families in Court) Legislation Act 2020.

Representation is necessary in some cases, a blanket ban would risk miscarriages of justice. Further, the removal of representatives would require significant increases in resourcing to the institutions. The Authority would be forced to investigate further, rather than relying on parties to present their cases adequately.[271] Mediators and members should always be alive to inequalities regardless of representation.

(b) Public education

There must be better, legal information about the employment law, services and legal processes.[272] Preventative information targeted at employers may reduce the need for resolution services.[273] Employees need free information and support to counteract the inherent power imbalance in the employment relationship and navigate the system without representation.[274] The law commission states explicitly this is the government's responsibility.[275]

(c) Increased funding to free service providers

Community providers such as the Citizens Advice Bureau (CAB) and Community Law Centre (CLC) play crucial roles in the employment jurisdiction.[276] They are independent charities which help fill the justice gap but cannot meet demand.[277]

CLCs offer free legal advice and sometimes representation.[278] Increased funding can increase one-to-one advocacy. This may include accompanying employees to meetings and negotiations, helping individuals to understand the process, present their arguments and ensure employers are meeting their obligations. The capacity and capability of CLCs are limited,[279] and the service is only available to those who meet an income threshold.[280] Funding should be increased to take this service nation-wide.[281]

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[271] Former Chief Judge Graeme Colgan "Dinner Speech", above n 43, at 5.
[272] Law Commission *Delivering Justice for All,* above n 7, at 11.
[273] Jayne McKendry "Introduction and recap from 2018 symposium" (New Zealand Work Research Institute's conference, Barriers to Participation: what would make a difference and would it work?, Wellington, May 2019) at 2.
[274] At 3.
[275] Law Commission *Delivering Justice for All,* above n 7, at 12.
[276] Gaye Greenwood and Erling Rasmussen, above n 213.
[277] Law Commission *Delivering Justice for All*, above n 7, at 22.
[278] Kayla Stewart, Bridgette Toy-Cronin and Louisa Cloe, above n 259, at 9.
[279] Jayne McKendry "Introduction and recap from 2018 symposium" above n 273, at 4.
[280] At 4.
[281] Peter Franks, above n 29.

CABs support people to know their rights and direct them to the services they need.[282] In 2018, there were over 2,300 trained providers in 83 locations.[283] Over 2017 and 2018 the service was used 508,000 times.[284] CABs can provide assistance to write letters, complete forms, sign-up to RealMe, sort documents and help to order clients' thoughts.[285] They direct people to contact their union officials, Employment New Zealand, CLCs, and representatives when necessary.[286]

Community service providers are usually trained and supervised but are still at risk of providing well-meaning, but poor advice.[287] These services do not require more rigorous competence regulation, because providing advice, without cost, removes a significant risk to the consumer.

(d) No-Cost Regime

The Irish and Australian systems have a no-cost system apart from in vexatious or highly unreasonable cases.[288] Eliminating the fear of a cost award may make workers more confident to begin their case and feel less pressure to settle in mediation.[289] This regime may reduce the value of an award in that the successful party ends up using all their winnings to cover their own costs.[290] Ireland has seen an increase in adjudication and a decrease in representation since implementing the regime.[291] The Authority and Mediation Services have considerable discretion, so could implement these changes without a legislative overhaul.[292]

(e) McKenzie friends (MF)

The court environment can feel daunting, overwhelming and isolating for self-represented litigants.[293] A MF is someone who, with the leave of the court, is allowed to sit with an unrepresented litigant. They can provide support, quiet advice and take notes but cannot address the court without leave to do so.[294] MFs in the United Kingdom have arguably

[282] Jayne McKendry "Citizens Advice Bureau Presentation" (New Zealand Work Research Institute's conference, Barriers to Participation: a Symposium, Auckland, September 2018) at 1.
[283] At 2.
[284] At 4.
[285] At 4.
[286] At 10.
[287] *Fee-charging McKenzie Friends*, above n 87, at 35.
[288] Gaye Greenwood and Erling Rasmussen, above n 213.
[289] Robin Arthur, above n 267, at 3.
[290] At 3.
[291] Gaye Greenwood and Erling Rasmussen, above n 213.
[292] Robin Arthur, above n 267, at 3.
[293] Law Commission *Review of the Juicature Act 1908: Towards a new Courts Act* (NSLC R126, 2012) at 147.
[294] Helen Winkelmann, above n 112, at 240.

"abused the position", which will be addressed in Chapter 4.[295] The law commission received widespread support for MFs domestically, so long as they are unpaid and confined to their role.[296] MFs are useful for improving access to justice; however, New Zealand should watch England closely and potentially legislate the bounds of the role before issues arise.

(f) Increase awards

Some suggest compensatory awards must increase, to make litigation viable.[297] Chief Judge Inglis proposed a banding approach to assess levels of compensation for humiliation and distress.[298] Band 1 should reflect low level loss or damage, $0-$10,000, band 2 reflect mid-range loss, $10,000-$50,000, or damage or band 3, high level loss or damage, $50,000+.[299] Of 71 successful claims between July and December 2019, 7 were awarded over $25,000 and 23 were awarded under $10,000, the rest were in between.[300] Increasing potential awards would make pursuing a case financially viable, thus empowering people to exercise their rights to access to the courts. However, this solution does not address deeper issues about affordability and accessibility of employment litigation.[301]

(g) Default union membership

Implementing default unionism may improve access to justice. This employs the 'nudge theory' of behavioural economics. It would increase union membership due to human's tendency for inaction.[302] Mark Harcourt suggests freedom of (dis)association would be intact, due to an opt-out mechanism.[303] In Harcourt's research, 71 percent supported the idea.[304] Other suggest cajoling workers into a membership they had not consciously joined is contravening their freedom not to associate.[305] Union members benefit from early, cheap

[295] Law Commission *Review of the Juicature Act 1908*, above n 293, at 147.
[296] At 148.
[297] Susan Hornsby-Geluk "Power balance in the employment tribunal and court must be addressed" (5 February 2020) Stuff <https://www.stuff.co.nz/business/119259796/power-imbalance-in-the-employment-tribunal-and-court-must-be-addressed>.
[298] Christina Inglis "Compensation for humiliation, loss of dignity and injury to feelings" (paper presented to Law @ Work Conference, Auckland, June 2018).
[299] At 6.
[300] "Compensation for personal grievance claims: Jul-Dec 2019" Employment New Zealand < https://www.employment.govt.nz/about/employment-law/compensation-and-cost-award-tables/compensation-personal-grievance-jul-dec-2019/ >.
[301] Inglis "Employment Litigation Costs", above n 240, at 1.
[302] Gill Dee "When 'nudging' is forever – the case of Sweden" (20 February 2018) Chicago Booth Review <https://review.chicagobooth.edu/behavioral-science/2018/article/when-nudging-forever-case-sweden >.
[303] Mark Harcourt, Gregor Gall, Nisha Novell and Margaret Wilson "Boosting Union Membership: Reconciling Liberal and Social Democratic Conceptions of Freedom of Association via a Union Default" (2020) *Industrial Law Journal* 1 at 3.
[304] At 12.
[305] At 13.

advice as collective action takes advantage of economies of scale. This proposal would require considerable public consultation and legislative changes.

E. Conclusion

Every jurisdiction faces access to justice problems. The employment sphere deals with both the economically powerful and vulnerable people in society. The regulation of employment advocates could lower the price of representation while ensuring consumer protection. This should be one of several measures implemented to improve access.

Chapter IV - The Comparisons

Before arriving at preliminary recommendations, it is helpful to consider the comparable industries of conveyancers and English McKenzie friends. Conveyancing exemplifies 'upstream' regulation, putting controls in place before an action occurs. Conversely, English MFs and employment advocacy, are examples of 'downstream' regulation, as controls are imposed on an industry that already exists.

A. Conveyancing Practitioners

Conveyancing is the legal work required to transfer the ownership of real estate from one person or entity to another.[306] Until 2008 practising lawyers had a monopoly over these services, making them very expensive. The Lawyers and Conveyancers Act 2006 (LCA) established the new conveyancing profession.[307] The consumer now has a choice for their legal support in property transactions.

Lester Dempster was the founding President of the New Zealand Society of Conveyancers (NZSOC). He worked with the Toi Ohomai Institute of Technology for the implementation of the Diploma in Conveyancing which invited its first intake in 2009.[308]

The LCA established NZSOC to represent, promote and regulate the conveyancing profession.[309] NZSOC created rules of conduct and client care, by which practitioners are bound.[310] The rules are very similar to the draft provisions in chapter 5. To become a

[306] "Home page" NZSOC <https://www.nzsconveyancing.co.nz >.
[307] LCA.
[308] LCA.
[309] "Home page", above n 306.
[310] Conveyancing Rules.

conveyancer, one must complete the two-year diploma.[311] Qualified individuals can apply for a practising certificate.[312] Only then may an individual describe themselves as a conveyancing practitioner.[313] Conveyancers must complete ten continuing education hours annually, and prove it to NZSOC for registration renewal.[314] Consumers may contact the Complaints Service about conduct, quality of service, level of fees and failure to comply with orders.[315] The Standards Committee and Disciplinary Tribunal punish conveyancers accordingly.[316]

Conveyancing exemplifies firstly, how a jurisdiction can be expanded pragmatically and secondly, that the provision of legal services ought to be regulated. The controls and mechanisms in the LCA and Conveyancers Rules, has prevented the issues, seen in the employment space, from eventuating.

As at September 2020, there were 65 conveyancers published on the Register.[317] While this is a small cohort of practitioners, their existence will have improved access to conveyancing services somewhat. There are two reasons why this profession has not flourished. Firstly, the diploma takes two years and costs approximately $7,000.00,[318] so the barriers to entering the profession are substantial. Secondly, the regulation created the profession, rather than imposing restrictions on a group of people already in operation. Neither of those factors applies to the regulation of employment advocacy. The barriers to entry will be a great deal lower, and while the figure is unknown, there already exists a discernible market of employment advocates.

B. UK McKenzie Friends

As mentioned in chapter 3, McKenzie friends (MFs) in New Zealand have been unproblematic. While friends or family members traditionally fill the role, the United Kingdom (UK) is seeing fee-charging, "professional" MFs.[319] Not unlike employment

[311] Toi Ohomai Institute of Technology "Diploma of Conveyancing (Level 6)" < https://www.toiohomai.ac.nz/study/course/new-zealand-diploma-conveyancing-level-6 >.
[312] "Qualifications and Registration" NZSOC < https://www.nzsconveyancing.co.nz/qualifications-and-registration.html >.
[313] "Qualifications and Registration", above n 312.
[314] "Conveyancers Continuing Education (CCE)" NZSOC < https://www.nzsconveyancing.co.nz/conveyancers-continuing-education.html>.
[315] "Complaints" NZSOC < https://www.nzsconveyancing.co.nz/complaints.html>.
[316] "Complaints", above n 315.
[317] "Register - NZ Society of Conveyancers" NZSOC < https://www.nzsconveyancing.co.nz/allmembers.html >.
[318] Toi Ohomai Institute of Technology "Diploma of Conveyancing (Level 6)", above n 311.
[319] Helen Winkelmann, above n 112, at 241.

advocates, their potential regulation and role in providing access to justice are finely balanced, thus controversial.[320]

The Legal Services Consumer Panel made recommendations for their regulation.[321] Again, similar to employment advocates, little is known about MFs, but anecdotal evidence suggests numbers are increasing.[322]

The right of audience is supposed to only be granted to MFs in exceptional circumstances, yet most MFs reported it being granted liberally.[323] Their services are beginning to mirror the lawyers' role, including research, advice on law and case strategy, drafting documents, completing forms and obtaining evidence.[324] Lawyers are regulated by preventative measures, such a qualification and a code of conduct, and remedial measures, such as insurances and access to redress, MFs are not.[325] Consumer detriment cannot be quantified, due to the absence of data collection or a complaint handling body and the lack of transparency of the courts.[326]

The concerns that are arising concerning MFs include lack of objectivity, low-quality advice, overstepping the boundaries of the role, overcharging and privacy breaches.[327] Nevertheless, MFs improve access to justice by providing support for vulnerable litigants.[328] Some judges and lawyers feel cases progress more smoothly with the assistance of MFs.[329] MFs provide essential public benefit when court resources are incredibly scarce. Further, they expand the choice for legal services consumers which promote competition.[330]

Some MFs welcome regulation as it would legitimise their industry and raise standards.[331] The panel determined regulation is unnecessary, as judges can easily reject and remove disruptive MFs.[332] They suggested that MFs need more effective self-regulation and should

[320] *Fee-charging McKenzie Friends*, above n 87, at 2.
[321] "Home" Legal Services Consumer Panel < https://www.legalservicesconsumerpanel.org.uk>.
[322] *Fee-charging McKenzie Friends*, above n 87, at 9.
[323] At 4.
[324] At 12.
[325] At 4.
[326] At 17.
[327] At 12.
[328] At 2.
[329] At 3.
[330] At 3.
[331] At 5.
[332] At 6.

establish a trade association with a code of practice.[333] They too suggested a training course and consumer guidance information, including some sort of credential indicator.[334]

The situation developing with MFs in the UK is strikingly similar to New Zealand's employment advocates. However, the risks are increased with advocates. MFs are simply support people, employment advocates are at liberty to run entire cases, virtually without restriction.[335] Further, the legislation surrounding MFs has sufficient checks already built in. One might speculate, that if the law was less protective, like the ERA, and MFs had an automatic right of audience like employment advocates do in the employment jurisdiction, the panel may have recommended more concrete regulations surrounding MFs.

Chapter V - Solutions

Regulating employment advocates involves making some difficult trade-offs. Regulators must arrive at a response proportionate to the present risks and the likely impacts.

Governments often regulate transactions between professionals and consumers.[336] Legal service consumers are poorly placed to identify the risks associated with legal representation, so safeguards should be imposed.[337]Advocacy is a relatively high-risk legal activity due to the potentially serious consequences of poor quality and unethical practice.[338] The privilege of right of audience in the employment institutions, should require certain knowledge, experience and skill.[339]

A. Preface: Lack of Empirical Evidence

Due to mediation's confidentiality, there is very little information about advocates. A 2007 press release suggested MBIE were exploring better ways to assess non-lawyer advocates, but nothing public came of this.[340] ELINZ, as the current, unofficial complaints body, are in the best position to advise the government on the extent of these issues. Regulation of

[333] At 5.
[334] At 7.
[335] At 22.
[336] Claude Balthazard "What does it mean to be a regulated profession?" (Human Resources Processionals Association, 1 January 2016), at 1.
[337] *Fee-charging McKenzie Friends*, above n 87, at 9.
[338] At 33.
[339] Law Commission *Delivering Justice for All*, above n 7, at 235.
[340] Trevor Mallard, Minister of Labour, "Workplace research released, code to be developed" (press release, 12 December 2007).

employment advocacy is necessary, but a deeper knowledge will help parliament to develop policy which strikes a more accurate balance between access to justice and consumer protection. The following recommendations are conditional on further inquiry.

B. Preliminary Recommendations.

The ambit of the Lawyers and Conveyancers Act 2006 (LCA) should be extended to provide for the new profession of employment advocacy. The LCA will establish the profession and governing society. The society will be empowered to make rules regarding, qualification, conduct, client care and a complaints mechanism.

The draft legislative provisions in this chapter are heavily based on the Lawyers: Conduct and Client Care rules[341] (Lawyers rules) and the Conveyancing Practitioners: Conduct and Client Care rules (Conveyancers rules).[342]

1. Establish the Regulated Profession of Employment Advocacy.

The first step to regulation is defining the profession. The Employment Relations Act should be amended to remove the 'any other person' provision in s 236 and sch 3 cl 2. The words should be replaced to the effect, that only registered employment advocates (REAs), lawyers and union officials, may represent employers and employees in the Employment Relations Authority and Employment Court.

Any other person may accompany an employer or employee to, and play an active role in, mediation, disciplinary meetings, wage negotiations and other such actions. This role is intended to be a support person who can assist, but their lack of legal expertise should be known. Individuals are also at liberty to instruct a REA, lawyer or union delegate during these actions. Public information should be improved to support litigants to feel comfortable at mediation without professional assistance.

Those who wish to charge for their services must be held to minimum standards of qualification and ethical conduct.[343] Matters entering the Authority and Court are sufficiently serious that the people paid to conduct such matters should be regulated professionals. The

[341] Lawyers and Conveyancers (Lawyers: Conduct and Client Care) Rules 2008.
[342] Lawyers and Conveyancers (Conveyancing Practitioners: Conduct and Client Care) Rules 2008.
[343] Former CJ Graeme Colgan "Special article: Regulation of the Industry", above n 84.

judicial system is currently structured to accommodate legal representatives. Until there are institutional changes, courtwork is arguably a craft, which requires training.

The interpretation of the LCA should be amended to include definitions to the following effect:[344]

Registered Employment Advocate means –

(a) a person, not being a lawyer, who provides advocacy services; and
(b) holds a current practising certificate issued by the New Zealand Society of Employment Advocates.

Advocacy Services includes –

(a) Reserved areas of work;
(b) Representation in mediation, conciliation or arbitration services;
(c) In the direct management of any employment proceeding –
    (i) Providing advice in relation to any legal rights or obligations;
    (ii) Preparing documents which create or provide evidence of any legal rights or obligations;
(d) Any legal services that are incidental or ancillary to, any work described in (a)-(c)

Reserved area of work, in relation to employment advocates, means the work carried out by a person –

(a) In advising an employer or employee in relation to the direct management of –
    (i) Any proceeding that the person is considering bringing, or has decided to bring before the Employment Relations Authority or the Employment Court; or
    (ii) Any proceeding before the Employment Relations Authority or the Employment Court to which the person is likely to become a party.
(b) In appearing as an advocate for any other person before the Employment Relations Authority or the Employment Court;
(c) In representing any other person involved in proceedings before the Employment Relations Authority or the Employment Court;
(d) In giving legal advice or in carrying out any other action that is required to be carried out by a lawyer or advocate.

[344] LCA, s 6.

A new part could be added into the LCA surrounding Registered Employment Advocates. It would include provisions to the effect:

Provision of advocacy services

(1) A person commits an offence who, not being a lawyer, union official or registered employment advocate –
    (a) provides advocacy services to any other person; or
    (b) receives gain, reward or remuneration (whether direct or indirect) for the provision of any services in relation to assisting with an employment matter.

Misleading descriptions

(1) A person commits an offence who, not being a lawyer, union official, or registered employment advocate, makes any representations intended or likely to cause any other person to believe that the person is qualified, entitled, able or willing to undertake advocacy services.

Penalty

(1) A person who commits an offence against these sections is liable on conviction to a fine –
    (a) not exceeding $5,000 for a natural person
    (b) not exceeding $15,000 for a corporation.

2. Establish the New Zealand Society of Employment Advocates

The LCA should be amended to establish a body, tasked with qualifying and registering advocates, creating and administering rules around continuing education requirements, conduct, client care and a complaints service and disciplinary mechanism.

(a) Considered Options

(i) The New Zealand Law Society (NZLS)

The Law Society is not a viable regulatory society. Just as the rules between conveyancers and lawyers are not identical, nor are the rules for employment advocates. Unlike lawyers, REAs are not officers of the High Court. They are simply individuals who have a limited and specific right of audience in the employment jurisdiction. As outlined below, REAs should have duties to the Employment Court, however not to the extent that Chapter 4 and 13 bind

lawyers.[345] Further, lawyers are in cut-rate competition with employment advocates; it would be inappropriate to conflate the two.

(ii) The Courts

While the courts can award penalties against advocates as demonstrated against Mr Halse in *Turuki*, it is not the proper role of the courts to discipline all behaviour.[346] Burdening the court with this responsibility is not in the interests of access to justice. It can take years of appeals before penalty awards are enforced. Further, the provision of the majority of advocacy services takes place away from the judiciary, so would be invisible to scrutiny.[347] It is well beyond the court's role to administer the other functions required of this body, such as creating rules around conduct, qualification and continuing education.

(iii) The Employment Law Institute of New Zealand (ELINZ)

ELINZ has expressed interest in becoming the governing body of the employment space.[348] ELINZ is operated by practitioners, thus would lack independence. Further, the rules for lawyers and advocates will not be identical, and it would be unworkable for lawyers to be answerable to two authoritative bodies. However, as has proved successful in the architecture industry, The New Zealand Institute of Architects[349] is closely affiliated with The New Zealand Registered Architects Board.[350] The latter is the official regulatory body, and the former, similar to ELINZ, is a voluntary membership which promotes the interests of architects. ELINZ will be enabled to maintain a close relationship with the society and provide advice and collaboration on the formulation of various rules, from their experience in the field.

(b) The New Zealand Society of Employment Advocates (NZSEA)

The best approach is to create a new, independent society designed explicitly for the regulation of employment advocates. This body will be akin to the NZLS for lawyers and

[345] Lawyers Rules, chs 4 and 13.
[346] *Turuki*, above n 143.
[347] *Fee-charging McKenzie Friends*, above n 87, at 22.
[348] Mark Nutsford, ELINZ former President "The Road to Regulation of the Employment Law Industry", above n 201.
[349] "Who We Are" NZIA <https://nzia.co.nz/about-us/who-we-are>.
[350] "The New Zealand Registered Architects Board" NZRAB <https://www.nzrab.nz/c/About-the-NZRAB>.

NZSOC for conveyancing practitioners. All of these regulatory societies are established and monitored by the enabling statute, the LCA.

The LCA should be amended to include provisions to the effect:

New Zealand Society of Employment Advocates

(1) This section establishes a New Zealand Society of Employment Advocates.
(2) The society may only exercise its rights, powers and privileges to perform its functions.

Regulatory powers

(1) The New Zealand Society of Employment Advocates has all such powers, rights, and authorities as are necessary or expedient for or conducive to the performance of its regulatory functions to control and regulate the profession of employment advocacy.
(2) The society has the following powers –
    (a) To make rules providing for the registration of employment advocates;
    (b) To issue practising certificates to registered employment advocates;
    (c) To keep and maintain a public register of practising employment advocates;
    (d) To make practice rules that are binding on all employment advocates;
        (i) Practice rules must include rules relating to –
            A code of conduct and client care; and
            A complaints service and disciplinary mechanism.
    (e) To oppose applications for registration;
    (f) To establish and manage the Employment Advocates' Fidelity Fund;
    (g) To make rules concerning the indemnity of employment advocates against claims made against them in respect of anything done or omitted by them in their professional capacity; and
    (h) To appoint any person to work for the society.

3. Qualification, Registration and Continuing Education

These controls are designed to address competence. Requiring qualification, registration and continuing education hours should remove or deter those advocates who joined the industry to make quick, large sums of cash, without considering it a serious career path. Further, by establishing the bounds of the profession, it identifies which individuals are bound by the rules and are subject to the disciplinary mechanism.

(a) Qualification

To practice, advocates will have to be on the New Zealand Register of Employment Advocates. To qualify for registration, advocates must meet minimum training requirements. NZSEA will be empowered by the new LCA provisions to develop rules outlining the requirements.

Rules relating to education

(1) NZSEAs rules may –

(a) set the qualification and educational requirements for candidates;

(b) define and prescribe the courses of study required to be undertaken;

(c) provide for the delivery of the courses of study;

(d) provide the courses, or provide for the licensing of other persons to deliver courses; and

(e) arrange how the courses will be monitored or assessed.

The Council of Legal Education sets the qualification and educational requirements for lawyers' admission.[351] They define, prescribe and approve the courses of study required and arrange for their delivery. The Council must consult with the NZLS in prescribing the mechanisms and criteria concerning admissions.[352] The NZSEA should develop a fully online course, covering basic court and mediation skills, case management and substantive employment law. NZSEA may choose to approach Toi Ohomai Institute of Technology, which may help develop and run this course. The institute currently administers comparable diplomas for conveyancers, immigration consultants and legal executives.[353]

In the interests of access to justice, this course should be brief, only three to four months long. Proficient advocates will be well versed in substantive employment law and practical skills; thus, the qualification will be relatively elementary. The goal is to ensure a base knowledge for all advocates and drawing boundaries around the profession.

[351] LCA, s 274.
[352] Section 276.
[353] Toi Ohomai Institute of Technology "Diploma of Conveyancing (Level 6)"; "Diploma in New Zealand Immigration Advice" and "Diploma in Legal Executive Studies (Level 6) <https://www.toiohomai.ac.nz/study/>.

(b) Registration

Once an individual completes the qualification, they can approach NZSEA to become registered and issued a practising certificate. The LCA may be amended to include provisions such as,

Rules for Registration

(1) NZSEA must have rules providing for the registration of employment advocates (REAs).
(2) The rules must prescribe –
    (a) the criteria for registration;
    (b) how it will be granted;
    (c) any other conditions;
    (d) the grounds for cancellation or suspension of registration;
    (e) the educational criteria to be met before registration;
    (f) the recognition of foreign qualifications; and
    (g) for the ongoing education that employment advocates are required to complete, including –
        (i) The times and frequencies at which this must be undertaken, and the topics addressed.

Section 39, of LCA, could be amended to include –

Issue of practising certificates

(2A) NZSEA must, on application made to it by any person whose name is on the ……register of employment advocates, issue to that person a practising certificate as an ……employment advocate.

(4) NZSEA may decline to issue practising certificates if the individual –

    (a) has outstanding fees or levies;
    (b) do not meet the criteria prescribed by NZSEA's practice rules; or
    (c) is not a fit and proper person to hold a practising certificate.

Fit and proper

(1) To determine whether or not a person if fit and proper person to be granted registration, NZSEA may take into account any matters it considers relevant, in particular –
    (a) whether the person is of good character;

(b) whether they have been convicted of an offence in New Zealand or elsewhere, considering the –

(ii) nature of the offence;

(iii) time elapsed since then; and

(iv) their age at the time of the offence.

(c) whether they have supplied unauthorized advocacy services previously; and

(d) whether they have practiced overseas.

(c) Continuing Education Hours

As per ss (2)(g) of the Rules of Registration provision drafted above, NZSEA will make rules providing for the ongoing education relating to the law or the practice of employment advocacy that employment advocates are required to complete. NZSEA may decide advocates must complete 10 continuing education hours annually. The society should develop a list of approved activities. Advocates will have to keep a log of their attendance which they will submit to NZSEA annually. This requirement is to ensure an adequate level of knowledge and competence in the practice of employment advocacy.

4. Rules of Conduct and Client Care

As empowered by the amended s 94(e) of the LCA, NZSEA should create rules that provide for standards of professional conduct and client care.[354] As per s 95 of the LCA, these rules will be a reference point for discipline.[355] These rules could be called the Lawyers and Conveyancers Act (Employment Advocates: Conduct and Client Care) Rules.

Effect of practice rules

(1) The practice rules of NZSEA are binding on all REAs and REAs, whether or not they are members of NZSEA.

At present judges refer to the Lawyers Rules as a "guideline" when advocates have misbehaved.[356] In *RPW v H,* the judge said the advocate "nevertheless should act in the same way as legal counsel would act."[357] This is problematic because the professions are not the same. Advocates need their own rules which reflect their specific role in the jurisdiction.

[354] LCA, s 94(e).
[355] Section 95(e).
[356] *Lucas,* above n 96, at [6].
[357] *RPW v H* [2018] NZEmpC 103 at [22].

Nevertheless, the practical outcome of the lawyer's rules and advocates rules will be very similar.

NZSEA will be empowered to create whichever rules it sees fit. The following are recommendations as to the types of rules they should consider including in their code.

Duties to the Court

(1) REAs are obliged to uphold the rule of law and to facilitate the administration of justice.
(2) REAs have an overriding duty to the Employment Court;
    (a) REAs have an absolute duty of honesty to the court.
    (b) REAs must not undermine the process or dignity of the court.
    (c) REAs must not attempt to obstruct, prevent, pervert or defeat the course of justice.

Professional competence

(1) REAs must:
    (a) act with reasonable skill, care, competence and diligence at all times;
    (b) not accept instructions unless competent and capable to perform such work; and
    (c) complete work in a timely manner.

Professional conduct

(1) REAs must:
    (a) practice in a manner which adheres to their duties to the court and their client and which preserves the reputation of the profession;
    (b) conduct themselves with honesty, fairness and professionalism;
    (c) only act for proper purposes, and not cause unnecessary embarrassment, distress or inconvenience to another person;
    (d) not make threats for any improper purpose; or
    (e) not practice in a misleading or deceptive manner.

Clients engaged in litigation

(1) A REA must:
    (a) obtain and follow the client's instructions about the conduct of litigation;
    (b) inform the client as to the nature and consequences of their decisions;
    (c) advise the client as to alternatives to litigation;
    (d) maintain their independence at all times; and
    (e) ensure the client fully complies with their discovery obligations.

Relationships

(1) A REA must always:

(a) treat clients with respect and courtesy; and

(b) act in accordance with client's instructions, unless contrary to law.

Communication

(1) A REA must:

(a) keep their client well informed of all relevant matters;

(i) ensuring the specific client understands the information;

(b) respond in a timely manner;

(c) inform their client about material or unexpected delays;

(d) explain the steps to implement the client's instructions; and

(e) advise the client when a matter is completed;

(i) explaining the final position; and

(ii) identifying any future action.

Record keeping

(1) A REA must keep written records of:

(a) all dealings with and instructions given by the client, and

(b) all other dialogue, phone conversations, inquiries and correspondence.

Prior information

(1) Before entering an arrangement, a REA must provide written information, including:

(a) the basis of calculating their fee, including but not limited to if the fee is:

(i) fixed for specific types of work;

(ii) calculated per hour and if so a reasonable estimated range;

(iii) contingency fee adhering to the specific rules; or

(iv) subject to additional disbursements or expenses.

(b) when payment is required;

(c) the professional indemnity arrangements of the practice;

(d) the coverage provided by the REA fidelity fund;

(i) the lack of meaningful protection from the fidelity fund due to the recent establishment of the employment advocacy profession.

(e) advice about NZSEA's complaints service and how to make a complaint.

Completion of work

(1) An employment advocate must always complete the work for which they have accepted instructions, unless:
    (a) The practitioner and client agree; or
    (b) The client or REA lawfully terminates the services.

Confidential information

(1) A REA must protect and hold in strict confidence all information acquired in the course of the professional relationship, concerning, the client, their affairs and the retainer.

Independence

(1) The relationship between the REA and the client is one of trust and confidence.
(2) A REA must:
    (a) be fully independent when providing services to their clients;
    (b) act solely for the benefit of the client;
    (c) at all times exercise independent professional judgment on the client's behalf; and
    (d) give objective advice.

Conflicts

(1) A REA must not:
    (a) act for more than one client on a matter where there is a negligible risk that the REA will not be able to discharge the obligations owed to either of the clients.
    (b) act if there is a conflict between the interests of the REA and the interests of their client.

Duties to others

(1) A REA must treat other practitioners and third parties with respect and courtesy
(2) A REA must not communicate directly with a person whom the REA knows is represented by another REA, lawyer or union official.
    (a) Unless the matter is urgent, and it is not possible to contact the representative.

As illustrated in chapters 2 and 3, fee calculations of REAs are a crucial target area of regulation. General rules surrounding fees may include:

Reasonableness of fee

(1) A REA must charge fees which are fair and reasonable for the services provided, having regard to:
    (a) the interests of both the client and the REA;
    (b) the time and labour expended on the matter;
    (c) the skill, specialised knowledge, and responsibility required;
    (d) the importance of the matter to the client and the results achieved;
    (e) the urgency and circumstances, and any time limitations imposed;
        (i) including those imposed by the client.
    (f) the degree of risk assumed by the REA in undertaking the services;
    (g) the complexity and novelty of the matter;
    (h) the experience, reputation and ability of the REA;
    (i) the possibility that the acceptance of the arrangement will preclude engagement of the REA by other clients;
    (j) whether the fee is fixed or conditional;
    (k) any quote or estimate of fees given by the REA;
    (l) the reasonable costs of running a practice; and
    (m) the fee customarily charged in the market and locality for similar regulated services.

Fee information

(1) A REA must upon request provide an estimate of fees and inform the client promptly if it becomes apparent that the fee estimate is likely to be exceeded.
(2) A REA must inform the client of their legal aid eligibility and whether the REA is prepared to work on legally aided matters.

Final Account

(1) A REA must render a final account, within a reasonable time of concluding services, including sufficient information to identify the work undertaken and any disbursements.

Conditional fees or "No Win No Fee" agreements have been identified as a significant issue among current employment advocates. Conditional fee agreements (CFAs) are permissible

under the LCA.[358] The Act allows arrangements which are either a normal fee or a normal fee plus a premium, which complies with any requirements made by the regulatory society's practice rules.[359] Section 333 defines normal fee and premium as:[360]

> **Normal fee**, in relation to a conditional fee agreement, is the amount of the remuneration that would be payable for the services provided by the lawyer under the agreement if that amount were not contingent on the outcome of the matter to which the remuneration relates.
>
> **Premium**, means remuneration that a lawyer may become entitled to under the agreement in addition to a normal fee, being remuneration by way of premium that –
>
> (a) is payable only if the outcome of the matter is successful; and
> (b) is expressly provided for in the agreement; and
> (c) compensated the lawyer –
> (i) for the risk of not being paid at all; and
> (ii) for the disadvantages of not receiving payments on account; and
> (d) is not calculated as a proportion of the amount recovered.

The NZLS created additional requirements in relation to Lawyers using CFAs.[361] NZSEA should replicate these conditions to the effect that:

> **Conditional Fee Agreements (CFAs)**
>
> (1) A REA may enter into a CFA only in the circumstances and in accordance with, the requirements set out in sections 333 and 335 of the Act and these rules.
> (2) A REA must ensure that –
> (a) The client is aware of other appropriate fee arrangements including legal aid; and
> (b) the total fee charged at the conclusion of the matter is fair and reasonable, in accordance with the rules.
> (3) A CFA must be written and provide –
> (a) the method by which the fee is to be determined;
> (b) the conditions that will amount to success and fees become payable;
> (c) whether there are expenses for which the client will be liable regardless of success;
> (d) the basis upon which each party may terminate;

[358] LCA, s 333 - 336.
[359] Section 334.
[360] Section 333.
[361] Lawyers Rules, r 9.7 - r 9.12.

(e) the method by which the fee is to be determined if an offer of settlement is made, which the client declined to accept against the advice of the REA;
(f) the circumstances in which the client may be liable to pay the costs of another party to the proceedings; and
(g) that the client may give notice of cancelling the CFA within five working days of entering it. The REA may charge a normal fee for work done during that period.

(4) Upon conclusion of a matter subject to a CFA, the REA must provide the client with an account which discloses the normal fee and the premium.

5. Complaints and Discipline

Part 7 of the LCA must be amended to require NZSEA to create rules necessary for complaints and discipline.[362] Section 121 can be amended to include,[363]

Obligation to establish a complaints service

(3) NZSEA must establish a complaints service to receive complaints about:

(a) REAs and former REAs;
(b) Incorporated employment advocacy firms; and
(c) Employees of REAs or advocacy firms.

As per the amended s 132 of the LCA, complaints can be made about a partitioner's conduct, the standard of service or their costs rendered.[364]

A section, 125A should be drafted to outline the functions of the NZSEA in relation to administering the complaints service, as to:

(a) Ensure places for complaints to be lodged;
(b) Give appropriate publicity to those places and the procedure;
(c) Public information about the process;
(d) ensure consistency and quality of the service throughout New Zealand; and
(e) to ensure determinations are enforced.

A section, 127A should be drafted as to require the NZSEA to establish an Employment Advocates Standard Committee as part of its complaints service and appoint members to it.

[362] LCA, pt 7.
[363] Section 121.
[364] Section 132.

Section 130 should be amended to include NZSEA's complaints service.[365] Its functions will include:

(a) inquiring into and investigating complaints made;
(b) promoting the resolution of complaints by negotiations, conciliation or mediation; and
(c) making final determinations in relation to complaints.

As per s 156, the Standards Committee may order, among other things, apologies, censure or reprimand, payments of compensation, the cancellation or reduction of fees, the refund of sums, additional practical training or education.[366]

Section 131 outlines rules relating to standards committees, must include:[367]

(a) details of the procedures to be followed in relation to complaints;
(b) the manner in which the Standards Committee is to exercise its functions and powers;
(c) the publication of information;
(d) how people can access the services; and
(e) instructions as to how complaints may be made.

The LCA includes more information about notices, procedures, investigators, reports, evidence, hearings on the papers, and so on, which will apply to the employment advocacy profession.[368]

The jurisdiction of the Disciplinary Tribunal should be expanded to encompass REAs.[369] The Tribunal hears and determines applications made to it by Standards Committees[370] and applications for restoration of names to the register.[371] It would have the ability to remove REAs from the register if, by way of their conduct, they are not a fit and proper person to be in practice.[372]

The NZSEA may wish to include the following provisions in their rules:

Disciplinable Conduct

(1) REAs may be disciplined for –

[365] Section 130.
[366] Section 156 (a)-(o).
[367] Section 131.
[368] Part 7.
[369] Section 226.
[370] Section 227.
[371] Section 246.
[372] Section 244.

(a) misconduct:
(b) unsatisfactory conduct:
(c) negligence or incompetence in their professional capacity, which brings into question their fitness for practice: or
(d) the conviction of an imprisonable offence.

Reporting Conduct

(1) REAs must report to the NZSEA –
    (a) misconduct or unsatisfactory conduct by other practitioners; and
    (b) an individual providing unauthorised employment advocacy services.

C. Predicted Impacts of Regulatory Changes on Stakeholders

In developing regulation, parliament must consider the impacts on relevant stakeholders. The stakeholders in the regulation of employment advocates are, employment advocates, consumers, the institutions and to a lesser extent, lawyers.

1. Legal Services Consumers

These regulations will improve the quality of advocacy services consumers receive. By improving efficiency, consumers will experience lower costs, not just financial. Consumers will be subject to less overcharging. These practices will be considered misconduct or serious misconduct and dealt with by NZSEA. The average price of advocacy is expected to fall, which should improve competition in the legal services market. Consumers will be assured the worst transgressors will be removed, which will increase their confidence in the profession.

Some individuals may be frustrated that ‘any other person’ can no longer accompany them into the institutions, however, this is a necessary incident of regulation. With a successful public legal information campaign, more individuals should feel empowered to effectively self-represent.

2. Advocates and Lawyers

Many advocates will be discontented to sacrifice their self-regulation. Some will consider compliance frustrating and inconvenient and may choose to exit the market As explained, some advocates will be compelled to reduce their fees, some will be unchanged, and some

may increase their prices nominally to account for the cost of compliance. However, advocates are likely to experience increased respect from other lawyers, the institutions, the media, clients and so on. To date, a small minority have tarnished the reputation of all. Good advocates are probably eager to get their legitimacy cemented. Due to improved confidence in the market for REAs, some REAs may experience higher demand for their services.

Lawyers, as the direct competition of employment advocates, are likely to support these regulations. The improvements will help lawyers who come across REAs to run their cases efficiently, with flow-on benefits to their clients.

3. The Institutions

The Employment Court, the Employment Relations Authority and the Mediation Services are likely to benefit from these regulations. Increasing the competence of representatives will increase the disposal rate of these bodies. It will also dampen the behavioural issues they deal with, including the integrity of judges and members being called into question. They will be less likely to have to use their power to award penalties, as NZSEA can discipline REAs outside of the courtroom.

Conclusion

The employment jurisdiction has a peculiar past, which has allowed for an unusual pocket of lay advocates. What once was a small group of experienced union officials has ballooned into a considerable market of unregulated representatives. Much is justifiably sacrificed at the feet of access to justice, however, the responsibility of conducting representation is significant. Employment relationship problems have far-reaching consequences for all parties involved. Many lay-advocates are brilliant, but a small portion of bad-actors have caused enough disruption to create a need for regulation.

When considering regulation, one must look at the history of the special jurisdiction, consider the consumer detriment flowing from current malpractice and study the regulation of comparable industries.

The government must critically review this unregulated, but vital legal services sector.[373] This paper has made a range of recommendations for legislative reform. While the substantive regulation will be at Parliament's discretion, the overarching policy goal must be to improve the standard of representation provided to consumers of legal services, without inhibiting access to the employment institutions.

[373] ELINZ "Outline to Minister of Labour on Regulation of legal advocates", above n 181.

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L. Newsletters

Kelly Coley, ELINZ President "Further to the debate on The Regulation of the Employment Law Industry" (2 August 2018) ELINZ Newsletter, Employment Lore.

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Former CJ Graeme Colgan "Special article: Regulation of the Industry" (1 September 2019) ELINZ Newsletter, Employment Lore.

Mark Nutsford, ELINZ former President "The Road to Regulation of the Employment Law Industry" (9 May 2017) ELINZ Newsletter, Employment Lore.

Mark Nutsford, former ELINZ President "Special article: President's resignation" (29 March 2019) ELINZ Newsletter, Employment Lore.

M. Other resources

Letter from Kathryn Beck (President of NZLS) to Justice Dobson (Chair of the Rules Committee) regarding Unbundled legal services – potential rule changes (14 March 2019).

Anthony Drake "Closing Submissions on Behalf of the Defendant" Wynn Williams (4 June 2020).

ELINZ "Outline to Minister of Labour on Regulation of Legal Advocates" (July 2020).