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Ministry of Justice
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By email: malcolm.luey@justice.govt.nz

Dear Malcolm

Criminal Procedure (Simplification Project) – Mechanisms to ensure compliance with criminal procedure obligations

The Society's Criminal Law Committee is grateful for the opportunity to comment on the above discussion document. The committee's responses to the questions in the discussion document are set out below.

1. *Is it appropriate to draw an adverse inference from the defendant's failure to identify, at a specified time before a defended hearing in the summary jurisdiction or a trial in the indictable jurisdiction, the issues that are in dispute?*

   Yes.

2. *Are there any other areas of non-compliance for which you consider an adverse inference may be appropriately drawn?*

   Failure to admit non-controversial evidence pursuant to ss9 and 130 of the Evidence Act 2006, and where cross-examination would make no difference to the admissibility or reliability of the evidence, e.g. Telecom phone records, copies of invoices, etc.

3. *Should section 9(1) of the Sentencing Act 2002 be amended to include as a mitigating factor any steps that the offender has taken before or during the trial to reduce the cost or expense of proceedings or to shorten the time to disposition?*

   Yes.

4. *Should section 9(1) of the Sentencing Act 2002 be amended to include as an aggravating factor that the offender has not complied with procedural requirements?*

   Yes, but only if those failures have led to an increase in trial length.

5. *Should it be possible to reduce an offender's sentence to recognise a delay in resolving proceedings (and the effects of that delay) due to the prosecution's non-compliance with procedural requirements?*

   Yes, this appears to be occurring already. In *Williams v R* [2009] NZSC 41, a case involving methamphetamine, the trial Judge reduced Williams' sentence by 25% due to a 5 year delay in resolving the proceeding.

6. *Should costs orders be able to be imposed on parties when they fail to comply with specific statutory requirements?*

   No. This is not a sensible option in the criminal jurisdiction, because it could lead to costs arguments in criminal trials. This would be detrimental to efficient justice, particularly when most defendants rely on legal aid.

   It would be contrary to the Costs in Criminal Cases Act 1967 (see s7(2)) to award costs against the prosecuting entity, unless negligence or bad faith can be proved against a prosecutor.

7. *Should a wasted costs order be available?*

   No.

8. *Are there any aspects of legal aid that should be addressed other than those identified in the paper (that is, reviewing the structure of legal aid payments, the possible extension of the Public Defence Service, and reviewing LSA processes for investigating and managing providers)?*

   <u>A similar system for Crown and defence</u>

   The Crown and the defence should be on an equal playing field. It is an important part of equality at arms, a well recognised international concept. In the committee's view that includes equality of administrative requirements, payment and support. Crown counsel are paid at a significantly higher rate, at all experience levels, than defence counsel and the Crown have the resources of the State behind them. For example, requests for information or further witnesses can be provided to the Police who will then action those, whereas for defence counsel funding needs to be expressly sought from the Agency, a process that is time consuming and sometimes unsuccessful. It impacts on justice and the perception of justice.

   <u>Public Defence Service</u>

   The committee recognises the logic of rolling out the Public Defence Program in main centres only, as it will provide mentoring and training opportunities for junior lawyers.

   <u>Police Detention Legal Assistance Scheme (PDLA)</u>

   Many years ago lawyers, often at no cost, made themselves available to give urgent over the telephone advice to those who had been detained in Police custody, usually at the point of or shortly after arrest. Over time that has developed into a formal scheme that is

now funded by the Agency and known as the PDLA scheme. It is an important scheme and gives effect, in the Police context at least, to s24 of the New Zealand Bill of Rights Act 1990. It provides that everyone who is charged with an offence *"(c) shall have the right to consult and instruct a lawyer; and ... (f) shall have the right to receive legal assistance without cost if the interests of justice require and the person does not have sufficient means to provide for that assistance ..."*.

There is a concern that the scheme focuses only on those who have been detained or arrested by the Police. There are many other areas to which the scheme ought to be extended, including those who are detained or arrested for alleged offences pursuant to fisheries, immigration, social welfare and accident compensation legislation, to name a few. That view is supported by the wording of s24 of the New Zealand Bill of Rights Act 1990 and natural justice, both at common law and as affirmed by s27 of the New Zealand Bill of Rights Act 1990. The need to provide such a scheme is seen as falling within the purpose of the Legal Services Act 2000 of promoting access to justice.

LSA processes for investigating and managing providers

The Agency requires lawyers to meet certain experience and quality criteria before approving them to undertake legal aid work. The power to do so is set out ss71 and 72 of the Legal Services Act 2000, which includes the ability to assess a person against specific criteria. The Society and the Agency have consulted to develop some quite detailed listing criteria. The criteria differs for each area of law, for example there are specific criteria to be met in relation to mental health, family, accident compensation and immigration law. In relation to criminal law there are different criteria to be met depending on the type of hearing and potential penalty, for example whether the case involves a summary trial, a jury trial, life imprisonment or preventative detention. The criteria should ensure that lawyers who are approved can provide advice and representation of an appropriate quality.

The Agency has a variety of legislative mechanisms available to it to help enforce quality after a lawyer has been approved to provide legal aid services. Section 72A of the Legal Services Act 2000 confers upon the Agency the power to temporarily suspend listing where a person has been charged with a disciplinary offence under the Law Practitioners Act 1982 (now the Lawyers and Conveyancers Act 2006) and that will have an adverse affect on aided persons or the integrity of the legal aid scheme.

Pursuant to s73 of the Act the Agency may also cancel listing for one or more types of work in a variety of circumstances including where a person does not meet the listing criteria, regardless of when those listing criteria were adopted, or the person is not providing or has not provided a service for which he or she is approved to a standard that is acceptable to the Agency.

Pursuant to ss 75 to 79 of the Act the Agency has extensive powers to examine the quantum of invoices and also the services provided by a lawyer. Of especial relevance, pursuant to s78 of the Act the Agency may audit a listed provider at any time, for the purpose of assessing the quality and value of the services provided. Lawyers are required to co-operate with examinations and audits.

9. *Do you agree that the framework provided by the Lawyers and Conveyancers Act 2006 has a role to play in this area? Is anything more required (see, in particular, paragraph 52)?*

The Society, Agency, public and the Justice system have a common interest to ensure that clients receive a good quality of representation and advice. In the legal aid context, that is promoted by:

- the criteria that the Agency applies when approving legal aid providers (as discussed above);
- the legislative provisions available to the Agency and to the Society to enforce standards;
- the professionalism of firms and practitioners; and funding available to firms and practitioners for training and ongoing education.

Pursuant to the Law Practitioners Act 1982 the Society had the ability to enforce standards by way of the disciplinary process. The threshold for disciplinary intervention was quite high. A practitioner could be the subject of a charge where the practitioner was:

(a) guilty of misconduct in his or her professional capacity;

(b) guilty of conduct unbecoming a barrister or solicitor;

(c) guilty of negligence or incompetence in his or her professional capacity, and that negligence or incompetence was of such degree or such a frequency so as to reflect on the practitioner's fitness to practice or so as to tend to bring the profession into disrepute; or

(d) convicted of an offence punishable by imprisonment, which conviction reflected upon his or her fitness to practice or tended to bring the profession into disrepute.

The Law Practitioners Act 1982 was replaced by the Lawyers and Conveyancers Act 2006. Pursuant to that Act, on 1 August 2008, a new disciplinary regime came into effect involving:

(a) branch Standards Committees and a national Disciplinary Tribunal, with the ability to enforce standards, including by way of charge against a practitioner. Lay members form a part of those bodies so as to help ensure transparency and public confidence;

(b) a substantially lower threshold for intervention. Standards Committees can uphold a complaint where a practitioner has engaged in "*unsatisfactory conduct*". It appears that that will include quite minor issues that could not previously be the subject of a charge. It will also include a practitioner not appearing at a deposition or substantive hearing when scheduled to do so, or at least failing to make alternative arrangements;

(c) a much wider range of remedies, including censuring, ordering a reduction or cancellation of fees, ordering compensation, requiring rectification of any error or admission, imposing a fine, ordering a practitioner to undergo practical training or education and striking off.

Under the Lawyers and Conveyancers Act 2006, the Society also has a new power to impose a minimum time period before a person can commence practice as a barrister sole. It could previously do so in relation to solicitors only, and a minimum period of 3 years experience was imposed upon solicitors having regard to, amongst other things, trust account requirements and responsibilities which go with those. As an interim measure, the Society has imposed a minimum period of 6 months experience upon barristers, and that period is likely to be increased. The 6-month period will avoid the rare phenomenon of a practitioner commencing practice upon completion of a law degree and the law professionals course, but without further experience.

Firms and practitioners set their own standards and can improve these standards by observing other practitioners, assisting in cases, and undertaking education courses. The vast majority of lawyers try to do the best they can. The Society has a strong continuing legal education focus and runs courses throughout the year directed at maintaining and improving standards.

In relation to Court work, for example, NZLS Continuing Legal Education topics include:

(a) an Introduction to Family Law Advocacy and more specialist family law courses;

(b) an Introduction to Criminal Practice and a more detailed Jury Trial course; and

(c) an intensive one week Litigation Skills course and a further Advanced Litigation Skills course for more senior practitioners.

Some of these courses form part of the criteria that must be met to enable practitioners to undertake legal aid work at a specific level.

It is our understanding that high office overheads and the low legal aid rates have meant that it is increasingly more difficult for practitioners to afford to train young lawyers to do legal aid work; for example for a firm to have an unpaid practitioner sit in for the duration of a Court case, and for practitioners to be able to enrol and take the time off required for Continuing Legal Education courses.

In our view, the combination referred to above provides a strong (and, as a result of the Lawyers and Conveyancers Act 2006, a newly enhanced) ability to regulate lawyers, including legal aid providers. It could be helpfully supplemented by the Agency providing funding sufficient to enable its legal aid providers to undertake a high level of continuing education.

10. *Do you agree with the proposal discussed in paragraphs 55-56 of the paper, under which the court registry would be given statutory authority for recording and reporting on counsel non-compliance with procedural requirements?*

Yes. The efficacy of the standards mechanisms available to the Agency and the Society depend upon alleged unsatisfactory conduct being brought to the attention of those bodies by the legally aided person, a Judge or another appropriate person in a position to do so. The overwhelming majority of legal aid practitioners work hard to deliver a good service, although there are the rare occasions that the Society becomes aware of, either as a result of a complaint or anecdotally, where that has not been the case. When cases of misconduct or unsatisfactory conduct by lawyers are brought to the attention of the Society through the Lawyers Complaints Service, it will respond appropriately.

11. *Are there other mechanisms, not identified in this paper, which could be used to ensure compliance with procedural requirements?*

    No.

The committee hopes that the above comments are of assistance to the Ministry. If you wish to discuss any matters raised in this letter please contact me, or the committee secretary, Rhyn Visser by phone (04) 472 7837 or email rhyn.visser@lawsociety.org.nz.

Yours sincerely

Jonathan Krebs
Convener, Criminal Law Committee