



2 June 2017

Ministry of Justice
SX10088
Wellington

Attention: Nora Burghart, Policy Manager, Courts and Tribunals Policy

By email: Nora.Burghart@justice.govt.nz

Re: Legal aid defence counsel – training and competence requirements in sexual violence trials

Thank you for seeking views from the New Zealand Law Society on a Law Commission 2015 recommendation that the “Legal Services (Quality Assurance) Regulations 2011 should include experience and competence requirements applicable to defence counsel who appear in sexual violence trials on a legal-aid basis” (the recommendation).¹

Overview

The Law Society agrees there is a need for specialist training for defence counsel, including legal aid counsel, who appear in sexual violence trials. This would minimise the risk of oppressive or inappropriate questioning of vulnerable witnesses, whilst ensuring the defendant is able to mount an effective defence. It is also important for the credibility of the pilot Sexual Violence Court that suitably qualified counsel are involved.

For the reasons set out below, however, the Law Society considers that specialist training should be encouraged, rather than being a mandatory prerequisite for appointment as legal aid counsel in sexual violence trials. This could be achieved without any amendment to the current Legal Services (Quality Assurance) Regulations 2011 (the Regulations).

The Law Society is also concerned that the legal profession and other stakeholders have not been adequately consulted about the recommendation. The Commission’s 2015 report was prepared on a tight timetable that precluded public consultation and the Commission therefore did not have the benefit of feedback from the profession on what training might be needed and what form that training should take. The recommendation will be of considerable interest and importance to the criminal bar

¹ *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes*, NZLC R136, December 2015 – Recommendation 26 (r26).

and legal aid lawyers in particular, and if it is to proceed there will need to be proper engagement and discussion with the profession.

Confidential consultation

The Commission's 2015 report was released in December 2015, and subsequently a pilot Sexual Violence Court has been implemented in both Auckland Central and Whangarei. We understand the government is currently considering the Commission's report and recommendations. Notwithstanding that the report is in the public domain, the Ministry has asked for the Law Society's views on the recommendation on a confidential basis, and has made clear it will only consult on that basis. The recommendation has therefore been considered by the Law Society's Criminal Law Committee and Legal Services Committee, whose members are senior and experienced criminal and legal aid practitioners, and the committees' comments are set out below.

However, undertaking this consultation on a confidential basis is highly undesirable. The Law Society's preferred approach is open consultation, as it provides the opportunity for full input from the profession and makes for better policy and legislation. Early, informed consultation with those working in the field helps to ensure effective and workable reforms and an effective justice system. The Law Society also has an obligation to ensure the views of the profession, including those with the relevant expertise and experience, are reflected in its feedback. The Law Society considers that public consultation with relevant stakeholders including the legal profession will be needed if the government decides to proceed with the Commission's recommendation.

Background to the Commission's recommendation r26

In 2012 the Law Commission released an issues paper, *Alternative Pre-Trial and Trial Processes: Possible Reforms*,² which included a *possible reform 3E: Accredited counsel for sexual offence cases*. In its 2012 submission to the Commission,³ the Law Society supported specialist training for counsel undertaking this work but did not support the proposal that counsel (both prosecution and defence) should be accredited, on the basis that:

“Accreditation would affect the accused's ability to choose his or her own counsel. It could also lead to a situation where a QC was prohibited from conducting a trial they are more than capable of doing simply because they are not formally accredited.”

The Law Society maintains that position, and considers the same concern would apply if the training was a mandatory requirement for appointment as legal aid counsel.

The Commission's 2015 report recorded that the Law Society supported specialisation and that “most lawyers we spoke to were amenable to training and education sessions, *if* they were properly

² *Alternative Pre-Trial and Trial Processes: Possible Reforms* (IP30).

³ NZLS submission dated 3 May 2012.

resourced to complete them” (emphasis added).⁴ The Law Society agrees with that statement: adequate resourcing will be essential, as those working in the criminal legal aid area are often under financial pressure. The question of resourcing will need to be addressed if the recommendation is to proceed.

The Commission’s report also noted that:⁵

“... care must be taken with any proposal to require accreditation of defence counsel given the right of defendants to counsel of their choosing.⁶ One might argue that the right is infringed upon if the defendant is limited to a pool of defence lawyers who have completed the necessary requirements to become accredited to appear in sexual violence cases.”

The Law Society agrees this is a valid concern and applies equally to any proposal to introduce a mandatory training requirement for legal aid counsel.

Comments on r26

The recommendation r26 is that the Legal Services (Quality Assurance) Regulations 2011 “should include experience and competence requirements applicable to defence counsel appearing in sexual violence trials on a legal-aid basis”. What form those ‘experience and competence requirements’ would take, and how they would be delivered, is unknown. We note that the proposal, if it proceeds, would also be piecemeal since r26 does not cover privately instructed (non-legally aided) counsel.

The Law Society is supportive of some degree of training and education for counsel undertaking sexual violence trials, for the reasons outlined in the Commission’s report at [5.86] – [5.91]. Sexual violence cases are complex and sensitive, and it can be challenging to manage the tension between ensuring processes avoid re-victimising victims whilst ensuring fair trial rights. Education and training can help to minimise the risk of oppressive or inappropriate questioning of witnesses. As noted in the Commission’s report,⁷ since 2013 all lawyers are required to complete Continuing Professional Development (CPD) and defence counsel appearing in sexual violence cases can be expected to incorporate in their CPD plan training relevant to sexual violence trials.

However, r26 appears to propose a *mandatory* requirement on legal aid counsel – presumably by way of a new subcategory in the Schedule to the regulations (a new PAL3(a) and new PAL4(a), specific to sexual violence trials). This would inevitably reduce the number of legal aid practitioners available to undertake sexual violence trials and would therefore affect the defendant’s right to choose his or her own counsel. Requiring defence counsel in legal aided sexual violence cases to meet mandatory

⁴ Note 1 above, at [5.86].

⁵ Note 1, at [5.92].

⁶ Commission footnote: New Zealand Bill of Rights Act 1990, s 24.

⁷ Note 1, at [5.96].

requirements may also have the effect of restricting senior, experienced counsel from conducting a trial they are more than capable of doing, simply because they are not formally approved.

The Law Society also questions whether it is necessary to make competence/training requirements for defence counsel in sexual violence trials mandatory. We understand that judges in the current pilot Sexual Violence Court intend to maintain judicial oversight of cross-examination of vulnerable witnesses, to ensure questioning is done properly and sensitively. This is an appropriate control mechanism. Any counsel who persisted in inappropriate or oppressive questioning would no doubt face complaints and potential disciplinary consequences.

Lawyers who wish to undertake legal aid work are already required under the current regulations to prove their experience and competence in the relevant area of work. Applicants “must be experienced and competent in each area of law” in which they intend to provide services, and in determining whether applicants meet that standard, the Secretary must –

- (a) apply the relevant experience and competence requirements set out in the Schedule; and
- (b) *take into account the applicant’s experience as a lawyer; and*
- (c) *be satisfied that the applicant has the appropriate level of knowledge and skill ...*⁸

For the purposes of subclause (c), “the Secretary may take into account *any course that the applicant has successfully completed* and that the Secretary considers relevant to an area of law to which the application relates”.⁹

In the Law Society’s view, the regulations as currently worded and the current CPD requirements provide an appropriate platform for requiring defence counsel involved in sexual violence trials to undertake specialist training if they need to do so.

In contrast, r26 if it proceeds would require the regulations to be amended to introduce a blanket requirement for all legal aid defence counsel to undertake training, regardless of whether such training is necessary for the individual practitioner.

Conclusion

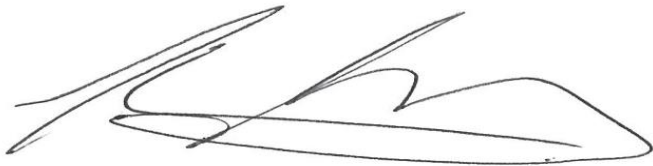
The Law Society in principle supports the introduction of specialist training for defence counsel undertaking sexual violence trials but does not support the introduction of mandatory experience and competency requirements for legal aid defence counsel. If the recommendation is to proceed, there will need to be more information and clarity, and proper consultation with the profession, about what experience and competency requirements are proposed.

⁸ Legal Services (Quality Assurance) Regulations 2011: clauses 6(1) – 6(2), emphasis added.

⁹ Note 8, clause 6(3), emphasis added.

If you have any questions or wish to discuss this submission, please contact the convenors of the Law Society's Criminal Law Committee (Steve Bonnar QC) and Legal Services Committee (Elizabeth Bulger) through the secretary to those committees, Amanda Frank (amanda.frank@lawsociety.org.nz / ddi 04 463-2962).

Yours sincerely

A handwritten signature in black ink, appearing to be 'K. Beck', written in a cursive style.

Kathryn Beck
President