

17 February 2021

Service Improvement Team
Commissioning and Improvement
Ministry of Justice
Wellington

By email: ServiceImprovement-CSI@justice.govt.nz

Tēnā koe

Re: Court-Appointed Communication Assistance – Draft Quality Framework

The New Zealand Law Society | Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to comment on the Ministry of Justice’s draft *Court-appointed Communication Assistance Quality Framework, January 2021 (draft framework)*. The draft framework has been reviewed by members of the Law Society’s Criminal Law Committee whose comments are provided below. The Law Society’s feedback is limited to issues relating primarily to confidentiality and legal professional privilege and other minor matters arising from Chapter 4.

The Law Society supports the development of a quality framework for court-appointed communication assistance to vulnerable witnesses or parties. Given the growing need for communication assistance in court, it is important to ensure there are appropriate controls and oversight mechanisms in place to govern this rapidly changing area of practice. The ad hoc development of processes to facilitate the use of communication assistance in court means the creation of a quality framework is both timely and necessary.

However, the Law Society’s primary concern is around the lack of detail and guidance provided in the draft framework when information of a confidential nature may be disclosed to the communication assistant. This is of particular concern when the communication assistant is assisting a defendant. In the Law Society’s view, information that is disclosed by a defendant (to the communication assistant), during the course of the assessment interview, pre-trial hearings and/or trial, should be subject to legal professional privilege and treated as such. We recommend the Ministry carefully considers this issue and amends the draft framework accordingly.

Overview

The purpose of the draft framework is to ensure “communication assistance is delivered in a nationally consistent manner by well-qualified and well-trained professionals”. It is intended to:

- a. introduce minimum qualifications required to become a communication assistant;
- b. provide for a nationally consistent training programme for communication assistants;
- c. set a nationally consistent process for identifying the need for communication assistance and making an application;

- d. describe how the communication assistance service should be delivered in a court proceeding; and
- e. set a framework for Ministry leadership, contract and relationship management and ongoing service improvement.

The use of communication assistance in court, both in criminal and civil proceedings, is a growing practice and enables a vulnerable complainant, witness or defendant to give evidence. As noted in the draft framework, communication assistance may be required to meet the purpose of the Evidence Act 2006 (**the Act**), namely to “help secure the just determination of proceedings”, including by promoting fairness to parties and witnesses, and protecting rights of confidentiality. Communication assistance may also be warranted to meet the requirements of the Oranga Tamariki Act 1989 and obligations under international conventions such as the United Nation Convention on the Rights of Persons with Disabilities and the United Nations Convention on the Rights of the Child. An appointment by the Court is made under section 80 of the Act and at the direction of the judge.

Recent case developments

Two recent Court of Appeal decisions discuss the role of communication assistance at length.¹ While the substance of those decisions is outside the scope of the draft framework, we mention them here as they will serve as useful guidance for future courts when considering what measures need to be put in place should a communication assistant be involved pre-trial and during trial. For example, in *Aitchison v R*, the Court summarised observations about procedures that had been adopted in lower courts relating to the way evidence of vulnerable witnesses may be adduced, including endorsing the practice of conducting a hearing in advance of the trial so as to provide an opportunity to put in place special measures and to ensure all parties understand those measures.²

Disclosures and issues of confidentiality

The majority of chapter 4 discusses the procedures and processes for undertaking the assessment of a defendant/witness; obligations of the communication assistant should information be disclosed to them during the course of the assessment and/or at the time the communication assistant is engaged; and the role of the communication assistant prior to and during the trial.

While the draft framework (at page 23) briefly addresses the steps a communication assistant should take if information about the case is disclosed to them, we are concerned this guidance is insufficient and does not adequately deal with the risks if confidential and legally privileged information come into their possession. These risks are especially heightened when the communication assistant is assisting a defendant. In the Law Society’s view, information obtained during assisted discussions with counsel and the defendant should be subject to legal professional privilege and treated as such. There is nothing in the draft framework and suggested training that recognises this point nor the legal basis in which the communication assistant can claim privilege, assuming it can be claimed.³

¹ *T v R* [2020] NZCA 626 and *Aitchison v R* [2020] NZCA 657.

² *Aitchison v R*, at [143].

³ For example, legal professional privilege is codified in sections 51 & 56 of the Evidence Act 2006. It is unclear whether a communication assistant would be covered as an ‘agent’ (authorised representative) of the lawyer under section 51(4) and in any event, any change would require legislative amendment.

As discussed further below, during an assessment a responsible third person must be present. Their role is defined in the draft framework as (amongst other things) someone who will “monitor that the substance of the case is not discussed”,⁴ and the communication assistant has an obligation to advise the defendant (or witness) not to discuss the case. However, it is likely this will not always be possible. Any discussion or disclosures about the case itself may have potential evidential value, whether inculpatory or exculpatory. This raises several questions:

- If counsel is present as the responsible third person, are those disclosures then subject to legal professional privilege, given the context and the presence of the communication assistant?
- If counsel nominates the responsible third person, does legal professional privilege extend to what is said during the assessment as if they are their agent?⁵

Further, the draft framework indicates that if the disclosure contains substantive new information about the case, the communication assistant should submit an affidavit that includes a verbatim transcript of the information disclosed.⁶ We suggest this requires further definition. If it is the defendant who discloses substantive new information, this should only occur with the approval of defence counsel. If defence counsel is present as the responsible third person or if a video record has been taken (with agreement of defence counsel), there should be no such mandatory requirement to provide an affidavit. We also recommend that the communication assistant is required to warn the person about the risk of an affidavit being prepared if information is disclosed about the case, before starting the assessment.

One of the responsible third person’s roles is to “follow up on any information about the case that may be disclosed during the assessment”. This is too broad. Following on from our previous comments about disclosures being made during the assessment, if the disclosures relate to anything other than matters directly relevant to the defendant’s communication issues (such as medical notes), we recommend that it should not be followed up by anyone without the approval of counsel for the defendant.

Finally, at page 25, the draft framework states that the communication assistant may be asked to assist during the pre-trial phase by, for example, helping the defendant in interviews with their lawyer. However, the framework is silent on whether the suggested duty to disclose new information from a defendant also arises during such interviews (the framework only covers disclosures made during the assessment interview). This needs to be addressed separately, since that information should not be disclosed by the communication assistant as a matter of course. As noted above, the Law Society considers that such discussions would be legally privileged. Similarly, other communication during the proceedings such as when a witness is giving evidence and the communication assistant is assisting the defendant, should be subject to legal privilege.

Assessment Interview

Responsible third person

Once a communication assistant has accepted a referral from the Court, an assessment interview with the defendant or witness must take place. The purpose of the assessment is to analyse the person’s communication abilities and difficulties and how they will function in a court context. As

⁴ Draft *Court-appointed Communication Assistance Quality Framework, January 2021*, at p20.

⁵ Evidence At 2006, section 51(4) covers an authorised person acting on behalf of the lawyer.

⁶ Note 4 above, at p23.

noted on page 20 of the draft framework, “the assessment should be done with the CA, the person being assessed and at least *one other responsible person present*”.

The draft framework notes that for complainants or prosecution witnesses, the responsible third person could be a police officer or forensic interviewer, and for a defendant, the responsible third person could be defence counsel.⁷ This raises two issues:

- Where it is the defendant that is being assessed and their counsel is unavailable to be the responsible third person, the third person should be selected and/or approved by counsel.
- The draft framework is silent on who the responsible third person should be for a defence witness. This should not be defence counsel as it raises the prospect of defence counsel becoming a witness too. Ultimately, whoever is chosen to be the third person for a defence witness, cannot be associated with the prosecution.

We recommend both issues are clarified in the framework.

Location of the assessment

The draft framework states it is not appropriate for the assessment interview to be conducted in a person’s home, school or workplace “except in exceptional circumstances and where no other option is suitable”. “Exceptional circumstances” is not defined and could include for example, undertaking the assessment interview at the home of the witness/defendant to reduce their level of anxiety. This contradicts the following paragraph which acknowledges that the location of the assessment could induce increased anxiety for the person and decrease their engagement in the assessment process. Given this risk, we suggest that further detail is provided around what may amount to “exceptional circumstances” that warrant an assessment being conducted in the person’s home.

Minor matters

We note paragraph 4.2.3 says “after an application for communication assistance is approved by the judge”. We suggest it would be clearer to say the judge only approves the *referral* for communication assistance. This paragraph could be rephrased to: “After an application for communication assistance is made *and the Judge approves the referral*, the Court Registry Officer will send the communication assistance provider a copy of the application form (see Appendix A). The application form serves as a referral for communication assistance.”

Paragraphs 4.2.2 and 4.2.3 also appear twice on pages 20 and 21 respectively. This will need to be corrected when the framework is finalised.

Oath taken by communication assistant

To prepare for trial, the court will usually hold one or more hearings to set the “rules” for the trial. At this pre-trial (or ground rules) hearing, part of the communication assistant’s role is to clarify when and how they will take their oath. The purpose of the oath is to “ensure the communication assistant can participate freely and ensure confidentiality when either counsel consult the communication assistant over question preparation”. Example wording of the oath is set out in Appendix C of the draft framework. However, the oath provided is focused on assisting a witness/defendant during questioning – where a communication assistant is required to give

⁷ Draft Court-appointed Communication Assistance Quality Framework, at p 21.

assistance to the defendant to understand the proceedings, we recommend the oath is worded differently to cover that task.

Training for legal professionals

The draft framework sets out the roles and responsibilities of relevant participants in the justice system. Legal professionals are stated to have the following responsibilities:

- to be aware of the communication assistance service and when to use it;
- to initiate applications for communication assistance as required; and
- to work with communication assistants to implement the judge-directed special measures and ensure participants can understand proceedings and give evidence.

We have informed NZLS Continuing Legal Education (CLE) Ltd about the draft framework and the need to arrange training for lawyers about the communication assistance service, to ensure those responsibilities are met. Any training will need to be tailored for Crown and Police prosecutors as well as defence counsel, noting that some of the recommended situations where applications for communication assistance are required go beyond the current prosecutorial practice (for instance where a witness is 12 years and younger).

We invite you to get in touch with the Chief Executive of NZLS CLE Ltd, Hellen Papadopoulos (hellen.papadopoulos@lawsociety.org.nz) once the Quality Framework is finalised.

Next steps

If further discussion about these points would assist, please contact the Law Society's Criminal Law Committee via our Law Reform and Advocacy Advisor, Amanda Frank (amanda.frank@lawsociety.org.nz). We look forward to seeing the Quality Framework in its final form in due course.

Nāku noa nā,

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

Tiana Epati
NZLS President