Access to Justice
Āhei ki te Ture

Report of the New Zealand Bar Association
Working Group into Access to Justice

NEW ZEALAND
BAR ASSOCIATION

This report is also available on the internet at the NZBA's website:
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"It is for the profession to play its part, a critical part, in meeting the challenge to provide access to justice for all in our society. To do this, the profession will have to innovate. It will have to be prepared to initiate and engage in debate about these issues and to question, and if necessary change, its current way of doing business."

Justice Winkelmann, "Access to Justice – Who Needs Lawyers" (Ethel Benjamin Address, 2014)

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Introduction

The New Zealand Bar Association (the NZBA) is committed to playing its part to improve access to justice for litigants. This report owes its origins to the NZBA "Access to Justice Working Group" formed in September 2015, and the subsequent work of Professor Christopher Gallavin. The 2015 conference addressed access to justice themes as the rise in self-represented litigants made it evident that reduced legal aid funding and the costs of legal services generally, were impeding access to justice. In 2018, the NZBA has produced this report to update developments and produce a set of recommendations in key areas that we believe the Bar can make a material contribution. We aim to set a benchmark for achievable goals.

The NZBA through its Access to Justice Working Group will monitor progress on the recommendations in the Report and report to the NZBA Council six monthly, and to the wider Association as part of every annual conference. The NZBA asks every member to consider what they can do to assist the Association's goals in this fundamental aspect of the justice system and to contribute to the Association's aim of improving access to justice.

Background

The modern origins of the discussion on access to justice issues can be traced to Lord Woolf's Report delivered in 1996.[1] This was a comprehensive report on access to justice issues impacting the United Kingdom's civil justice system. Lord Woolf was asked to report on options to consolidate the existing rules of civil procedure. The Woolf Report identified six key limitations on access to justice, namely:

(a) Expense in bringing claims;

(b) Delays in processing civil proceedings;

(c) Inequality between wealthy litigants and those with humbler means;

(d) Uncertainty in the costs and length of litigation;

(e) Fragmentation and a lack of clarity in administration of the civil justice system;

(f) The adversarial nature of the system and perceptions that the court did not enforce its own rules.

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[1] See *Access to Justice Final Report*, by the Right Honourable Lord Woolf, Master of the Rolls, July 1996, available online: http://webarchive.nationalarchives.gov.uk/20060214041307/http://www.dca.gov.uk/civil/final/intro.htm Section 1, Overview, para [1], (accessed 30 April 2018).

Following the release of the Report, reforms in the civil justice systems in both the United Kingdom and New Zealand were instigated. The "Woolf Reforms" were designed to improve access to justice by making legal proceedings more responsive, proportionate and certain for parties. Both jurisdictions developed new rules of civil procedure.[2] However, despite continued efforts, the challenges of access to justice remain both in the civil and criminal jurisdictions.

Almost 20 years on, in 2015, the Bach Commission on Access to Justice was established in the United Kingdom.[3] The Commission spent two years reviewing the legal aid system, receiving submissions and producing a final report in September 2017. The goal was to develop realistic but radical proposals for re-establishing the right to justice as a fundamental public entitlement.

The Bach Commission concluded "*the justice system is in crisis*". The most immediate cause for this conclusion, according to the report, is that people were being denied access to legal aid because of excessively stringent scope and eligibility requirements. Further access to justice issues were also found to exist, including insufficient public legal education, shrinking information and advice available within government units and uncertainty about the viability of practice for legal aid practitioners.

The Commission concluded that the problems are so wide spread in the United Kingdom that a new legislative response was required - a proposed "Right to Justice Act". The purpose of the proposed Act was to create a new legal framework that would, over time, transform access to justice, principally by reform of the legal aid system and improving public access to legal information and education.

In New Zealand, on-going access to justice concerns have mirrored those raised by the Bach Commission. In 2014, former Chief High Court Judge and current Court of Appeal Judge, Justice Helen Winkelmann, raised the following serious concerns about access to justice issues arising in New Zealand:[4]

(a) The "*user pays*" approach to litigation, which imposed rising court fees on litigants, even though the outcome of litigation sometimes benefited broader society;

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2 Civil Procedure Rules 1998 (UK) and, in New Zealand, High Court Amendment Rules 1998 and subsequent amendments of the Judicature Act 1908.

3 *The Right to Justice: The final report of the Bach Commission* (September 2017) http://www.fabians.org.uk/wp-content/uploads/2017/09/Bach-Commission_Right-to-Justice-Report-WEB.pdf (accessed 7 July 2018)

4 Winkelmann, H. "Access to Justice – Who Needs Lawyers?" Ethel Benjamin Address, 7 November 2014 www.courtsofnz.govt.nz/speechpapers/WinkelmannJEthelBenjaminAddress.pdf. (accessed 13 July 2018).

(b) The significant reduction in civil legal aid funding created by the low financial ceiling for legal aid eligibility. This has resulted in an increase in the number of people who cannot afford legal representation but are also ineligible for legal aid; and

(c) The resulting increase in unrepresented litigants who are disadvantaged by their lack of knowledge of the law and court procedure and create inefficiencies for the court registry, judges, other parties to the litigation and court users generally.

Her Honour called for the access to justice issues to be addressed, in part, by new pro bono initiatives to assist unrepresented litigants and the unbundling of legal services by lawyers to permit access to more affordable legal services.

Similar concerns have continued to be raised by the judiciary in subsequent years. In 2015, the Chief Judge of the High Court, Justice Geoffrey Venning, also raised serious concerns about access to justice in New Zealand.[5] In March 2016, Justice Stephen Kós, now President of the Court of Appeal, again addressed judicial concerns about access to justice in his paper, "*Civil Justice: Haves, Have-nots and What to Do About Them*".[6] His Honour commented that none of the existing responses to the access to justice gap have stemmed the increasing flow of disadvantaged persons appearing in the Courts.[7]

The Courts have provided information for litigants in person to help them navigate the justice system and to reduce the burden that they might otherwise place on the court system. This has included the Ministry of Justice webpages that explain how to go to court without legal representation.[8] The Courts' efforts in this regard are to be commended but should be supported by other initiatives to ensure access to legal representation or advice, as outlined in our report.

The NZBA recognises that it has an important role to play in continuing to highlight access to justice issues as well as developing solutions.

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5 Venning J "*Access to Justice – A Constant Quest*" Address to New Zealand Bar Association Conference, Napier, 7 August 2015, p2.

6 Justice Stephen Kós, Address to the Arbitrators' and Mediators' Institute of New Zealand and International Academy of Mediators Conference, Queenstown 2016.

7 At p6. See www.courtsofnz.govt.nz/speechpapers/HJK2.pdf (last accessed 17 July 2018).

8 See the Ministry of Justice's website at https://www.justice.govt.nz/courts/going-to-court/without-a-lawyer/

The Goals of this Report

The goals of this report are two-fold:

1. To identify areas of the legal justice system in which the NZBA can contribute to improving access to justice in New Zealand; and
2. To provide realistic and achievable recommendations regarding initiatives that will improve access to justice to which the NZBA can contribute in a meaningful way.

This report identifies four key access to justice areas ("Access Points") in which the NZBA can advocate for change and play our part in the solutions:

(a) Legal aid;

(b) Pro Bono initiatives;

(c) Court Procedures;

(d) New models for barristers' services and fees.

There are of course other worthy areas of investigation that are not covered by this report. These include, by way of example only, Māori and new immigrant access to justice, public legal education tools and on-line dispute resolution options. These will be areas that the Association will contribute to in future.

As recently as August 2018, the Law Council of Australia (LCA) produced the final report of its Justice Project.[9]. This report is described by the LCA as a national, comprehensive review into the state of access to justice in Australia for people experiencing significant disadvantage. We expect this will be a valuable resource for the NZBA in its continued work on access to justice issues in New Zealand, given some common themes are identifiable from the LCA Report.

We note that this report is confined to access to justice issues in the civil courts. The NZBA is aware that similar and other issues arise in the criminal jurisdiction. The NZBA proposes to liaise with interested stakeholders to assist with the identification of and solutions to access to justice issues in the criminal justice system.

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9 Law Council of Australia, The Justice Project: Final Report (August 2018)

Executive Summary

Access Point 1: Legal Aid

Key Findings

The current legal aid system is a material factor impeding access to justice:

- Legal aid eligibility requirements exclude any person who earns over $23,820 per annum. The median income in New Zealand in 2017 was $48,880 (or $23.50 per hour). A large portion of the population do not qualify for legal aid but are equally unable to pay for legal services.
- Legal aid is considered a loan, and repayment is obligatory (even for criminal legal aid). Interest is charged at 8% per annum. Although there are caps on the amount of repayment which are set according to income, in some cases the amount owed can be up to one third of an applicant's annual income. This deters applications by those who are not willing or able to incur such debts.
- The process of application for legal aid is complex with on-going reporting obligations on both the applicant and the provider.
- The applicant is not able to choose their legal aid representative, creating concerns about the right to elect counsel, duplication of costs in new counsel instructed and harm to the client in having to instruct new counsel on sensitive matters involving family, psychological and health issues and other personal factors.

Recommendations

- The NZBA should urgently advocate for improvement to protect reasonable access to legal representation.
- The NZBA should advocate urgently for the establishment of a Working Group to seek improvement to the legal aid regime and protection of access to legal representation. The Working Group is to be comprised of representatives from organisations which represent affected advocates and stakeholders.
- The Group will be tasked with re-assessing the eligibility criteria for legal aid, reviewing the payment levels and fixed-fee steps for providers, the rules relating to selection of legal aid providers and the long-term viability of the system.
- A working group of stakeholders on Legal Aid should include:

- NZBA;
- New Zealand Criminal Bar Association;
- New Zealand Law Society (the Regulator);
- Te Hunga Rōia Māori o Aotearoa – the Maori Law Society Inc;
- Ministry of Justice and/or Legal Aid Services representatives;
- Pacific Lawyers' Association Inc; and
- Community Law Centres.

Access Point 2: Pro Bono Initiatives

Key findings

- There are currently several community-based pro bono access to justice initiatives. However, they are not co-ordinated through any national pro-bono clearing house model and there is a growing demand for pro bono services.
- There is a lack of public knowledge and education about existing pro bono/low-cost initiatives available in the community;
- There is a lack of knowledge within the legal profession about pro bono initiatives and the opportunities for participation.

Recommendations

The NZBA should:

- Provide active support for the Community Law Centre (CLC) and public law pro bono projects, and ensure that barristers are involved in working groups and on CLC/Public Law pro bono lawyer panels;
- Annually promote the CLC pro bono projects with NZBA members and encourage education and participation on pro bono initiatives;
- Host an annual NZBA Pro Bono Function to promote and encourage pro bono work by the Bar;
- Continue to advocate for the long-term option of the establishment of a Pro Bono Clearing House and/or a Public Law Service with both the NZLS and the Government and other relevant stakeholders;
- Consult with its membership on a pro bono criterion for qualification as Queen's Counsel.

Access Point 3: Court Procedures

Key findings

- Court procedures continue to affect the cost and efficiency of resolving litigation. While efficiency in time and cost are desirable, a balance must be struck with the needs of the parties for substantive justice. An incremental and evolutionary approach should be adopted to the amendment of court procedures to address the issues.
- There are several options which may help reduce hearing times by encouraging completion within allocated hearing time. These include:
    - Greater judicial involvement in the assessment of the length of trials;
    - The adoption of a more structured and disciplined process for the use of hearing time, such as those utilised in some arbitral procedures;
    - Consideration of a shorter-trial scheme designed to resolve disputes on a commercial timescale;
    - An initial determination procedure, which would allow litigants to obtain (by way of interlocutory application) a 'first blush answer' from the Court.
- It is time for the courts and/or Parliament to reconsider the 130 year old "general rule" that litigants in person are not entitled to costs (other than out of pocket expenses).
- Electronic filing systems are to be encouraged provided they do not prove too complicated for lay litigants.
- Online courts and other online dispute resolution services have the potential to decrease costs, thereby increasing the affordability of dispute resolution/litigation.
- There is a need to ensure practitioners can operate cost-effectively within the electronic paradigm.

Recommendations

- The NZBA Law Reform Committee should be charged with renewing the discussion with relevant parties about:
    - The need for agreed statements of facts, issues and chronologies;
    - Identification of cases which may not require written briefs and/or submissions;

- Exploring methods for setting hearing time allocations and dates which are observed by the parties to prevent hearings exceeding their allocations.

- The NZBA should continue to advocate for a review of party and party costs for litigants in person by intervening in relevant proceedings at appeal level and engaging with the Rules Committee and Government.
- A Litigation Technologies Committee should be formed by the NZBA to investigate how technology can assist the Bar and access to justice.

- The NZBA should continue its focus on litigation technologies as part of its core training syllabus. It should also continue its co-operation with the courts to advise and train barristers in the use of new technologies as they are rolled out.

Access Point 4: Barristers – Services and Fees

Key findings

- The current emphasis on time billing is a barrier to many parties seeking a lawyer's help.
- New models for provision of legal services and calculation of legal fees may provide opportunities to increase access to justice, including:
    - Unbundled legal services;
    - Value billing/flat fees/contingency fees;
    - Low bono.

Recommendations

The Working Group recommends that:

- The NZBA should consider further the utility of, and demand for, unbundled legal services. In particular, regulatory change may be necessary to assist promotion of this type of service to the profession and the public.

- The NZBA should encourage low or delayed fee models where appropriate. Specific low bono schemes may be a logical extension of pro bono initiatives and the NZBA should support and participate in investigations into the establishment of a low bono scheme.

Access Point 1: Legal Aid

Background

1.1 In 2009, the Dame Margaret Bazley Report, *Transforming the Legal Aid System*[10], prompted the restructuring of the legal aid system and led to the enactment of the Legal Services Act 2011.[11] This resulted in a material reduction in funding for legal aid, demonstrated by the following:

- total legal aid payments have dropped from $157m in 2011 to $137m in 2016 (up from a low of $112m in 2013).[12] [13]
- between 2010 and 2015, there was a 24.9% drop in total criminal legal aid funding approved;[14]
- individual applications for criminal legal aid funding between 2010–2015 dropped by 20.9%;[15]
- between 2010 and 2015, family legal aid funding dropped 14.2% overall; with individual applications dropping by 30.3%;[16]

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10 https://www.beehive.govt.nz/sites/default/files/Legal%20AidReview.pdf (accessed 16 July 2018).

11 The changes and context are summarized in the Legal Services Bill 2010 (189-1) (explanatory note) and contemporaneous media coverage: www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10612187 (accessed 13 July 2018)

12 www.stuff.co.nz/national/crime/10285613/Legal-aid-funding-limits-creating-justice-gap (accessed 13 July 2018).

13 There is an increase in the appropriations vote for legal aid in 2018/2019 of $3.404 million which reflects additional funding required in 2017/2018 to address cost pressures. It should also be noted that the legal aid figures do not include the cost of running PDS, which does a reasonable proportion of the criminal legal aid work in the centres in which it is based. For appropriations figures see https://treasury.govt.nz/publications/estimates/vote-justice-justice-sector-estimates-2018-2019-html#section-17 (accessed 31/08/2018).

14 www.lawsociety.org.nz/practice-resources/research-and-insight/practice-trends-and-statistics/legal-aid-funding-2008-to-2015. Total legal aid expenditure for the fiscal year to date at 1 March 2018 was up 9.5% on the same time in 2017: www.lawsociety.org.nz/practice-resources/research-and-insight/practice-trends-and-statistics/legal-aid-expenditure-up-9-to-1-march-2018 (accessed 13 July 2018).

15 www.lawsociety.org.nz/practice-resources/research-and-insight/practice-trends-and-statistics/legal-aid-funding-2008-to-2015 (accessed 13 July 2018).

16 Ibid.

- total funding for civil legal aid fell between 2010–2015 by 19%, with applications down in the same period by 46.8%;[17] and
- since 2010, the number of legal aid providers has dropped over 26%, to 1852 providers in 2016.[18]

1.2 The Ministry of Justice describes legal aid as follows: [19]

> "Legal aid is government funding to pay for legal help for people who cannot afford a lawyer.
>
> Legal aid is an important part of New Zealand's justice system. It helps people resolve legal problems that may go to court and makes sure that people are not denied justice because they can't afford a lawyer."

1.3 However, steps taken since 2009 to reduce legal aid costs have impacted access to justice and include:

- lowering the income threshold of those eligible to obtain legal aid;
- lowering the value of fees that legal aid lawyers are entitled to obtain; and
- creating constraints in the way that fees are calculated, identified and paid to legal aid providers.

1.4 These legal aid reductions have had the following results:

- a diminution in the numbers of those lawyers willing to become legal aid providers;
- a diminution in the number of legal aid grants that are made, and their quantum; and
- a rise in the numbers of self-represented litigants (also referred to in this report as litigants in person).[20]

1.5 The change to the legal aid system since 2009, has raised concerns about the weakening of the lawyer's role in the courts and individuals' ability to be effectively represented in legal proceedings. Similar legal aid constraints have also been introduced in other jurisdictions.

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17 Ibid. See also: www.stuff.co.nz/national/92113907/legal-aid-bills-skyrocket-but-in-some-cases-no-lawyer-can-be-found-for-kids-in-danger (accessed 13 July 2018).

18 www.lawsociety.org.nz/practice-resources/research-and-insight/practice-trends-and-statistics/legal-aid-providers,-five-years-to-30-june-2016 (accessed 13 July 2018).

19 Ministry of Justice "*Going to Court*" www.justice.govt.nz/courts/going-to-court/legal-aid/ (accessed 28 May 2018).

20 See for example Hon Justice Helen Winkelmann's comments above at n4; and Hon Justice Venning's comments, above n5.

1.6 In 2018, the New Zealand Government increased legal aid spending by $32m to a level of $144m for the last financial year. However, the numbers of civil (and specifically, family) legal aid lawyers is now regarded anecdotally difficult to find, and they grow ever smaller. The population of family lawyers available to do legal aid cases has halved between 2007 and 2016.[21]

The Australian Experience

1.7 In late 2016, the Law Council of Australia launched its campaign *Legal Aid Matters* to urge Australian political parties to increase legal aid funding. The campaign sought an immediate injection of $200 million into the system and an overall increase of $350 million in funding. The Law Council noted that between 2009 to 2014 at least 45,000 Australians represented themselves in court because of a crisis in legal aid funding which equated to over 10,000 people per year being denied representation.[22]

The English Experience

1.8 On 29 March 2018, the United Kingdom Criminal Bar Association voted to stage mass walkouts and refuse new publicly funded cases in protest to the sustained government funding cuts to the justice system.[23] The Chair of the Criminal Bar Association commented "the criminal justice system is desperate, as are [criminal barristers]". The funding cuts in the UK resulted in court closures and the collapse of a series of rape cases because of failures to ensure advocates operating under publicly funded schemes were adequately remunerated for the level of work required to properly review evidence.

1.9 The Bach Commission's final report published in September 2017, called on the UK government to address serious threats to the rule of law, the rights of individuals to representation, and highlighted the urgent need to bring areas of civil justice back under the umbrella of legal aid. The Bach Commission was clear: the unequal provision of legal services, exacerbated by routine cuts to legal aid funds, threatens the rule of law.[24]

The NZBA's role

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21 www.stuff.co.nz/national/92113907/legal-aid-bills-skyrocket-but-in-some-cases-no-lawyer-can-be-found-for-kids-in-danger (accessed 13 July 2018).

22 www.lawcouncil.asn.au/media/media-releases/45-000-people-faced-courts-alone-due-to-legal-aid-crisis- (accessed 16 July 2018)

23 www.theguardian.com/law/2018/mar/29/barristers-vote-to-walk-out-in-protest-at-government-cuts (last accessed 13 July 2018).

24 Above at n3, p5

1.10 Legal representation is a fundamental gateway to fair and substantive access to justice. This report aims to set out the state of legal aid in New Zealand, gleaned both anecdotally and empirically, and to propose steps to begin to address the issue. As the voice of the independent Bar, the NZBA can help to bring stakeholders together to identify ways for reform and ensure that sustainable improvements to legal aid remain on the agenda for New Zealand's justice system.

Legal aid eligibility thresholds and debt repayment obligations

1.11 The Legal Services Act 2011 and Legal Services Regulations 2011 set out the eligibility requirements for legal aid. For a single person with no dependents' to be eligible for legal aid in New Zealand, he or she must earn $23,326 or less for an application made before 1 July 2018, and $23,820 or less for an application made on or after 1 July 2018. There are higher thresholds for applicants with spouses/partners and/or dependents. However, the thresholds are generally low, given the median income in New Zealand in 2017 is $48,880 (or $23.50 per hour).

1.12 The across the board capital threshold is $80,000 equity in a property. The maximum disposable capital threshold in respect of a civil matter is $3500, with an additional $1,500 for a spouse, and each additional child. A couple with more than $5000 in savings is considered wealthy enough to afford legal representation in a civil dispute.[25]

1.13 Legal aid is considered a loan, and repayment is obligatory (even for criminal legal aid). Debt collection is outsourced to a private agency, the costs of which are added to the legal aid debt. Interest on the debt is 8%. While the Legal Services Regulations 2011 create maximum repayment obligations based on income and capital, a single applicant earning at least $26,029 may be subject to a $10,000 maximum repayment obligation, comprising more than a third of their annual income.

1.14 There is no provision in eligibility or repayment calculations to account for basic living necessities, including rent, food, car and fuel payments and other associated costs. Legal aid providers are obliged to inform prospective legal aid applicants of these conditions attaching to legal aid and the risk of becoming indebted to the Legal Services Agency often deters many

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25 Legal Services Regulations 2011, reg 6(2).

applicants from applying. This may account for the consistently downward trend in the numbers of applicants.[26]

1.15 The assessment regime itself adds costs and burdens related to the level of bureaucratic compliance for legal aid. The paperwork for an application for legal aid is significant and means testing is complex, with on-going reporting obligations on both the applicant and the provider.

1.16 The low legal aid thresholds mean there will be large numbers of people who will not qualify for legal aid but who also cannot afford legal services. This issue has recently been neatly summarised in a report by Kayla Stewart and Bridgette Toy-Cronin:[27]

> "This begins with the 'working poor' (characterised by low wages and insecure employment) through to the middle class. For example, New Zealand has record levels of paid employment (meaning likely an income above the legal aid threshold) but this does not necessarily translate to disposable income (to spend on legal costs) or even alleviation from poverty. For example, approximately forty per cent of children in families experiencing financial hardship have a parent in full-time paid employment. When those not eligible for legal aid are asked to resort to funding their own defence, for an increasingly large number of people, this is simply unrealistic – "You can't pay $500 per hour when you earn $500 per week". Most lawyers charge on an hourly basis and the average charge-out rate in 2016 was $292.70 (excluding GST and disbursements). Furthermore, legal services are increasing in price (an increase of over four per cent in 2017 alone), likely making them further out of reach for the ordinary person."

Legal aid fixed fee levels, fee steps and payment of providers

1.17 Legal aid payments operate on a fixed fee per proceeding step basis. There is complexity in determining the steps, what they apply to, how they are calculated, and the recovery rate.[28] Cases considered more complex or difficult may be allocated "fixed fee plus" or "high cost", but most legal aid invoices are paid according to a fee per proceeding step basis.[29] This brings with it some problems.

1.18 The complexity of modern proceedings is evolving – in part because of the expansive documentation accompanying almost all litigation. Email communication alone can lead to

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26 Joychild, F "Continuing the conversation … the fading star of the rule of law" (ADLS, 2015) see www.adls.org.nz/for-the-profession/news-and-opinion/2015/2/5/continuing-the-conversation-%E2%80%A6-the-fading-star-of-the-rule-of-law/. (last accessed 13 July 2018).

27 Stewart, K and Toy-Cronin, B., "The New Zealand Legal Services Mapping Project: Finding Free and Low-Cost Legal Services – Auckland and Otago Pilot Report" (Civil Justice Insight Series: University of Otago Legal Issues Centre, May 2018) at p11 (original footnotes omitted), see https://ourarchive.otago.ac.nz/handle/10523/8054 (last accessed 13 July 2018).

28 The information can be found at: www.justice.govt.nz/about/lawyers-and-service-providers/legal-aid-lawyers/legal-aid-provider-manuals/ (accessed 9 July 2018)

29 There is a specific and limited criterion for discerning where a case may be eligible for fixed fees plus – which permits a provider to obtain her hourly rate of pay. This does not alter the time allocations, however.

large volumes of discovered documents when disputes arise. The extent of disclosure and the burden of reviewing it are not adequately reflected in legal aid proceeding steps. The steps allocate limited hours for practitioners to complete complex and often strategically important steps in a proceeding.

1.19 The High Cost Case allocation metric involves an additional administrative burden, namely to set out intended steps in advance of obtaining funding, to account for those steps, and to provide significant paperwork to Legal Aid Services, with no additional provision for the time it takes to comply with these requirements.

1.20 Practitioners remain obligated to fulfil ethical obligations to their client, which require services that may outstrip the level of remuneration that legal aid will provide. The cost of running a practice is not built into the legal aid funding model. To run viable practices, practitioners must take on fee-paying work alongside legal aid work or accept a very high number of legal aid matters. There are obvious risks that legal aid practitioners may become overworked. There are also issues with the quality of legal services provided to recipients of legal aid if practitioners are not adequately remunerated. This can have particularly adverse implications for legal aid recipients who are faced with well-resourced opponents such as the Crown.

1.21 The allocation of level 1 and 2 criminal providers of legal aid based on certain criminal convictions poses a further threat to the justice system.[30] Legal aid recipients in these circumstances do not have the ability to choose the lawyers that represent them, which can also pose access to justice issues. This can particularly be an issue when the legal aid recipient is a defendant in a criminal matter, or suffers from a psychological or health problem, and is therefore particularly in need of a practitioner with whom the recipient can form a trusting relationship.

1.22 The legal aid system's rotational approach to lawyers through vulnerable and poor communities consolidates distrust and disengagement from the justice system. Many legal aid applicants have been through the system before, and their rapport and trust may have been established with a former lawyer, only to be placed with a new and unknown lawyer another time. Reports from legal aid providers indicate that critical facets of a case, particularly for issues relating to historic abuse, psychological and health problems, and other personal and sensitive factors are discovered too late, or not at all, to be used by an individual's lawyer to their advantage. This can result in less fair outcomes, a lack of trust

30 Criminal legal aid is split into four approval levels – PAL 1 through to PAL 4. These designations are made on the nature of the crime at issue for the individual charged.

from clients of the system and their lawyers, and an undermining of a lawyer's sense of efficacy and hampering their own ability to assist their clients.

Long term viability of legal aid providers

1.23 There are significant concerns surrounding the viability of a justice system that relies on legal aid and pro bono efforts of practitioners to support a sustained funding gap. Lawyers have increasingly self-selected out of legal aid, which is to the detriment to the legal aid profession generally, and specifically to individuals who need high-quality, experienced legal aid practitioners to support them.[31] Experienced senior legal aid providers are limited. In some parts of the country it is "next to impossible" to locate civil or family legal aid providers with the capacity or expertise to run a case.

1.24 Alongside the increasing number opting out of the system, fewer practitioners are becoming legal aid providers because it is financially unsustainable to practice in this area.

1.25 Using junior lawyers to plug gaps in the system is not an answer as it creates dual issues:

- Junior practitioners need guidance and support, and particularly oversight. Consolidating them in the legal aid field forces them to work without oversight and feedback and may place them in lead counsel roles too early. Further, funding realities often prevent extensive junior counsel roles where they can learn from senior counsel. Junior practitioners may find themselves out of their depth to the detriment of both the client and the practitioner.;
- Junior practitioners are the most financially vulnerable members of the profession in the field with the lowest pay and highest hours of work. This creates serious risks for quality and the emotional and financial well-being of the junior practitioner.

Recommendations

1.26 The current legal aid system is contributing to limitations on access to justice. The NZBA should responsibly advocate for improvement to protect reasonable access to legal representation.

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[31] Between 2010 and 2016, there has been a steady decrease in legal aid providers: www.lawsociety.org.nz/practice-resources/research-and-insight/practice-trends-and-statistics/year-on-year-declines-in-lead-legal-aid-lawyers (accessed 12 July 2018)

1.27 A working group should be established to undertake advocacy for improvements to the legal aid system. This working group would comprise representatives from organisations which represent affected advocates and stakeholders who desire change, particularly an increase in funding of and accessibility to the legal aid system. Consultation with the government department responsible for legal aid policy should be undertaken.

1.28 A working group of stakeholders on Legal Aid should include:

- NZBA;
- New Zealand Criminal Bar Association;
- New Zealand Law Society (the Regulator);
- Te Hunga Rōia Māori o Aotearoa – the Maori Law Society Inc;
- Ministry of Justice and/or Legal Aid Services representatives;
- Pacific Lawyers' Association Inc; and
- Community Law Centres.

1.29 This working group should be tasked with assessing the adequacy and sustainability of various current features of the legal aid system. The Terms of Reference should include:

1. Re-assessing the eligibility criteria for legal aid, including:

a) Pegging the income threshold to inflation;

b) Pegging the income threshold to minimum wage levels;

c) Creating specific income carve-outs for living wages (rent and food) and taxes;

d) Lowering the interest rate on debt repayments;

e) Lower the proportion of repayment obligations on all legal aid debt (but especially legal aid grants that carry zero chance of any pecuniary award, such as criminal grants);

f) Remove separate income and capital assessments, and streamline income assessments with existing means-testing measures, such as for benefits;

g) Increase the income threshold across the board, to include more people within the scope of the grants who can pay it back but who still cannot consistently afford legal representation;

h) Assess and critically review the scope of legal aid, particularly in civil and family, and consider whether a larger portion of the civil and family jurisdictions ought to be included in its scope;

i) Consider the utility of automatic eligibility components – for example, making anyone on a benefit or earning minimum wage automatically eligible.

2. Review the payment levels and fixed-fee steps for providers, and the rules relating to selection of legal aid providers:

a) Consider removing rotation requirements in provincial and rural areas;

b) Remove all PAL 2 cases from the rotational programme;

c) Review and overhaul steps and fees in line with market rates and realistic assumptions and expectations of the time and effort invested in specific steps;

d) Improve gradations for the complexity of a case and the subject matter;

e) Explore methods to minimize the administrative burden of providers, including streamlining to reduce document submission, ensuring fit for purpose in terms of means-testing and provider qualifications, and allowing recovery of time spent on administrative compliance.

3. Long-term viability:

a) Oversight requirements – create provision for mentoring and oversight for younger legal aid providers to train and sustain the junior legal aid Bar;

b) Greater funding for junior counsel to work on legal aid matters with oversight by senior counsel;

c) Explore ways to streamline some of the burdens faced by legal aid providers alongside other public justice initiatives, such as community law centres.

1.30 Once the stakeholders' working group has assessed the prospective changes, recommendations should be presented to the Minister of Justice and released to the public. The working group can press for changes to improve access to justice through increases to legal aid funding and changes to the administration of the legal aid system.

Access Point 2: Pro Bono Initiatives

Background

2.1 There are several pro bono initiatives already being undertaken in the New Zealand legal landscape. We have reviewed current key pro bono initiatives and set out below proposals for initiatives that the NZBA is able to assist with to promote and improve access to justice.

2.2 The pro bono initiatives available in New Zealand have also recently been discussed in Kayla Stewart and Dr Bridgette Toy-Cronin's, Legal Services Mapping Project.[32] Stewart and Toy-Cronin conclude that many people ineligible for legal aid are still unable to afford legal services and are therefore dependent on free or low-cost legal services offered to the community. There will be people who are both ineligible for legal aid and for assistance by community organisations, which often have their own income-tested eligibility criteria.[33] Stewart and Toy-Cronin propose a national database of free or low-cost legal service providers and providers of legal information be set up, to help both potential users of those services and to help identify gaps in the services available.

Community Law Centre initiatives

2.3 As at 2018, there are 24 Community Law Centres (CLCs) located around New Zealand.[34] CLCs have staff lawyers as well as around 1,200 volunteer lawyers and additional law student volunteers. CLC lawyers and caseworkers also travel widely to provide services to those who live far away from a CLC and those who are in prison. These CLCs provide individuals with free legal assistance in most civil and criminal matters. Generally, this does not extend to legal assistance with wills, trusts, property, business, employer or landlord disputes.

2.4 As a first step, CLCs conduct face to face or telephone interviews with prospective clients and provide ongoing legal assistance where appropriate. Assistance is only provided to individuals who cannot otherwise afford legal representation and/or are especially vulnerable.[35] Priority is given to those with mental or physical disabilities, who are homeless or who are suffering domestic violence. Legal representation is only provided if there are available resources and the issue is serious, such as loss of income or housing, harm in the home or community or a

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32 Stewart and Toy-Cronin, "The New Zealand Legal Services Mapping Project", above at n27.

33 Ibid, At p2.

34 Community Law "Our law centres" Community Law website http://communitylaw.org.nz/our-law-centres (accessed 23 April 2018)

35 See generally: Community Law "*Am I Eligible?*" http://communitylaw.org.nz/free-legal-help/eligibility (accessed 28 May 2018).

serious social justice issue. Advice is also generally not provided on property or business issues or to landlords or employers.

2.5 In Auckland, the Equal Justice Project, is a further community law resource. It is a student-run organisation operating out of the University of Auckland Law School, providing student volunteers to Auckland based CLCs each year.

2.6 CLCs also provide general legal information, through their websites and several online publications which simplify the law in various areas so that it is easily understood by laypeople. Notably, the Community Law Manual is a comprehensive guide to various areas of the law, which runs to over 900 pages and is republished each year. The 2018-2019 edition will contain information under headings such as "Disability rights", "Neighbourhood life", "Driving and traffic", "Domestic violence", "Dealing with Work and Income" and "Employment conditions and protections". The manual is not free – its advertised price is $72.50 incl GST.[36]

2.7 There are specialist CLCs dealing with disability law (Auckland Disability Law), Maori land law (Maori Law Centre) and youth issues (YouthLaw Aotearoa). Auckland disability law provides free legal services to disabled people on disability-related legal issues and also provides legal education to the community.[37] YouthLaw Aotearoa provides legal services to persons under the age of 25 who meet income eligibility criteria. It provides free legal advice, legal information on their website and via a mobile phone app, and conducts education sessions for and about young people.[38]

2.8 Individual CLCs have coordinated other initiatives, including the Litigant in Person service and the Community Mediations Services pilot. As at December 2017, CLCs act for approximately 53,000 clients each year and achieve an annual return of $50 million in value with only $11 million cost.[39]

Community mediation services pilot

2.9 The Community Legal Services South Trust is a community law centre covering South Auckland and Franklin. The trust launched a community mediation services pilot in October 2017. The pilot relies completely on pro bono services from mediators and lawyers. The Trust aims to

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36 See http://communitylaw.org.nz/resources/bookshop/ (accessed 13 July 2018).

37 Auckland Disability Law "*Welcome to Auckland Disability Law*" http://aucklanddisabilitylaw.org.nz/ (accessed 28 May 2018)

38 YouthLaw "*Free Legal Help"* http://youthlaw.co.nz/free-legal-help/ (accessed 28 May 2018)

39 ADLS "Auckland Community Law Centre – 40 years of providing access to justice" (1 December 2017) www.adls.org.nz/for-the-profession/news-and-opinion/2017/12/1/auckland-community-law-centre-%E2%80%93-40-years-of-providing-access-to-justice/ (accessed 13 July 2018).

assist low income people in resolving civil disputes and receives referrals from the community, police, court staff and local councils.

Auckland Community Law Centre – Pilot Litigants in Person service

2.10 In March 2018, the Auckland Community Law Centre introduced a Litigant in Person Service at the Auckland High Court. A similar service will also be provided in the Auckland Employment Court from April 2018.[40] As at the date of this report, the service is focused on lay litigants in who are debtors in bankruptcy proceedings. The service assists lay litigants through a referral and briefing process which will enable them to have short, on-on-one, meetings with senior legal practitioners. The senior practitioner will provide the lay litigant with guidance and advice about their case, which may include advice on the merits of the case, pleadings, evidence, checking documents prepared by the client, settlement strategy, hearing preparation and conduct of the hearing. The pilot is being launched in consultation with the Auckland High Court Bench.

2.11 The service does not operate as a duty lawyer service, conduct the litigant's proceeding or communicate with the court or the other party on the client's behalf. The service will provide pro bono legal assistance via a panel of legal volunteers. The Auckland CLC will provide the lawyer with a written brief, staff support and a law student volunteer to assist with research, draft file notes and a letter of advice, and with administrative tasks. There is potential for the practitioner advising the litigant to take the case over and be counsel on the record on a pro bono basis if the lawyer consents.

2.12 Eligibility for the litigant in person service is determined based on financial need. The service is provided to those who are not eligible for legal aid but still lack the resources to obtain legal representation. The number of meetings a lay litigant may have will be determined according to the litigant's level of need. Requests for assistance can be made by individuals as well as by referrals from legal service providers and caseworkers.

2.13 The service was introduced as a response to the complexity of bankruptcy proceedings, which mean it is often difficult for litigants in person to conduct cases efficiently and to their advantage. The service is based on successful overseas models and provides a good opportunity for barristers to become involved in providing pro bono assistance.

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40 Aitchison, Darryn "Unlocking potential through the Litigants in Person Service" (2 March 2018) 915 *LawTalk*. See https://www.lawsociety.org.nz/practice-resources/the-business-of-law/pro-bono/unlocking-potential-through-the-litigants-in-person-service (accessed 13 July 2018).

Citizen's Advice Bureaus

2.14 Citizens Advice Bureaus (CABs) provide a wide range of general services to the community and are staffed by trained volunteers. There are more than 80 CABs in New Zealand.[41] The CAB website contains legal information on a range of matters, such as employment, privacy, family law and property law. Some CAB branches offer a free, 10-15 minute consultation with a volunteer lawyer for general legal advice, although the CAB does not offer any further legal representation.[42]

Lawyers and Conveyancers (Employed Lawyers Providing Free Legal Services) Amendment Bill

2.15 A Members' Bill, the Lawyers and Conveyancers (Employed Lawyers Providing Free Legal Services) Amendment Bill, is currently before Parliament. The Bill has not yet had its first reading. Currently, s 9 of the Lawyers and Conveyancers Act 2006 provides that an employed lawyer (including an employed barrister) is guilty of misconduct if he or she provides regulated services to the public outside of his or her employment, with exceptions for services provided through a Community Law Centre or Citizen's Advice Bureau.

2.16 The Bill proposes to amend the Lawyers and Conveyancers Act 2006, to allow a lawyer who is an employee to provide free legal services other than for the lawyer's employer, if it is done with the agreement of the employer and in accordance with practice rules made by the Regulator. The explanatory note to the Bill explains:

> "The aim of this Bill and the associated amendments to the Rules is to improve access to justice without compromising the standards of professional conduct and client care required under the Rules."

2.17 This matter was recently the subject of some debate in the profession. John McLean, Head Counsel of Rabobank New Zealand, argued that s 9 of the Lawyers and Conveyancers Act 2006 significantly limits the ability of employed lawyers to do pro bono work, and that relying on community law centres to conduct litigation work is insufficient.[43]

2.18 While most barristers are self-employed and therefore not subject to the restriction in s 9, employed barristers and those who employ junior barristers are subject to the restriction. If

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41 Citizens Advice Bureau "*What we do*" (accessed 28 May 2018) Citizens Advice Bureau website <http://www.cab.org.nz/aboutus/wwsf/Pages/home.aspx>.

42 For example, the New Lynn centre in Auckland provides 10 minute appointments once a week: Citizen's Advice Bureau "*Services we offer*" http://www.cab.org.nz/acabnearyou/newlynn/Pages/services.aspx (accessed 16 July 2018). See also Stewart and Toy-Cronin, above n27, at p18.

43 McLean, John "Misconduct made easy for in-house lawyers" [2017] NZLJ 303; Letter from John McLean to editor (December 2017) 913 *LawTalk* 44.

the Bill is passed, there will also be greater scope for barristers doing pro bono work to be assisted, on a pro bono basis, by lawyers who are employed by others.

Pro Bono Clearing House proposal

2.19 There has been recent discussion within the New Zealand legal community about whether a Pro Bono Clearing House (PBCH) should be established in New Zealand. A PBCH is a single organisation that collects potential pro bono instructions from referral agencies, reviews the instructions against threshold considerations of suitability and merit, and then allocates the claim to a suitable lawyer. New Zealand is the only Commonwealth country that does not have a PBCH.

2.20 Based on overseas models, a PBCH in New Zealand could be structured as follows:

(a) Firms and individual barristers and solicitors become members of the PBCH by paying an annual fee, which funds the PBCH. Members will be eligible to receive pro bono instructions from the PBCH but can decline instructions. If a member accepts instructions, they will work pro bono but otherwise on their usual terms and under their own insurance. Clients are responsible for any disbursements and security for costs, but the PBCH may help.

(b) Referral agencies such as Community Law Centres, Citizens' Advice Bureaus and social workers may refer clients to the PBCH.

(c) Potential clients would be vetted by a PBCH to meet threshold criteria. The criteria may be that the client's needs cannot be met by other services (e.g. legal aid), the client has insufficient resources to access representation themselves and the claim appears to be one a rational self-funding litigant would bring or is otherwise in the public interest.

(d) The PBCH may match clients that meet the threshold criteria to a PBCH panel lawyer with appropriate experience.

2.21 A PBCH would enable interested and suitably qualified lawyers to do pro bono work. This would assist in providing access to justice for litigants who genuinely cannot afford representation but do not qualify for legal aid. It also allows non-profit and charitable/community organisations – which are ineligible for legal aid – to bring public interest litigation.

2.22 A PBCH model may also take the strain off existing Community Law Centres, who currently operate as the sole source of pro bono assistance, particularly when complex litigation is

involved. A PBCH would provide a centralised system to be accessed by all community organisations and lawyers when potential pro bono clients approach them.

2.23 However, there is currently a lack of government funding or support for the establishment of a full-scale PBCH. The Regulator has also declined to pursue this option when it was raised by the NZBA in 2016- 2017. Currently, the Ministry of Justice and NZLS prefer to support existing CLC pro bono initiatives.

Public Law Service initiative

2.24 In February 2018, a working group including representatives from CLC's, NZLS and the NZBA was set up to prepare a feasibility report on establishing a Public Law Service, to be run through CLCs. The focus of the Public Law Service would be to take cases of broad public interest, rather than focusing on providing legal services to those who cannot afford them. It is envisaged that such cases might set precedents which would be valuable to vulnerable or disadvantaged communities in general.

2.25 The proposed Public Law Service would operate on the following basis:

- receive referrals of possible public interest cases from sources such as CLCs;
- operate a panel to assess whether referrals meet threshold criteria of being in the public interest;
- refer suitable cases to a team of lawyers who can provide advice and/or take the case to a hearing.

2.26 Cases would generally be taken on a pro bono basis unless some form of litigation funding or contingency arrangement can be secured.

2.27 The Service would also provide general legal information to the public on public interest matters and provide legal assistance to those sectors of the community currently not adequately serviced.

2.28 The initial services it is envisaged that the Public Law Service would provide are:

(a) Housing Advocacy Services, to be established through CLCs, to provide legal advice and advocacy services relating to housing e.g. disputes with landlords, issues relating to obtaining government housing benefits.

(b) Assisting CLCs with the development of resources for litigants in person.

(c) Maintaining a Public Law Clearing House to co-ordinate lawyers willing to volunteer their time to public interest law cases.

Proposal for mandatory pro-bono work for lawyers

2.29 Currently, the New Zealand legal community does not have any requirement for a mandatory pro bono contribution. Consideration could be given to requiring firms, solicitors practising on their own account and barristers to complete a modest number of pro bono hours per year as a condition of holding a practising certificate.

2.30 This requirement could be monitored and promoted in a similar way to Continuing Professional Development requirements. The possibility of mandatory pro bono work has been a topic of discussion in the United States and Australia, although it has not been adopted in those jurisdictions.[44] New York State requires that candidates for admission to the Bar must have completed at least 50 hours of pro bono work before being admitted. Voluntary national targets for pro bono hours have also been instituted in Australia to encourage law firms to conduct pro bono work.[45]

2.31 Alternatives to a mandatory pro bono requirement include:

- setting voluntary targets for large firms,
- creating a pro bono criterion for appointment as Queen's Counsel;
- Law Schools introducing more structured pro bono programmes through which students can earn academic credit for pro bono work (see below).

2.32 In the United States, many law schools offer clinics run by academic staff or practitioners which focus on taking public interest cases or cases for individuals who cannot afford legal representation, and academic credit is given to students. The clinics include employment law clinics, domestic violence clinics, immigration law clinics and disability law clinics.[46]

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44 See, for example: Ronald D Rotunda "Forcing Lawyers to Perform Pro Bono Services" (18 July 2016) Verdict verdict.justia.com/2016/07/18/forcing-lawyers-perform-pro-bono-services (accessed 13 July 2018).

45 Caneva, L. "Lawyers Reach Pro Bono Target for First Time in Five Years" Pro Bono Australia (11 October 2016) probonoaustralia.com.au/news/2016/10/lawyers-reach-pro-bono-target-first-time-five-years (accessed 13 July 2018).

46 See, for example, the Clinical Program offered at Harvard Law School (hls.harvard.edu/dept/clinical/clinics/), and at Columbia Law School (https://www.law.columbia.edu/experiential/clinics) (both accessed 16 July 2018).

2.33 If something similar were introduced in all the New Zealand law schools, practitioners interested in taking pro bono cases could apply for assistance from law students through their law schools. At Canterbury Law School, a Clinical Legal Studies course has been introduced, part of which involves assisting CLCs and lawyers acting on a pro bono basis with cases.[47] This course could provide a model for similar courses in other law schools. There are already student-led pro bono organisations at some New Zealand law schools – including the Equal Justice Project at the University of Auckland and the Wellington Community Justice Project at Victoria University – and any formal course offering could be developed by universities with the assistance of those organisations.

Pro Bono criterion for Queen's Counsel appointment

2.34 The current criteria for appointment of Queen's Counsel in New Zealand are as follows:[48]

- Excellence: this is the overarching requirement. The standard for appointment is high and, in most cases, requires considerable length and depth of experience.
- Knowledge of the law: expert, up to date, legal knowledge.
- Oral and/or written advocacy: superior skill in oral and/or written persuasive argument, including presentation and testing of litigants' cases.
- Independence: the ability to devote him or herself to the client's interests, free of other influences.
- Integrity and honesty in all dealings with clients, the judiciary and fellow practitioners.
- Leadership in setting and maintaining the standards of the profession.

2.35 The Queen's Counsel application form asks candidates to outline how they meet the appointment criteria. While leadership at the Bar will often include reference to pro bono services, it is not a formal requirement.

2.36 If the New Zealand criteria were to include pro bono service and/or a commitment to access to justice in the Queen's Counsel qualification process, this would be another way in which the legal profession and the Bar could demonstrate a commitment to access to justice.

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47 University of Canterbury "Clinical Legal Studies" http://www.canterbury.ac.nz/courseinfo/GetCourseDetails.aspx?course=LAWS386&occurrence=18S1(C)&year=2018 (accessed 13 July 2018); McCarty, M. "*Mandatory pro bono work for students: It's not all bleeding-heart liberal stuff*" NZ Lawyer (30 May 2014) www.nzlawyermagazine.co.nz/news/mandatory-pro-bono-work-for-students-its-not-all-bleedingheart-liberal-stuff-188174.aspx (accessed 13 July 2018)..

48 "Queen's Counsel – Guidelines for candidates 2017" at www.crownlaw.govt.nz/assets/Uploads/QC-Guidelines-2017.pdf (accessed 13 July 2018).

2.37 Furthermore, this would provide an opportunity for senior counsel to work with junior barristers on pro bono projects and thereby provide juniors with experience and supervision.

Conclusion on pro bono initiatives

2.38 There are several pro bono and low-cost initiatives available in the community. However, a lack of centralised coordination means that people may not necessarily be aware of what is available. Similarly, practitioners who are interested in assisting on a pro bono basis, or with matters of public interest, may not be aware of how best to do so.

2.39 Barristers should be encouraged to take part in these initiatives, both to ensure they remain viable and because of the ability of many members of the Bar to provide high quality assistance in litigation matters.

2.40 The NZBA can assist with pro bono work by encouraging Barristers to volunteer for, or otherwise support community initiatives providing low cost and pro bono legal services.

Recommendations

2.41 The NZBA should:

- provide active support for the Community Law Centre/Public Law pro bono projects, and ensure that barristers are involved in working groups and on CLC/Public Law pro bono lawyer panels;
- annually promote the CLC pro bono projects with NZBA members and encourage participation with articles or interviews of interest;
- host an annual Pro Bono Function and invite relevant speakers to promote and encourage pro bono access to justice work by the Bar;
- explore proposals for mandatory pro bono practising requirements and a separate pro bono criterion for qualification as Queen's Counsel;
- advocate for the establishment of a Pro Bono Clearing House and/or a Public Law Service with both the NZLS and the Government and other relevant stakeholders.

Access Point 3: Court Procedures

Background

3.1 Court procedures affect the cost and time efficiency of resolving litigation, and therefore have access to justice implications.[49] In theory, the less bureaucratic and more flexible the procedure, the less expensive and the more time efficient it is, and therefore the more accessible the procedure. But that theory does not always hold true. Lack of rules, or overly flexible rules, can lead to a reduction of control over litigants by the courts and permit gaming of the system leading to elongation of proceedings. On the other hand, overly rigid rules as to time or procedure can lead to injustice or unfairness.

3.2 While efficiency in time and cost are desirable, a balance must be struck with the needs of the parties for substantive justice. Accordingly, court procedures are a carefully crafted balance between flexibility, prescriptiveness, speed, cost and quality of justice. The ongoing work of the judiciary in finding this balance is to be commended.[50]

3.3 Several parties are involved in striking this balance: the judiciary, Ministry of Justice, the legal profession and the public. The Bar plays a part in amending court procedure through its representation on the Rules Committee, submissions on key legislation or other initiatives (such as the Court led Review of the Senior Courts Electronic Document Protocol) and, when appropriate, direct discussion with Heads of Bench, the Attorney-General, the Solicitor-General and the Minister of Justice.

3.4 Fundamental or wholesale change to court procedure has proven in the past to be a difficult exercise, both in New Zealand and overseas, at times resulting in uncertainty and conflicting rules. An incremental and evolutionary approach should be adopted to the amendment of court procedures to address issues of time, efficiency, transparency, cost effectiveness, the quality of justice and the understanding of the processes of our courts.

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49 The authors emphasise that this report, and particularly this section, deals with civil/commercial procedure in the High Court and does not address other court procedures. However, some of the initiatives discussed in respect of civil procedure may apply equally or in part to procedure in other areas of law and other courts.

50 See for example the measures outlined by Hon. Justice Venning, above at n5 pp 8 – 12.

3.5 Procedural matters worthy of review are:

- the need for mandatory agreed statements of issues, facts and chronologies;
- the need for written briefs and submissions; and
- certainty of completion of hearing within allocated hearing time.

3.6 These matters are discussed in turn below.

Agreed statements of issues, facts and chronologies

3.7 Statements of agreed facts and issues are not mandatory, although regularly required.[51] Plaintiffs are required to file a chronology and defendants to respond to it.[52]

3.8 Anecdotal evidence is that the time taken to negotiate such documents outweighs their usefulness. Common ground and the issues in dispute invariably emerge during a hearing and effective counsel will demarcate agreed facts from disputed ones and present the bench with a chronology and a statement of issues where that may be helpful. Whether such can be agreed ought perhaps to be left to counsel in most situations.

3.9 The requirement for such agreed statements/chronologies ought to be discussed with the Rules Committee to determine the extent to which these documents are needed.

Written briefs and submissions

3.10 The exchange of briefs of evidence and written submissions have introduced additional cost, but opinion differs as to their utility and value in the process. However, removing written briefs and/or submissions would have a fundamental effect in terms of cost and time, as well as natural justice and the workload of the judiciary and court staff. This approach is therefore not recommended.

3.12 Oral evidence directions have the potential to ameliorate the need for written briefs in appropriate cases,[53] although little is known about the frequency of use of such directions, or the types of cases in which such directions have been deployed. A written synopsis limited to

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51 High Court Rule 9.10.
52 High Court Rules 7.39 and 9.16, respectively.
53 High Court Rule 9.10.

10 pages is required for defended interlocutory hearings and for opening addresses.[54] There are no rules relating to closing submissions.

3.13 The judiciary should be consulted as to whether enough focus is given to identifying cases which can be fairly and efficiently dealt with in the absence of written briefs and/or submissions or made subject to page limits. Guidelines on appropriate cases (e.g. based on length of hearing or quantum) could be developed. Case management conferences could place a greater focus on the necessity for, and length of, written briefs and submissions.

Completion within allocated hearing time

3.14 A significant cost of litigation is the actual hearing time. Parties (and counsel) have a large degree of freedom in assessing the anticipated duration of a hearing, with few repercussions if they get that estimate wrong. Adjournments part heard can involve significant additional cost, as can hearings that are needlessly long. Hearing fees are charged on a daily basis and are a significant cost of litigation (currently $1600 per half-day beyond the first half-day).

3.15 Greater judicial involvement in the assessment of the length of trials could perhaps mitigate this problem, although responsibility falls mainly on the parties and counsel.

3.16 The adoption of a more structured and disciplined process for the use of hearing time, such as those utilised in some arbitral procedures, could assist the efficient disposal of hearings. Time can be fixed for each step in the trial process or divided equally between the parties to use as they wish, but with no (or very limited) room for extension.

3.17 A shorter-trial scheme designed to resolve disputes on a commercial timescale, such as that currently being trialled in England and Wales, should also be considered. This uses the same judge from beginning to end of the proceeding and limits trials to four days, with judgment delivered within six weeks of conclusion of the trial.[55] This streamlined procedure is not mandatory and claimants are required to "opt in". However, more flexible trials are encouraged by the judiciary in appropriate cases, allowing for a simpler and speedier trial, where both sides agree.

3.18 Another potential improvement would be an initial determination procedure, which would allow litigants to obtain (by way of interlocutory application) a 'first blush answer' from the

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54 High Court Rules 7.39 and 9.16, respectively.

55 For further information see J. Hyde 'High Court Scheme Brings in One Year Litigation Target' (1 October 2015) *Gazette*, The Law Society: available online at www.lawgazette.co.uk/law/high-court-scheme-brings-in-one-year-litigation-target/5051321.fullarticle, (accessed 16 July 2018).

Court. The decision will have cost consequences to deter the continued pursuit of cases adjudged unmeritorious at the 'first blush' stage. If a party loses the initial determination but proceeds with litigation and loses the ultimate litigation as well, there would be a rebuttable presumption that the costs from the initial determination would be assessed on a solicitor-client basis rather than scale.

3.19 The potential utility of an initial determination procedure like this is based in a key lesson from interim relief applications, namely, that the outcome of such applications is often determinative of the proceeding.

Court Fees

3.20 In his address to the 2015 NZBA Annual Conference,[56] the Chief Judge of the High Court, Justice Venning, commented that litigants face significant costs in bringing their cases to the Court. The Judge noted that although court fees contribute no more than 15 percent towards the actual costs of operating the courts, a market driven approach to the increasing cost of providing public services has in real terms led to a significant increase in Court fees over the last 20 years. As His Honour commented:

> "The economist's argument that the tax payer should not be subsidising the resolution of civil disputes between individuals overlooks the importance of the judgments of the Courts in the civil area. Judgments of the courts do not merely provide private benefit."[57]

3.21 The Judge also remarked that Court judgments are important for the regulation of society and commerce. Although alternative dispute resolution (ADR) may be available, this cannot substitute for the certainty provided by a court precedent.[58]

Costs Awards - the litigant in person

3.22 Since at least the 1884 case of *London Scottish Benefit Society v Chorley,*[59] litigants in person have not been entitled to costs, other than out of pocket expenses. The NZBA considers that it is time for the courts and/or Parliament to reconsider this 130 year old "general rule" ("the rule").

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56 Above at n5
57 Ibid, at p3.
58 Ibid.
59 *London Scottish Benefit Society v Chorley* (1884) 13 QBD 872

3.23 The United Kingdom (by legislation in 1975)[60] and all common law jurisdictions in Canada (by judicial intervention beginning in 1995)[61] have rejected the general rule and award costs to successful litigants in person to reflect the time and effort involved in the preparation and presentation of their case (but not for the time and trouble that is an inherent part of being a litigant, represented or unrepresented). Australian law reform bodies over many years have also recommended that litigants in person be eligible for costs in addition to out of pocket expenses,[62] as did a New Zealand Rules Committee Discussion Paper in 2001.[63] Professor Andrew Beck has advocated for New Zealand to follow Canada and the United Kingdom in recent articles in the New Zealand Law Journal.[64]

3.24 The rule is based on the premises that:

a) the purpose of costs is to indemnify the successful party for legal costs incurred; and

b) it is too difficult to quantify the costs of a successful litigant in person.

3.25 However, the expanded purposes of modern costs regimes and the development of a set of flexible but established court rules for quantifying costs ameliorate the strength of the rationales for the rule. The modern purposes of costs are broader than simple indemnification for outlay on litigation. They also include:[65]

a) assisting efficient resolution of litigation by promoting settlement;

b) encouraging the responsible and efficient conduct of cases; and

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60 Litigants in Person (Costs and Expenses) Act 1975 s 1(1). Under this legislation, costs (excepting disbursements) were capped at two-thirds of the amount allowed had the litigant in person been legally represented. Subject to that limit, the present Civil Procedure Rules permit costs to a litigant in person on the basis of costs that would have been allowed if the work had been done by a legal representative on the litigant in person's behalf.

61 *Skidmore v Blackmore* (1995) 122 DLR (4th) 330; *Fong v Chan* 181 DLR (4th) 614; *232 Kennedy Street Ltd v King Insurance Brokers (2002) Ltd* [2009] ILR 1-4799; *McBeth v Dalhousie College and University* (1986) 10 cpc (2d) 69, 26 DLR (4th) 321 (Nova Scotia); *Dechant v Law Society of Alberta* 2001 ABCA 81 (Alberta); *Hope v Pylypow* 384 DLR (4th) 255; *Cabana v Newfoundland and Labrador* 401 DLR (4th) 113.

62 Law Reform Committee of South Australia, *Relating to the Award of Costs to a Litigant Appearing in Person* (Report 29, 1974); and Australian Law Reform Commission, *The Unrepresented Party* [1996] ALRCBP 4.

63 Rules Committee Discussion Paper: *The Award of Costs to Unrepresented Lay Litigants* (Courts of New Zealand, 26 July 2001).

64 Andrew Beck, *Who Gets Costs? The Plight of the Unrepresented* [2017] NZLJ 281; and *Costs and the Unrepresented – Again* [2018] NZLJ 87.

65 *Hope v Pylypow* 384 DLR (4th) 255 per Richards CJ at [55] – [57]; *Skidmore v Blackmore* (1995) 122 DLR (4th) 330 at [37]; and *British Columbia (Minister of Forests) v Okanagan Indian Band* [2003] 3 SCR 371 at [19]-[26].

c) facilitating access to justice by persons who might not otherwise be able to afford to have a dispute resolved.

3.26 The rule serves to "skew"[66] the adversarial litigation system against a person exercising her or his right to self-represent, and in favour of those with resources to engage counsel. The Chief Justice of Saskatchewan explained the inequities that arises from the rule this way:[67]

> "The second shortcoming of the existing approach to costs awards for self-represented litigants in this province is that it creates inequities. As is self-evident, it puts an individual who does not have counsel in the difficult position of being unable to take advantage of the costs features of the Rules while leaving that same individual liable to pay costs if his or her claim is ultimately unsuccessful. On the other hand, the existing regime effectively inoculates a litigant facing a self-represented party against any risk of an unfavourable costs award. This two-sided dynamic serves to skew the cost-benefit equation that all litigants must consider when contemplating litigation or when evaluating a settlement opportunity."

3.27 These inequities arguably breach section 27 of the New Zealand Bill of Rights Act which ensures that every person has a right to the observance of principles of natural justice. Equal treatment of participants is a core principle of natural justice. A person's right to equal treatment before the courts is also a tenet of the International Covenant on Civil and Political Rights, to which New Zealand is a signatory.[68] Another Canadian judge explained the access to justice concerns created by the rule as follows:[69]

> "… to hold an unrepresented litigant liable for costs while not offering the benefit of costs is unjust. Unrepresented lay litigants find themselves at tremendous disadvantage as soon as they enter the legal system against represented parties … To additionally disadvantage those least able to afford a lawyer by holding them liable for costs, which they themselves would not be entitled to, creates a double disadvantage. The courts should be loath to promote such inequality."

3.28 The problems of quantification of opportunity costs of litigants in person is contrary to the principle of predictable and expeditious determination of costs but not insurmountable, particularly given that proof of the financial cost (direct or opportunity) of litigation to a litigant is not necessary under modern costs rules such as exist in New Zealand and Canada. Modern costs rules expressly disregard the costs actually incurred by a party and place a prescribed value on each step in the litigation process, through the application of schedules

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66 per Richards CJ in *Hope* at n65 above

67 per Richards CJ in *Hope* at n65 above at [57].

68 *Cachia v Hanes* (1991) 23 NSWLR 304 at 312; (1994) 179 CLR 403 where in his dissent from the NSWCA decision Kirby P held that the principle of equality in the ICCPR required all lay litigants to be entitled to costs.

69 *Shillingford v Dalbridge Group Inc* [2000] 5 WWR 103, 268 AR 324, 42 CPC (4th) 214 (QB) at 115 per Perras J.

which account for the complexity of the proceeding. Quantification of lay litigant costs is dealt with in Canada using the scale tariff and the court's residual discretion: [70]

> "Provided the self-represented litigant can demonstrate that he or she expended time and effort of the type that legal counsel would have done, the litigant should as a general rule be entitled to receive an amount also calculated according to the tariff. This has the merit of exposing the represented litigant on the other side to a similar level of financial risk as that to which the self-represented litigant would be exposed. …"

3.29 There is no empirical evidence that awarding costs to litigants in person will not open the floodgates to unmeritorious litigation. It is unlikely, given the vicissitudes of litigation, that litigants in person would be motivated by the hope of costs awards as if it were a profit-making exercise. Further, costs may be reduced or refused based on the conduct of successful litigants, including any excessive burdens placed on the Court and/or opposing parties.[71] There are also other well-known procedures devoted to weeding out and discouraging meritless claims and defences or vexatious conduct: e.g. strike out and summary judgment applications, Calderbank letters, unless orders, and contempt of court.

3.30 The Association recently appeared in the Supreme Court as an intervener in the case of *McGuire v Secretary of Justice.*[72] It argued that as a matter of principle, costs awards in accordance with the High Court Rules ought to be available to successful litigants in person to compensate for the opportunity costs of preparing and presenting a successful case.

3.31 The NZBA considers that, perhaps with some minor changes, the present costs rules in Part 14 of the High Court Rules are sufficiently broad to permit the award to, and quantification of, costs to successful litigants in person in appropriate cases. Accordingly, it will continue to advocate for change through the courts or by legislation to recognise the availability of costs awards for self-represented litigants as in Canada and the United Kingdom.

Electronic Filing

3.32 It is inevitable that soon all court documents will be communicated and handled through electronic means. Alterations to the rules of various courts to assist parties to proceedings and the courts to make better use of electronic means of communicating and handling documents should be designed to make court processes easier and cheaper to use.

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70 *Cabana v Newfoundland and Labrador* 401 DLR (4th) 113 at [39].

71 See for example HCR 14.7.

72 SC22/2018 heard on 1 August 2018. At the time of the writing of this report, judgment has not been issued.

3.33 It is common practice in all Courts to file memoranda electronically, which greatly improves the efficiency of day to communication between the Bar and the courts. The Senior Courts have adopted an Electronic Documents Protocol (currently under review as at July 2018). The protocol is a guideline to be used by counsel and the Courts and intended to encourage and facilitate the use of electronic documents for civil cases in the High Court, Court of Appeal and Supreme Court. The Court of Appeal has also implemented an Electronic Document Practice Note. [73] Yet some courts, including the Supreme Court, insist on originals (as opposed to pdfs) of submissions, applications, memoranda and affidavits, which amounts to an additional obstacle and cost to litigants for little apparent benefit.

3.34 Progress in electronic filing is largely a matter for the Ministry of Justice and Department for Courts. Acceptable initiatives require capable and robust technology. The NZBA can only play a supportive role by offering constructive proposals, encouragement and comment.

3.35 In general, the Bar supports developments that permit electronic filing and service of documents, the use of electronic signatures, and document search-ability.

3.36 The NZBA should set up a litigation technologies committee to liaise with the relevant stakeholders to consult on their initiatives from the perspective of the Bar and to foster progress that meets access to justice objectives.

Online courts and other dispute resolution services

3.37 The possibility of online court hearings as opposed to mere online filing and associated procedures has been discussed in an article by Dr David Harvey, a former District Court Judge and Director of the New Zealand Centre for ICT Law in the Faculty of Law, University of Auckland. [74] In his article Dr Harvey outlines English proposals for the establishment of a three-tier system initially based around the work of Professor Richard Susskind for low value civil claims. This proposal approached a hearing as a last resort rather than the ultimate goal. Professor Susskind's 2015 suggestions were quickly picked up and developed in a report by

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73 Also see the analysis in *Regulatory Impact Statement: Enabling Service Transformation in Courts and Tribunals* at www.justice.govt.nz/assets/Documents/Publications/Regulatory-Impact-Statement-Enabling-Service-Transformation-in-Courts-and-Tribunals.pdf (last accessed 12 July 2018).

74 Harvey, D '*On-Line Courts in Civil Proceedings*' At the Bar (September 2016) at p13.

the JUSTICE group [75] These reports gave rise to a review commissioned by the Lord Chief Justice and Master of the Rolls (the Briggs' Report).[76]

3.38 Globally there are several online dispute fora. In New Zealand the CODR initiative is attempting to bring the private sector into the world of online dispute resolution. [77] These do not have the status of courts but are aimed at giving parties an effective means of resolving civil disputes.

3.39 Online dispute resolution initiatives have the potential to resolve disputes in an efficient, cost effective and fair way. The proposed litigation technologies committee should be tasked with keeping abreast of and advocating for the Bar and access to justice issues with respect to the opportunities that new technology offers.

3.40 A key factor in the success of these alternatives will be practitioners being willing to engage with the technology. The NZBA can and does offer training in litigation technologies. This is a central party of its training syllabus and is integrated into the way it delivers workshops and practical training. This should continue to be a key focus of training programmes to ensure that practitioners operate in a timely and highly cost-effective manner.

3.41 The NZBA already co-operates with the judiciary in delivering its practical training. It is for example liaising with the Court of Appeal on training on the use of the courts' ClickShare technology. This partnership with the judiciary is critical to successful training.

Recommendations

- The NZBA Law Reform Committee will be charged with renewing the discussion with relevant parties about:
    - The need for agreed statements of facts, issues and chronologies;
    - Identification of cases which may not require written briefs and/or submissions;

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75 Chaired by the Rt. Hon. Sir Stanley Burnton, see, JUSTICE "Delivering Justice in an Age of Austerity" (April 2015) http://2bquk8cdew6192tsu41lay8t.wpengine.netdna-cdn.com/wp-content/uploads/2015/04/JUSTICE-working-party-report-Delivering-Justice-in-an-Age-of-Austerity.pdf, available online, last accessed 13 September 2016.

76 Lord Justice Briggs delivered his final report on 27 July 2016, see www.judiciary.gov.uk/civil-courts-structure-review/civil-courts-structure-review-ccsr-final-report-published/, available online,(last accessed 12 July 2018).

77 http://www.mscnewswire.co.nz/newsline/item/2138-former-solicitor-general-michael-heron-qc-to-set-up-an-online-dispute-resolution-service.html. The website address for CODR is http://www.codr.co.nz/.

- Exploring methods for setting hearing time allocations and dates which are observed by the parties to prevent hearings exceeding their allocations.

- The NZBA should continue to advocate for a review of party and party costs for litigants in person by intervening in relevant proceedings at appeal level and engaging with the Rules Committee and Government.

- A litigation technologies committee should be formed by NZBA to investigate and make submissions on how technology can assist the Bar and access to justice.

Access Point 4: Barristers' Services & Fees

Background

4.1 New models for provision of legal services and calculation of legal fees may provide opportunities to increase access to justice. Various models and programs have been developed in common law countries to permit those without means, or with insufficient means, to conduct meritorious litigation. Most, if not all, of these developments cover the legal profession more generally, as opposed to only the Bar and work in the courts.

4.2 Any promotion of these developments by the NZBA would necessarily occur in conjunction with other stakeholders such as the Regulator, the judiciary, and the Ministry of Justice.

Unbundled legal services

4.3 Unbundled legal services are the provision of limited assistance to a litigant, on a discrete aspect of their case, with the expectation that they will otherwise be litigating in person. Representation is offered for only particular aspects of the case, for example: drafting pleadings or affidavits (ghost writing), advice on grounds of appeal, negotiation, strategic advice, legal research, coaching, or appearing in court.[78]

4.4 The advantages of effective unbundled services are:

- provision of access to legal assistance for people who can afford some legal services but cannot afford to pay a lawyer to take full carriage of the matter (or who cannot pay without creating financial hardship);
- help to alleviate the burden litigants in person are thought to place on the courts and opposing parties (litigants are better equipped to litigate in person or represented at strategic moments in the case);
- tap into a market of people who can afford some legal assistance but cannot afford full carriage and who would otherwise be unrepresented;

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78 Bridgette Toy-Cronin "Just an hour of your time? Providing limited (unbundled) assistance to litigants in person" (24 March 2016) 884 LawTalk 20; See also New Zealand Law Society "Practice Briefing: Guidance to Lawyers Considering Acting Under a Limited Retainer" (4 February 2016) at 4 https://www.lawsociety.org.nz/practice-resources/practice-briefings/Guidance-to-lawyers-acting-under-a-limited-retainer.pdf (accessed 16 July 2018).

- are good for lawyers who want to reduce the demands of their practice due to situations like family responsibilities. It may facilitate working from home, or part-time;[79]
- reduction in fee-related complaints. Many complaints are about perceived expensive fees. Limited retainers mean that the client knows exactly what they are getting;
- the focus is on efficiency and client's core legal need.[80]

4.5 However, there are potential disadvantages namely:

- low efficiency and practicality of opening a new file just to carry out one task (this has led to lawyers doing it for free instead). It could unintentionally create a full retainer;[81]
- low monetary rewards because of additional time spent recording the advice to protect against future claims of incorrect advice;
- difficulty recording limits of the retainer and updating it when the client returns for further assistance;
- some cases are too complex to be dealt with in an unbundled model;
- the client may not understand the advice, so there is little benefit. The client must be able to comprehend the advice and its limitations;
- the factual basis may change, leading to an increased risk of being accused of having given incorrect advice;
- difficulty in giving accurate fees estimates for unbundled services. Alternatives to hourly billing should be considered.

4.6 There is potential for unbundled services to assist litigants and the Courts and thereby access to justice in appropriate cases. If that view is shared by other stakeholders, there is likely to be a need for regulatory change and promotion of this type of service to the profession and the public.

4.7 The Law Society of England and Wales has published guidelines on unbundling. These include a specimen letter, which can be handed to the judge to explain the limits of the lawyer's responsibility. A similar letter for the NZ context might be useful.

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79 Ibid, p4.
80 Ibid, p4.
81 Ibid, p5.

4.8 Two recent cases in England and Wales about unbundled services have resulted in lack of clarity about the limits of responsibility.[82] The Law Society (England and Wales) chief executive, Catherine Dixon, has called for statutory protection for solicitors delivering unbundled services for acts and omissions which fall outside the scope of their retainer.[83] The Lawyers and Conveyancers Act 2006 and/or Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (CCC Rules) may need amendment to reflect better the nature of limited retainer agreements and protect the practitioners who operate in accordance with them. Support from the NZLS and from the judiciary would be necessary to ensure lawyers are comfortable offering this type of service.

Value billing/flat fees/contingency fees

4.9 In appropriate cases value billing/flat fees/contingency fees have the potential to lower or defer the cost of litigation and thereby increase access to justice. These billing practices are permitted in New Zealand. Significantly, however, the Lawyers and Conveyancers Act 2006 contains statutory prohibitions against conditional fee agreements in criminal proceedings, immigration proceedings or proceedings in respect of which the Family Court has jurisdiction. The latter includes relationship property proceedings.[84]

4.10 It has been argued that time-based billing is over-emphasised in the CCC Rules.[85] Rule 9 of the CCC Rules governs the assessment of the fair and reasonable fee for a service provided. The first factor listed is an examination under r 9.1(a) of "the time and labour expended". Although no hierarchy of factors is set out, this may tend focus attention on time-based charging rather than value factors.

4.11 The NZBA supports discussion as to whether any emphasis on time-based billing in the CCC could be modified to encourage practitioners to explore other models of billing and alternative fee arrangements.[86]

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82 *Minkin v Lesley Landsberg* [2015] EWCA Civ 1152 (holding that a solicitor acting under a "defined limited retainer" does not owe a broader duty of care to clients that goes beyond the terms of the retainer) and *Sequence Properties Limited v Patel* [2016] EWHC 1434 (Ch).

83 "*New judgment 'kills' unbundled legal services*" The Law Society Gazette (United Kingdom, online ed, 24 May 2016).

84 s 335 Lawyers and Conveyancers Act 2006.

85 Billington, John "Value Billing - A webinar" (2 March 2016, New Zealand Bar Association) at p5.

86 For a general discussion on time billing v alternative fee arrangements, see Vaughan, R. "Is it time to review the "tyranny" of billable hours?" (22 April 2016) https://www.adls.org.nz/for-the-profession/news-and-opinion/2016/4/22/is-it-time-to-review-the-%E2%80%9Ctyranny%E2%80%9D-of-billable-hours/ (accessed 16 July 2018).

Low bono

4.12 Low bono is the provision of legal services by lawyers and other legal professionals to low and middle-income clients at reduced fees. This is not the provision of a discount on the total bill, but a lower hourly rate (usually 40–50% of the normal hourly rate). [87] Low bono initiatives are specifically designed for clients who do not qualify for legal aid but cannot afford standard legal service fees. [88]

4.13 There are various examples of this at work: [89]

- The Law Society of Manitoba (LSM) has "… recruited a panel of lawyers willing to provide family law services at a reduced rate to low and middle-income people in exchange for the LSM guaranteeing the payments. Eligible clients pay the LSM a monthly amount that they can afford." [90]

- The Chicago Bar Foundation's Justice Entrepreneurs Project (JEP)[91] is an 18-month training and mentoring programme for new, entrepreneurial lawyers. The lawyers work in a shared office environment to provide flexible service options. The programme allows them to develop their own practices, in line with principles of affordable and accessible justice. The Chicago Bar Foundation supports the programme including by referring middle-income clients (those who can afford some legal fees but not full carriage) to the JEP programme lawyers. Over 50 lawyers are a part of the JEP network and have participated in the incubator. Many of the alumni provide video advice, unbundled services, flat rates or flexible practice hours in their own firms, outside the JEP. [92]

- Similarly, Seattle University School of Law operates a Low Bono Program[93] for graduates of the University. It has "…three aspects — post-graduate mentoring, low bono-oriented

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87 Herrera, Luz "Encouraging the Development of "Low Bono" Law Practices" (2014) 14(1) University of Maryland Law Journal of Race, Religion, Gender and Class at p4. https://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?referer=https://www.google.co.nz/&httpsredir=1&article=1229&context=rrgc (accessed 16 August 2017).

88 Toy-Cronin et. al. "New Business Models for Legal Services: Prepared by the University of Otago Legal Issues Centre for the New Zealand Bar Association Working Group on Access to Justice" (August 2016), p9.

89 Ibid

90 Ibid

91 Chicago Bar Foundation, Justice Entrepreneurs Project chicagobarfoundation.org/jep/ (accessed 16 July 2018). A video on the JEP project can be viewed at http://www.openlawlab.com/2014/04/15/justice-entrepreneurs-project-incubator-young-lawyers/ (accessed 16 July 2017)

92 Herrera, above n87, at p39.

93 Randy Trick "*Legal Incubators - Helping to Hatch Solo Practices*" (10 October 2013) https://lawyerist.com/legal-incubators-helping-hatch-solo-practices/ (accessed 16 July 2018)

legal education and practice support, and an incubator program providing start-up business support, including a stipend to cover initial business expenses, for a limited number of attorneys dedicated to serving clients of moderate means".

4.14 A formal low bono scheme that vets clients and their cases for entry to the scheme and, perhaps, guarantees payment to participating lawyers, may be a sensible extension of a pro bono clearing house or CLC pro bono programme. However, the scope of, and need for, a low bono program may depend on future Government funding for legal aid.

4.15 The NZBA encourages all its members to accommodate those clients genuinely in need of fee reductions. The NZBA will promote discussion of a low bono initiative in conjunction with its support of the pro bono initiatives discussed in section 2 of this Report.

Contingent legal aid fund

4.16 A contingent legal aid fund is:[94]

> "… a recyclable, pooled fund which is financed by money derived from the damages recovered in successful civil cases where the client was supported by the fund. In this way, once up and running, a CLAF would fund litigation for those who don't have the resources to achieve it and wouldn't qualify for legal aid. The intention of a CLAF is to facilitate access to justice."

4.17 This model is being investigated in the UK by a joint working group of the Bar Council, the Chartered Institute of Legal Executives and the Law Society of England and Wales. Initial findings included that:

- substantial seed funding would be required;
- a rigorous merits test would be needed;
- funding of low value cases would be problematic; and administrative costs could be prohibitive.[95]

4.18 Such funds already exist in Canada, in some cases because of Canadian Courts making cy-près awards when it was not practical to distribute all the proceeds of a class action to individual plaintiffs. One such fund is the Access to Justice Fund (ATJF) of the Law Foundation of Ontario,[96] which was created in 2009 after receiving a $14.6 million cy-près award in *Cassano*

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94 United Kingdom Law Society "Joint contingent legal aid fund working group established" (18 July 2016) www.lawsociety.org.uk/news/press-releases/joint-contingent-legal-aid-fund-working-group-established (accessed 16 July 2018)

95 See http://www.lawsociety.org.uk/news/stories/contingency-legal-aid-fund-we-want-your-views/

96 Law Foundation of Ontario, http://www.lawfoundation.on.ca/what-we-do/access-to-justice-fund-cy-pres/ (accessed 16 July 2018)

v Toronto Dominion Bank[97]. The ATJF is a national funding source available to make grants to advance access to justice across Canada. Since its launch in May 2010, the ATJF has made grants covering linguistic and rural access to justice, indigenous peoples' legal needs, self-help, family violence, and consumer rights. In 2016 it sought to fund projects addressing legal needs of or relating to children and youth; consumers; public legal education, intake and referral; racialized groups; and refugees.

4.19 This initiative may not be amenable to New Zealand, where there are few class actions, let alone actions in which proceeds are not fully allocated to claimants. The NZBA's provisional view is that existing litigation funders may already provide this service for most cases that would qualify for a contingency legal aid fund and that the obstacles identified by the UK working group as part of its initial findings are likely to be difficult to overcome, at least in New Zealand.

4.20 However, the NZBA will monitor any developments of this type in common law jurisdictions and, if such a scheme is practical in the New Zealand context, will support a conversation with relevant stakeholders about whether, and if so, how, a contingent legal aid fund could operate in New Zealand and whether it would significantly enhance access to justice.

Recommendations

4.21 This report recommends that:

- The NZBA consider further the utility of, and demand for, unbundled legal services. Regulatory change may be necessary to assist promotion of this type of service to the profession and the public.

- The NZBA should encourage low or delayed fee models where appropriate. Specific low bono schemes may be a logical extension of pro bono initiatives. The NZBA should support a low bono scheme. This would be subject to the regulatory environment and the rate of evolution of pro bono services.

97 *Cassano v. Toronto Dominion Bank* 2009 CanLII 35732 (ON S.C.)

Conclusion

5.1 The four sections of this report reflect the four key "access points" that the NZBA is determined to play its part in, to improve access to justice. The first and most significant of those impacting access to justice in New Zealand is the funding of and eligibility for legal aid. The NZBA is committed to advocating for changes to the present legal aid system, to increase the level of legal aid funding, lower eligibility limits and improve the administration of legal aid.

5.2 The NZBA will also give support and promote pro bono initiatives in New Zealand. The Working Group considers that a pro bono clearing house, or a system akin to a clearing house ought to be established in New Zealand in the short to medium term. The NZBA will work with stakeholders to this end.

5.3 The ongoing assessment of court procedures to achieve quality justice for participants in a time and cost-efficient way is critical. Issues surrounding agreed facts, issues and chronologies, the use of written briefs and submissions and disciplines for the efficient use of hearing time are topics that deserve further discussion and, perhaps, reform.

5.4 In addition, the rule that litigants in person are not entitled to costs other than out of pocket expenses should be reviewed. The NZBA supports a more flexible regime that recognises the modern purposes of costs to manage litigation and litigants, and permits awards of costs to compensate in part the opportunity costs of litigants in person for preparing and presenting a successful case consistent with the present costs schedules and principles in Part 14 of the High Court Rules.

5.5 Finally, the NZBA will continue to explore alternative practice models and billing structures to assist those without means, or with insufficient means, to conduct meritorious litigation. In addition, technology will continue to shape the litigation process and has the potential to make it more time and cost efficient.

Looking forward

5.6 The Working Group notes that there are several other access to justice areas that will in future require further research and reporting back to the NZBA Council. These include:

- Access to justice for Māori and new immigrants;
- Online and technology-based solutions to access to justice;

- Cultural and language barriers to access to justice;
- Exploration of online and technology solutions to benefit NZBA members as well as those needing legal advice.

5.5 As discussed in the Introduction to this report, further study of the Final Report of the Justice Project in Australia is likely to prove highly beneficial when conducting any further research. The NZBA should make every effort to liaise with the Law Council of Australia and the authors of its report while undertaking this study.

5.6 We have produced this report to inform discussion by NZBA members and motivate members to take action to assist in what is an on-going challenge to ensure access to justice for all members of society. Importantly, we have also produced this report to hold the Association accountable for action on the recommendations we have made in this report. We look forward to your support and reporting back on progress in the coming years.

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